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Marissa Lowthert,
Complainant(s)
against

Gary Richards, Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools,
Respondent(s)

Notice of Meeting

Docket #FIC 2014-289

March 23, 2015

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, Ist floor, Hartford, Connecticut, at **2 p.m. on Wednesday, April 8, 2015.** At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission ***ON OR BEFORE March 30, 2015***. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed ***ON OR BEFORE March 30, 2015***. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fourteen (14) copies** be filed ***ON OR BEFORE March 30, 2015***, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of Information Commission

W. Paradis
W. Paradis
Acting Clerk of the Commission

Notice to: Marissa Lowthert
Anne Littlefield, Esq.

2015-03-23/FIC# 2014-289/Trans/wrbp/VDH//CAL

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by | Report of Hearing Officer

Marissa Lowthert,

Complainant

against | Docket #FIC 2014-289

Gary Richards, Superintendent of
Schools, Wilton Public Schools;
and Wilton Public Schools,

Respondents | March 23, 2015

The above-captioned matter was heard as a contested case on December 8, 2014, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of hearing, the matter was consolidated with the Docket #FIC 2014-260; Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools; Docket #FIC 2014-265; Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; Cheryl Jensen-Gerner, Principal, Miller Driscoll School, Wilton Public Schools; and Wilton Public Schools; and Docket #FIC 2014-276; Marissa Lowthert v. Gary Richards, Superintendent of Schools, Wilton Public Schools; Cheryl Jensen-Gerner, Principal, Miller Driscoll School, Wilton Public Schools; and Wilton Public Schools.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by email dated April 28, 2014, the complainant sent the following request for copies of public records to Gary Richards, the Superintendent of Wilton Public Schools:

> The emails I am requesting cover a 1 month period beginning **12-10-13**[1] and continuing through until 11:59 pm **1-10-14** and consist of 4 categories of emails:

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[1] The Commission notes that the date in the actual request for records is "12-10-10." At the contested case hearing, the complainant clarified the date in the request was a typographical error and that the correct date is 12-10-13.

Category 1: Your 12-12-13 e-mail as issued (*identifying extract attached Exhibit 1*[2]) including:

1. A Full copy of the 12-12-13 e-mail showing all addresses and all BCC addresses;
2. Full copies of any version of this same or any *similar e-mail* used, or forwarded (*with any forwarding text*) to any person, including all bcc copies during this 1 month period AFTER 12-12-13;
3. Copies of any responses you received to e-mails in 1 or 2;
4. Copies of responses you issued to 3.

Category 2: Any e-mails similar to the attached e-mail issued *after* you received my 12-10-13 e-mail *(sent at 12:40 pm) but prior to* the Exhibit 1 e-mail:

1. A FULL Copy of any such e-mail showing all addresses and all BCC addresses;
2. Copies of any responses you received to 1;
3. Copies of any responses you issued to 2.

Category 3: Any and all e-mails issued to anyone, *including any Shipman and Goodwin Attorneys,* AFTER you received my 12-10-13 BRI diagnosis e-mail (at 12:40 pm) on the subjects of:

1. My children's diagnosis;
2. My request for tutoring per CT Reg 10-76 d15 and subsequent multiple requests for contact with Special Services;
3. The various scheduled/cancelled PPT meetings (1-3-14, 1-9-14);
4. Any e-mails provided under 1 or 2 should include a full copy of the e-mail including all address, all BCC addresses and copies of any responses you received.

Category 4: Any emails issued by you to anyone AFTER you received my 12-10-13 e-mail if that e-mail identifies me (or my children) directly by name ***or,*** as in Exhibit 1, identifies any or each of us indirectly in a

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[2] The Commission notes that, while an "Exhibit 1" is referred to repeatedly throughout the request, and that, while a copy of the request was attached to the appeal filed in this case, "Exhibit 1" was not included in such filing. By order of the hearing officer, the complainant filed an extract of the December 12, 2013 email after the contested case hearing.

> manner that makes me (them) identifiable as occurred immediately after Exhibit 1.[3]

(All emphasis in original).

3. It is further found that the complainant requested that the documents described in paragraph 2, above, "be provided digitally," and, with regard to any document claimed to be exempt from disclosure, that the respondents provide her with a privilege log.

4. It is found that, by email dated May 5, 2014, Superintendent Richards acknowledged the request on behalf of the respondents. It is further found that the superintendent informed the complainant that the respondents were currently processing multiple other FOI requests that the complainant had issued and that they planned to process the requests in the order in which they were received. It is found, however, that the superintendent informed the complainant that, if she wished to designate the instant request a priority, the respondents would handle it as such.

5. It is found that, by email dated May 6, 2014, the complainant replied to the superintendent's May 5, 2014 email, in part, as follows: "Are you saying that you <u>will not start</u> working on YOUR e-mail until Jensen-Gerner completes hers? And that Jensen-Gerner <u>will not start</u> on HER FOI until Giresi completes hers? Or did I misunderstand? . . . it would seem the 'good faith' way to go about this is called 'parallel processing'—not sequential processing." (All emphasis in original).

6. By email dated and filed May 12, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide her with copies of the records described in paragraph 2, above. The complainant requested that the Commission consider the imposition of a maximum civil penalty against Superintendent Richards and the Board of Education Chairman[4], as well as various other remedies, including the admonishment of the superintendent for "for repeatedly failing to discharge his lawful obligations" under the FOI Act.

7. Section 1-200(5), G.S., provides:

> "Public records or files" means any recorded data or information relating to the conduct of the public's

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[3] The complainant further defined the scope of her request in Category 4, as follows: "Category 4 items should include a FULL copy of the e-mail showing all Addresses, all BCC addresses and copies of any responses you received. Category 4 should include any communications between you and Principal Jensen-Gerner and/or the MD PTA/PTA Council, prior to or immediately after Principal Jensen-Gerner's 1-9-14 'Book bag' letter about me, sent home to the parents at all 900 Miller-Driscoll students. . . ."

[4] The Commission notes that the request for records in this case was directed solely to the Superintendent of Schools for Wilton Public Schools. Accordingly, no grounds exist for considering the imposition of a civil penalty against the Chairman of the Board of Education for Wilton Public Schools.

> business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

8. Section 1-210(a), G.S., provides in relevant part that:

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

9. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

10. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

11. It is found that Dr. Gary Richards was the Superintendent of Wilton Public Schools until approximately June 30, 2014. It is found that on or about June 30, 2014, Superintendent Richards retired. It is found that, on July 1, 2014, Dr. Kevin Smith took over the position of Superintendent and he continues to hold such position. It is further found that Moira Rollinson was the primary assistant to the former superintendent and is the primary assistant to the current superintendent. It is found that one of Ms. Rollinson's responsibilities is responding to FOI Requests.

12. It is found that Ms. Rollinson spent approximately eight hours reviewing, redacting, and assembling records in this case.

13. It is found that the complainant sent the request described in ¶ 2, above, to Superintendent Richards and that 57 pages of responsive records were provided to her on or around the time of his retirement in June 30, 2014.

14. It is found that, when Superintendent Smith assumed the position of the Superintendent of Schools, he conducted a general review of all FOI requests submitted by the complainant, as well as the respondents' responses and disclosures thereto. Despite the fact that Superintendent Smith's review occurred after Superintendent Richards had disclosed records to the complainant, it is found that Superintendent Smith

could find no record of the respondents having responded to the instant request for records.

15. As a result of having found no record of response, it is found that Superintendent Smith ordered a new search for records (the "second search") be conducted pursuant to the terms and parameters set forth in paragraph 2, above.

16. It is found that, under cover of letter dated November 7, 2014, the respondents provided the complainant with an additional 294 pages of records. It is found that these records were the result of the second search conducted at the direction of Superintendent Smith.

17. At the contested case hearing, the respondents claimed that the redactions were based on the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g ("FERPA). The respondent further claimed that certain other records were withheld in their entirety based on the attorney-client privilege.

18. At the conclusion of the hearing, the complainant moved to have the Commission order the respondents to produce the records that had been redacted or withheld to the Commission for an in camera inspection (hereinafter the "in camera records"). The complainant's motion was granted. On January 7, 2015, the respondents submitted the in camera records to the Commission.

19. The Commission notes that the complainant challenged the partial redaction and withholding of a total of fifty-four records. The in camera records will be referred to as follows: IC-FERPA-2014-289-1; IC-FERPA-2014-289-2; IC-FERPA-2014-289-3 and IC-FERPA-2014-289-4 (records redacted pursuant to FERPA); and IC-2014-289-1 through IC-2014-289-44 (records withheld in their entirety pursuant to the attorney-client privilege).

20. The respondents first claim that the portions of the following records are exempt pursuant to FERPA: IC-FERPA-2014-289-1; IC-FERPA-2014-289-2; IC-FERPA-2014-289-3 and IC-FERPA-2014-289-4.

21. Section 1-210(b)(17), G.S., provides that nothing in the FOI Act shall require the disclosure of: "Education records which are not subject to disclosure under the [FERPA], 20 USC 1232g."

22. "Educational records" are defined at 20 U.S.C. §1232g (a)(4)(A) as those records, files, documents, and other materials which (i) contain information directly related to a student and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

23. This Commission has concluded that 20 U.S.C. §1232g prohibits public schools that receive federal funds from disclosing information concerning a student that would personally identify that student, without the appropriate consent. <u>See</u> <u>Brenda</u>

Ivory v. Vice-Principal Griswold High Sch., Griswold Pub. Sch.; and Griswold Pub. Sch., Docket #FIC 1999-306 (Jan. 26, 2000).

24. 34 C.F.R. §99.3 provides, in relevant part, as follows:

> Personally Identifiable Information
>
> The term includes, but is not limited to--
>
> (a) The student's name;
>
> (b) The name of the student's parent or other family members;
>
> (c) The address of the student or student's family;
>
> (d) A personal identifier, such as the student's social security number, student number, or biometric record;
>
> (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
>
> (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
>
> (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

(Emphasis supplied).

25. After a careful inspection of the in camera records, it is found that the redacted material is information maintained by an educational institution. It is further found that the redacted material is comprised of names and addresses of various parents. It is further found that the redacted information could very easily be linked to specific students. It is further found that no consent has been obtained for the disclosure of this information.

26. Accordingly, it is concluded that the redacted portions of the records identified in paragraph 20, above, are exempt from public disclosure pursuant to the provisions of §1-210(b)(17), G.S., and FERPA. It is further concluded that the respondents did not violate the FOI Act when they denied the complainant unredacted

copies of such records.

27. The respondents next claim that the following records are exempt in their entirety pursuant to the attorney-client privilege: IC-2014-289-1 through IC-2014-289-44.

28. In relevant part, §1-210(b)(10), G.S., permits the nondisclosure of "communications privileged by the attorney-client relationship...."

29. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

30. Section 52-146r(2), G.S., defines "confidential communications" as:

> all oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice. . . .

31. The Supreme Court has stated that "both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney." Maxwell, supra. at 149.

32. The Supreme Court has further stated that, "[i]n Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. Olson v. Accessory Controls and Equipment Corp., et al., 254 Conn. 145, 157 (2000). As a general rule, "communications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice." Id.; citation omitted. Moreover, although Connecticut courts have recognized that "statements made in the presence of third parties are usually not privileged because there is then no reasonable expectation of privacy," they have also recognized that "the presence of certain third parties . . . who are agents or employees of an attorney or client, and who are necessary to the consultation,

will not destroy the privilege." Id.

33. Nonetheless, courts are reluctant "to extend the privilege to reports [or communications] compiled by third parties absent a clear indication that the information was submitted confidentially by an agent to the attorney for legal advice. Id. 161. See, also State v. Christian, 267 Conn. 710, 749 (2004) ("[C]ommunications between client and attorney are privileged when made in confidence for the purpose of seeking legal advice. . . . By contrast, statements made in the presence of a third party are usually not privileged because there is no reasonable expectation of confidentiality. . . . The only recognized exceptions to this rule are when the third party was an interpreter, clerk or agent of the client's attorney . . . ."); United States Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (court refused to extend attorney client privilege to communications made by consultants to the defendants and their in-house counsel; court noted that consultants were not employed by the defendants' attorneys specifically to assist them in rendering legal advice, but were hired by the defendants to formulate a remediation plan).

34. After a careful inspection of the camera records, it is found that the following records are entirely exempt from disclosure pursuant to the attorney-client privilege: IC-2014-289-1 through IC-2014-289-8; IC-2014-289-15; and IC-2014-289-23.

35. It is further found that the specifically identified parts of the following records are also exempt from disclosure pursuant to the attorney-client privilege: IC-2014-289-24: the email sent on February 21, 2014 at 3:14 PM; IC-2014-289-26: the email sent on January 14, 2014 at 6:37 PM; IC-2014-289-32: the email sent on January 8, 2014 at 7:07 PM; IC-2014-289-38: the email sent on January 9, 2014 at 9:17 AM; and IC-2014-289-44: the email sent on April 28, 2014 at 3:39 PM.

36. It is further found that the records identified in paragraph 34, above, and the portions of the records identified in paragraph 35, above, contain the legal advice that the respondents sought and/or received from their attorneys. It is further found that the respondents were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice. It is further found that the communications were made in confidence. It is further found that the respondents did not waive their attorney-client privilege. Accordingly, it is concluded that the respondents did not violate the FOI Act when they denied the complainant copies of such records.

37. However, based on a careful review of the in camera records and the evidence produced at the contested case hearing, with regard to IC-2014-289-9 through IC-2014-289-14; IC-2014-289-16 through IC-2014-289-21; and IC-2014-289-24 through IC-2014-289-44, other than the portions of these records specifically identified in paragraph 35, above, it is found that the respondents failed to prove that the camera records constitute records containing communications written in confidence between a public agency and a government attorney relating to legal advice sought by the public agency, or records

prepared by the government attorney in furtherance of the rendition of such legal advice, within the meaning of §52-146r(2), G.S.

38. Finally, with regard to IC-2014-289-22, it is found that, as the respondents communicated with their attorney, a third party was included in the communications. It is further found that the third party was also included in a communication between the respondents' attorney and the respondents.

39. No evidence was produced at the contested case hearing that would tend to show that the third party was engaged by the attorney as agent necessary to the attorney's rendering of legal advice to the respondents. In fact, it is found that there is no evidence in the record that would tend to show that the respondents' attorney had any kind of privileged relationship with this third party. It is therefore found that the communications contained in IC-2014-289-22 are not communications made in confidence between the respondents and their attorney.

40. Accordingly, it is concluded that, with regard to IC-2014-289-22, the attorney-client privilege was waived by the presence of the third party in the communications between the respondents and their attorney, and vice versa.

41. It is further concluded that other than the records identified in paragraph 34, above, and the specific portions of the records identified in paragraph 35, above, the records described in paragraph 27, above, are not exempt from disclosure pursuant to the attorney client privilege. Accordingly, it is concluded that the respondents violated the FOI Act when they denied the complainant copies of such non-exempt records.

42. At the contested case hearing, the complainant contended that the respondents' disclosure of records in this case violated the promptness requirements of the FOI Act. The complainant also contended that, because the former superintendent provided her with 57 pages of records and indicated that those were all of the responsive records in the respondents' possession, and because the current superintendent conducted a second search, provided her with additional records, and indicated that those were all of the responsive records in the respondents' possession, she believed that there may be more responsive records. The complainant also challenged the redactions contained in the records provided to her, as well as the fact that the disclosure provided to her on November 7, 2014 contained duplicate records.

43. With regard to promptness, the Commission has previously opined that the word "promptly" in §1-210, G.S., means "quickly and without undue delay, taking into account all of the factors presented by a particular request . . . [including] the volume of statements requested; the amount of personnel time necessary to comply with the request; the time by which the requester needs the information contained in the statements; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without loss of the personnel time involved in complying with the request." See FOI Commission Advisory Opinion #51 (Jan. 11,

1982). The Commission also recommended in Advisory Opinion #51 that, if immediate compliance is not possible, the agency should explain the circumstances to the requester.

44. It is found that, before Ms. Rollinson could review and assemble the records that were provided to the complainant, the respondents' Information Technology Specialist had to search for and gather all of the electronic records on the respondents' computer system. It is further found that, before the Information Technology Specialist conducted the search, he sought clarification from the respondents as to the timeframe. It is found that such clarity was required because, while the request stated that the time frame was one month, the typographical error in the date range indicated a much broader scope. It is found that once the Information Technology Specialist confirmed the correct date range, he conducted the search, gathering all emails for the one month period, pursuant to the terms set forth in paragraph 2, above. It is found that such search involved searching the former superintendent's electronic inbox, outbox and trash. It is further found that, once the relevant emails were gathered, the Information Technology Specialist saved the records to a separate electronic mail box and informed Ms. Rollinson that the search was complete and the records were ready for review. It is further found that the search conducted by the respondents' Information Technology Specialist was the second search. See ¶ 15, above. It is found that the respondents Information Technology Specialist did not conduct the search that resulted in the complainant receiving 57 pages of records, see ¶ 13, above.

45. It is found that, in addition to Ms. Rollinson's review and redaction of the records retrieved as a result of the second search, the records were also reviewed and the redactions made were confirmed by respondents' counsel.

46. The Commission takes administrative notice of the fact that, at the time of the instant contested case hearing, the complainant had issued numerous requests for records to these respondents (many within days of each other), and, between March 3, 2014 and September 23, 2014, had filed twenty-six appeals with the Commission against these respondents, or other public agencies and individuals associated with the Town of Wilton.

47. It is further found that the respondents have produced thousands of pages of records to the complainant. It is further found that, in connection with the totality of the requests for records that the respondents have received from this complainant, they have expended numerous hours reviewing, redacting, and assembling records.

48. With regard to the complainant's contention that more responsive records may exist, based on Superintendent Smith's testimony, including his reasons for directing that a second search be conducted, combined with the respondents' Information Technology Specialist's testimony, including the manner in which he conducted the second search, there is no evidence in the administrative record upon which a finding could be made that additional responsive records exist in this case. With regard to the complainant's contentions concerning duplicate records, it is found that, in a case such as this, where there is an error in the parameters of the request, as well as the need to conduct a second

search, it is understandable when some records are produced more than one time. With regard to the complainant's request for a privilege log, (see ¶ 3, above), it is concluded that there is nothing in the FOI Act that requires the respondents to create a privilege log after denying a records request absent an order from this Commission. Finally, although the complainant requested that the records be produced to her digitally, the fact the respondents produced hardcopy records to the complainant instead of digital records was never addressed by the complainant at the contested case hearing. Accordingly, such issue is deemed abandoned.

49. Based on the totality of the findings in this case, it is concluded that the respondents did not violate the promptness requirements §§1-210(a) and 1-212(a), G.S., as alleged in the complaint.

50. Based on the fact and circumstances of this case, the Commission declines to consider the imposition of civil penalties.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint.

1. The respondents shall forthwith provide the complainant with a copy of the in camera records described in paragraph 27 of the findings, above. In complying with this order, the respondents are not required to disclose the records identified in paragraph 34 of the findings, above, or the portions of the records specifically described in paragraph 35 of the findings, above.

Valicia Dee Harmon
as Hearing Officer