

Since 1975



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 165 Capitol Avenue, Suite 1100 • Hartford, CT 06106
Toll free (CT only): (866) 374-3617 Tel: (860) 566-5682 Fax: (860) 566-6474 • www.ct.gov/foi • email: foi@ct.gov

Mike Savino, and WFSB Channel 3
Complainant(s)
against

Director of Public Records, State of Connecticut,
University of Connecticut, Public Records
Administration; and State of Connecticut, University
of Connecticut, Public Records Administration
Respondent(s)

Notice of Meeting

Docket #FIC 2019-0756

July 16, 2021

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 remotely, at the Freedom of Information Commission, 165 Capitol Avenue, Suite 1100, Hartford, CT., at **2:00 p.m. on Wednesday, August 11, 2021.**

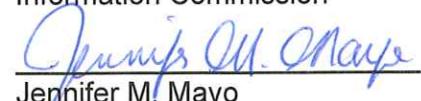
At the meeting you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE July 30, 2021.** 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.**

NOTICE: Due to public health concerns surrounding the COVID-19 pandemic, the Commission meeting of August 11, 2021 will be held solely through the use of electronic equipment (remotely). Further guidance is included regarding the dial-in procedure to follow in the event that you wish to attend, or to present oral argument at, the August 11, 2021 meeting.

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 July 30, 2021.** 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 **fifteen (15) copies** be filed **ON OR BEFORE July 30, 2021** 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



Jennifer M. Mayo
Acting Clerk of the Commission

Notice to: Mike Savino and WFSB Channel 3
Attorney Nathan LaVallee
Assistant Attorney General Ralph E. Urban

FIC# 2019-0756/ITRA/DLM/TAH/JMM/7/16/21

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Mike Savino, and WFSB Channel 3,

Complainants

against

Docket # FIC 2019-0756

Director of Public Records, State of
Connecticut, University of Connecticut,
Public Records Administration; and State of
Connecticut, University of Connecticut,
Public Records Administration,

Respondents

July 15, 2021

The above-captioned matter was heard as a contested case on December 18, 2020, at which time the complainants and the respondents appeared, stipulated to certain facts, and presented testimony, exhibits and argument on the complaint. Due to the COVID-19 pandemic and the state's response to it, the hearing was conducted telephonically.¹

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. By complaint filed December 27, 2019², the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying their request for certain public records.
3. It is found that, by email dated December 24, 2019, the complainants requested that the respondents provide them with a copy of "all exit interviews for the 2019 [University of Connecticut] football team.

¹ On March 14, 2020, the Governor issued Executive Order 7B, which suspended the requirement to conduct public meetings in person.

² On March 25, 2020, the Governor issued Executive Order 7M, thereby suspending the provisions of Conn. Gen. Stat. §1-206(b)(1), which requires the Freedom of Information Commission to hear and decide an appeal within one year after the filing of such appeal. Executive Order 7M is applicable to any appeal pending with the Commission on the issuance date and to any appeal filed on or after such date, for the duration of the current public health and civil preparedness emergency. Consequently, the Commission retains jurisdiction.

4. It is found that, by email dated December 27, 2019, the respondents denied the complainants' request, contending that the records are exempt from disclosure pursuant to §§1-210(a), 1-210(b)(17) and 10a-154a, G.S. Instead, the respondents provided the complainant with a template of the exit interview survey form.

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

“[p]ublic records or files” means any recorded data or information relating to the conduct of the public’s 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.

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

[e]xcept 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 . . . (3) receive a copy of such records in accordance with section 1-212.

7. 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.”

8. It is found that the records described in paragraph 3, above, are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

9. At the hearing the respondents contended that, pursuant to §10a-154a, G.S., the student athlete exit interview surveys are not public records and therefore are not subject to disclosure. Additionally, the respondents contended that some of the responsive records contain personally identifiable information (“PII”) pertaining to students, and that PII is protected from disclosure by the Family and Educational Rights and Privacy Act, 20 U.S.C. §1232g, et seq., and its implementing regulations, 34 C.F.R. Part 99, et seq. (“FERPA”), as incorporated in §1-210(b)(17), G.S. The complainants disputed the respondents’ contentions.

10. Immediately following the hearing, an order to submit records for in camera inspection was issued. The respondents submitted 74 pages of records and such records have been marked as IC-2019-0756-001 through IC-2019-0756-074. The respondents also submitted an Index to Records Submitted For In Camera Inspection, setting forth the following:

IC-2019-0756-001 through IC-2019-0756-074 are entirely exempt pursuant §10a-154a, G.S., because such records pertain to “evaluations of football coaches”;

IC-2019-0756-043 and IC-2019-0756-044 are exempt from disclosure pursuant to §1-210(b)(17), G.S., because such records consist of “student identifying information”; and

IC-2019-0756-021, IC-2019-0756-033, IC-2019-0756-055, IC-2019-0756-059, and IC-2019-0756-069 are exempt from disclosure pursuant to §1-210(b)(17), G.S., because such records consist of the names of “position coaches with 3 or less evaluating students,” the disclosure of which could result in the disclosure of student identifying information.

11. Notably, the respondents submitted redacted copies of IC-2019-0756-021, IC-2019-0756-033, IC-2019-0756-043, IC-2019-0756-044, IC-2019-0756-055, IC-2019-0756-059, and IC-2019-0756-069. After delivering the in camera records to the Commission, the respondents filed a motion, dated February 11, 2021, seeking an initial in camera review of all the in camera records under §10a-154a, G.S., and further requesting that, should it be determined that IC-2019-0756-021, IC-2019-0756-033, IC-2019-0756-043, IC-2019-0756-044, IC-2019-0756-055, IC-2019-0756-059, and IC-2019-0756-069 are not exempt pursuant to §10a-154a, G.S., that the Hearing Officer issue a subpoena for unredacted copies to determine whether such records are exempt pursuant to §1-210(b)(17), G.S. Essentially, the respondents contend that, absent a subpoena from the Commission, they are prohibited pursuant to FERPA from “disclosing” unredacted copies of the records to the Commission. The complainants objected.

12. After consideration of the motion and objection, for the reasons set forth in the Hearing Officer’s ruling, dated June 22, 2021, such motion was denied. The respondents did not subsequently provide unredacted copies of IC-2019-0756-021, IC-2019-0756-033, IC-2019-0756-043, IC-2019-0756-044, IC-2019-0756-055, and IC-2019-0756-059 for in camera inspection.

13. First, the respondents contended that the student athlete exit interview surveys constitute a “record of the performance and evaluation of a faculty or professional staff member” under §10a-154a, G.S., and are therefore exempt from disclosure.

14. Section 10a-154a, G.S., provides, in relevant part, that:

[a]ny record maintained or kept on file by a board of trustees of a constituent unit of the state system of higher education which is a record of the performance and evaluation of a faculty or professional staff member of such constituent unit shall not be deemed to be a public record and shall not be subject to disclosure under the provisions of section 1-210, unless such faculty or professional staff member consents in writing to the release of his records by the board of trustees of the constituent unit. Such consent shall be required for each request for a release of such records.

15. Although the phrase “record of the performance and evaluation” is not defined in §10-154a, G.S., or elsewhere in Title 10a of the General Statutes, it has been subject to judicial review. See Lieberman v. Aronow, 319 Conn. 748 (2015) (holding that reports related to the

resolution of a formal grievance alleging misconduct of a faculty member did not constitute a “record of the performance and evaluation” within the meaning of §10a-154a, G.S.).

16. The Lieberman Court examined similar language in a related statute, §10-151c, G.S., and concluded that §10-151c, G.S., provides guidance in determining the meaning of the phrase “record of the performance and evaluation” as used in §10a-154a, G.S. Id. at 760. In examining the larger statutory scheme, the Lieberman Court concluded that §10-151b(a), G.S., “requires superintendents to evaluate teachers on an annual basis and provides in relevant part that ‘[a]n evaluation pursuant to this subsection shall include, but need not be limited to, strengths, areas needing improvement, strategies for improvement and multiple indicators of student academic growth....’ [R]ecords of ‘performance and evaluation’ would be a part of this formal process performed at the direction of a superintendent and not something raised by a colleague or another individual not mandated to conduct evaluations.” Id. at 760-61.

17. Further, under §10-151c, G.S., the phrase “records of teacher performance and evaluation” shall be construed in a manner which is “narrow in scope and [is] not intended to include any document that contains evaluation content...” Id. at 761 citing Kelley v. Bonney, 221 Conn. 549, 578-79 (1992) (allegations by students, parents and community members concerning the conduct of a teacher, submitted to the State Board of Education, do not constitute “records of teacher performance and evaluation” under §10-151c, G.S., merely because the records contained evaluative information about teacher performance); and Ottuchian v. Freedom of Information Commission, 221 Conn. 393, 394-96 (1992) (concluding that certain letters, portions of which opined on the performance of school football coaches, do not constitute “records of teacher performance and evaluation” under §10-151c, G.S.).

18. In this case, it is found that the in camera records consisted of 74 pages of anonymous exit interview survey results which were completed by members of the 2019 UConn Football Team. It is found that the survey consists of pre-selected questions and multiple choice answers, as well as space for additional comments if the survey-taker chose to add comments. It is further found that the survey covers topics that include, but are not limited to, overall student experience; athlete training; school-related (e.g., academic support; campus housing, dining, social experience); team experiences; and coach-related (e.g., coaching style, communication style, knowledge of the sport). It is found that the purpose of the survey is for the Athletics Department to receive genuine feedback about the program and overall student experience, with a goal of enhancing and improving student athlete experience. It is found that questions and responses which pertain to the coaching staff are just one element of the multipart student exit survey. It is further found that pertinent survey results may be extracted and utilized as part of the Performance Review Evaluation of UConn coaches.

19. Based upon the foregoing and a careful in camera inspection, it is found that the in camera records do not constitute “records of the performance and evaluation” within the meaning of §10a-154a, G.S.

20. It is therefore concluded that the in camera records are not exempt from disclosure pursuant to §10a-154a, G.S.

21. Next, the respondents contended that IC-2019-0756-043 and IC-2019-0756-044, identified as “student identifying information,” and IC-2019-0756-021, IC-2019-0756-033, IC-2019-0756-055, IC-2019-0756-059, and IC-2019-0756-069, identified as the names of “position coaches with 3 or less evaluating students”, are exempt from disclosure pursuant to §1-210(b)(17), G.S. As already set forth in paragraphs 11 and 12, above, the hearing officer was precluded from reviewing the redacted information claimed exempt in these in camera records.

22. Section 1-210(b)(17), G.S., provides, in relevant part, that the FOI Act shall not require disclosure of “[e]ducational records which are not subject to disclosure under [FERPA], 20 U.S.C. §1232g.”

23. FERPA defines “education records” as “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.” 20 U.S.C. §1232g(a)(4)(A).

24. FERPA is a federal law which applies to educational agencies and institutions that receive funding under any program administered by the federal Department of Education. FERPA gives parents, and students who are 18 years older or who attend a postsecondary institution, rights with respect to access to education records, the right to seek to have education records amended, and the right to have some control over the disclosure of personally identifiable information, or “PII”, contained in such education records. See 20 U.S.C. §1232g and 34 C.F.R. Part 99.

25. FERPA prohibits the improper disclosure of PII contained in education records. Therefore, the Commission must first find that IC-2019-0756-021, IC-2019-0756-033, IC-2019-0756-043 and IC-2019-0756-044, IC-2019-0756-055, IC-2019-0756-059, and IC-2019-0756-069 are education records within the meaning of FERPA before it may consider the respondents’ contention that the redacted information constitutes “PII” exempt from disclosure pursuant to §1-210(b)(17), G.S.

26. The phrase “directly related to a student” is not defined under FERPA, but it has been interpreted by several courts. Courts have opined that:

[w]hile it is clear that “Congress made no content-based judgments with regard to its ‘education records’ definition,” U.S. v. Miami University, 294 F.3d 797, 812 (6th. Cir. 2002), it is equally clear that Congress did not intend FERPA to cover records … only tangentially related to students. See Bauer v. Kincaid, 759 F.Supp. 575, 591 (W.D.Mo.1991) (noting that the function of FERPA is “to protect educationally related information.”)

Ellis v. Cleveland Mun. Sch. Dist., 309 F. Supp. 2d 1019, 1022 (N.D. Ohio 2004).

27. Here, the respondents cite to no precedent interpreting the phrase “directly related to a student” in the context of anonymous student surveys. However, at least one court has declined to recognize such as “education records” under FERPA. C.N. v. Ridgewood Bd. of Educ., 146 F.

Supp. 2d 528, 531 (D.N.J. 2001), aff'd in part, rev'd in part on other grounds, 281 F.3d 219 (3d Cir. 2001). In C.N., a New Jersey public school district administered a survey to middle and high school students seeking information, anonymously, about student drug and alcohol use, sexual activity, and interpersonal relationships, and results were publicly released. Several parents filed suit alleging, *inter alia*, a violation of FERPA. However, the court noted that FERPA does not address this type of survey at all, and it appeared to the court that FERPA was inapplicable to the records at issue in that case. Id. at 535-8. Following a remand, the parties agreed with an order dismissing the FERPA claims. C.N. ex rel. J.N. v. Ridgewood Bd. of Educ., 319 F. Supp. 2d 483, 489 (D.N.J. 2004), aff'd sub nom. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159 (3d Cir. 2005).

28. As previously found in paragraph 18, above, the in camera records directly relate to the university and its programming, specifically the Athletics Program, rather than each student athlete's academic, athletic, or otherwise educational functioning or performance. It is therefore found that the surveys do not contain information "directly related to a student" under FERPA.

29. Moreover, the respondents failed to prove that the in camera records are maintained in a manner consistent with the requirements of FERPA. Courts have construed the term "maintained" under FERPA to require that educational institutions keep education records in a secure manner (i.e., in a filing cabinet in a records room or on a permanent secure database), that "maintained" implies that education records are records kept by a single central custodian, such as a registrar, and further, that in maintaining education records under FERPA, educational institutions are required to keep a record of those individuals who have had access to a student's education records, and the reason for doing so. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 427 (2002) citing 20 U.S.C. §1232g(b)(4)(A). Here, no such evidence was presented.

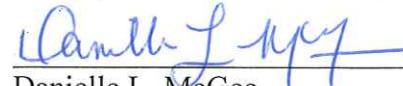
30. Based on the finding that IC-2019-0756-021, IC-2019-0756-033, that IC-2019-0756-043, IC-2019-0756-044, IC-2019-0756-055, IC-2019-0756-059, and IC-2019-0756-069 are not "directly related to a student" and the defendants failure to prove that the in camera records are "maintained" in accordance with FERPA, it is found that the in camera records are not "education records" under FERPA. Because the in camera records are not education records, it is found that §1-210(b)(17), G.S., is inapplicable.

31. It is therefore concluded that the respondents violated §§ 1-210(a) and 1-212(a), G.S., by withholding the in camera records.

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 copies of the in camera records to the complainant, free of charge.

2. Henceforth, the respondents shall strictly comply with the disclosure provisions of §§1-210(a) and 1-212(a), G.S.


Danielle L. McGee
as Hearing Officer



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 165 Capitol Avenue, Suite 1100 • Hartford, CT 06106
Toll free (CT only): (866) 374-3617 Tel: (860) 566-5682 Fax: (860) 566-6474 • www.ct.gov/foi • email: foi@ct.gov

Mike Savino, and WFSB Channel 3

Complainant(s)

Against

Docket # 2019-0756

Director of Public Records, State of Connecticut, University of Connecticut, Public Records Administration; and State of Connecticut, University of Connecticut, Public Records Administration

Respondent(s)

July 16, 2021

NOTICE OF DIAL IN INFORMATION

Due to public health concerns surrounding the Covid 19 pandemic, the Commission Meeting of August 11, 2021 will be conducted remotely at 2:00 p.m.

Should you wish to attend the meeting remotely, please dial in at 1:50 p.m.

+1 860-840-2075

Conference ID: 184 725 076