

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Nancy Axon,

Complainant

against

Docket #FIC 2019-0519

Legal Director, State of Connecticut,
Technical Education and Career System; and
State of Connecticut, Technical Education
and Career System,

Respondents

January 27, 2021

The above-captioned matter was heard as a contested case on December 4, 2019, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

Subsequently, the complainant and respondents submitted after-filed exhibits, which have been admitted into evidence and marked as:

Complainant's Exhibit H (after-filed): Records Request, dated May 25, 2019, and Records Request, dated May 29, 2019;

Complainant's Exhibit I (after-filed): Supplemental Response to Records Request, dated August 30, 2019;

Complainant's Exhibit J (after-filed): Letter, dated January 5, 2020, from Complainant to Hearing Officer (copied to respondents);

Respondents' Exhibit 3 (after-filed): Affidavit of Susan Scott (received December 18, 2019);

Respondents' Exhibit 4 (after-filed): Email Exchange (dated April 24, 2019) and three-page document titled "Loudermill Nancy Axon";

Respondents' Exhibit 5 (after-filed): Affidavit of Susan Scott, dated December 23, 2019;

Respondents' Exhibit 6 (after-filed): Affidavit of Susan Scott, dated January 6, 2020 (with enclosures);

Respondents' Exhibit 7 (after-filed): Redacted Copy of Email with line numbers;

Respondents' Exhibit 8 (after-filed): Affidavit of Susan Scott, dated July 29, 2020;

Respondents' Exhibit 9 (after-filed): Letter, dated July 29, 2020, from Respondents to Hearing Officer and Copy to Complainant (with attachments);

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 between March 31, 2019 and August 20, 2019, the day prior to the filing of her complaint, described in paragraph 3, below, the complainant, the complainant's attorney and union representatives, respectively, made over 20 separate records requests to the respondents. It is found that the complainant was a former teacher within the respondent Connecticut Technical Education and Career System ("CTECS"). It is found that all of her records requests relate to an investigation of alleged misconduct by the complainant while teaching at Platt Technical High School, her dismissal from state service (effective May 31, 2019), and subsequent grievance arbitration (in September 2019).

3. By email received August 21, 2019,¹ the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide her with all records responsive to her records requests described in paragraph 2, above. By letter dated August 23, 2019, the complainant also requested the imposition of civil penalties, legal fees and any other compensation the Commission may order.² At the hearing, the complainant testified that only certain records responsive to the records requests described in paragraphs 4, 6, 7, 9, 11, 13, 14, 17 and 19, below, remained at issue. The complainant described such records as follows: full witness statements; notes of statements taken by Ellen Morris, LaWanda Scott and David Telesca of staff members Jessica Grande, Annabelle Diaz and Sue Christensen; personnel and disciplinary records of complainant; disciplinary records of David Telesca; complainant's lesson plans; emails between David Telesca, Raphael Palacio and Superintendent Jeffrey Wihbey; and emails between Lisa Hylwa and Richard Cavallaro.

4. It is found that on or about May 23, 2019, the complainant requested the following:

[a] 1999-2018 year end teacher evaluations from Kaynor, Prince and Platt;

[b] Full witness statements of staff members Jessica Grande, Annabelle Diaz and Sue Christensen;

[c] original student statements taken by the intern and/or Sandra Heller between Feb 5-11, 2019;

¹ 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.

² The complainant also requested an expedited hearing, which was denied on August 26, 2019.

[d] All personnel records, including letters of discipline on David Telesca, Jessica Grande, Sandra Heller, Annabelle Diaz, Nancy Axon and Sue Christensen;

[e] Tom DeMers mid-year evaluation of Nancy Axon;

[f] Tom DeMers informal observations of Nancy Axon; and

[g] 2017-2019 Power School transcript of the six students that provided written statements about Nancy Axon. Their names redacted. (“May 23rd request”).

5. It is found that the respondents acknowledged the May 23rd request by email dated June 4, 2019. It is found that on June 19, 2019, the respondents provided the complainant with some records responsive to the May 23rd request including, but not limited to, the personnel records of David Telesca, Jessica Grande, Sandra Heller, Annabelle Diaz and Sue Christensen, as well as the personnel and disciplinary records of the complainant. The respondents also informed the complainant that there were no records that fit the description of “full witness statements” for Jessica Grande, Annabelle Diaz and Sue Christensen. It is found that the last written communication between the parties regarding the May 23rd request was on or about July 12, 2019. The complainant testified that there were additional oral communications between the parties regarding the May 23rd request, prior to the filing of the complaint, but she did not provide specific dates.

6. It is found that by letter dated May 25, 2019, addressed to David Telesca, Principal of Platt Technical High School, the complainant requested “copies of all my Nancy.Axon@cthss.org documents, including but not limited to [G]oogle documents, files, folder[s] etc. before they are deleted at the end of the day May 30, 2019.” (“May 25th request”). It is found that the respondents did not receive such request. It is found that by letter dated May 29, 2019, addressed to Principal Telesca, the complainant again requested copies of all her “Nancy.Axon@cthss.org documents”. (“May 29th request”). It is found that on June 6, 2019, the respondents informed the complainant that if she had access to Google Docs, they would send her a link to the computer files requested from Principal Telesca. The complainant responded in the affirmative, and on June 7, 2019, the respondents provided the complainant with a link to the computer files, which included copies of lesson plans that were saved on her school computer. It is unclear from the record as to when the parties last communicated regarding the May 25th and May 29th requests specifically, prior to the filing of the complaint.

7. It is found that on June 3, 2019, the complainant requested copies of:

[a] approved and unapproved lesson plans submitted to Kristen Hart since she started working at Platt Tech. four years ago;

[b] all approved and unapproved lesson plans submitted to Latrice James since she started working at Platt Tech.;

[c] all approved and unapproved lesson plans submitted to Tom DeMers, Samantha Palma, and Joe Tomasselli for 2018-19 school year;

[d] guidelines/criteria for an approved lesson plan, listing the date the document was created as well as how and when the document was disseminated to teachers;

[e] language arts literacy lab curriculum;

[f] all emails and documents sent and received between Principal Telesca and Raphael Palacio and Superintendent Wihbey regarding case;

[g] sophomore school attendance for Feb 1 and Feb 4, 2019; and

[h] Ms. Axon's five sophomore class rosters. ("June 3rd request").

8. It is found that on July 1, 2019, the respondents responded to the June 3rd request. The respondents provided the complainant with some records including, but not limited to, copies of emails between Principal Telesca, Mr. Palacio and Superintendent Wihbey. She was also advised that some of the emails were exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(4) and 1-210(b)(10), G.S. In addition, with respect to the lesson plans and guidelines/criteria requested in the June 3rd request, the respondents informed the complainant that there were no responsive records, and that CTECS is not required to retain lesson plans. It is unclear from the record as to when the parties last communicated regarding the June 3rd request specifically, prior to the filing of the complaint.

9. It is found that on or about June 7, 2019, the complainant's attorney, on her behalf, requested the following:

[a] complainant's entire personnel file;

[b] the approved curriculum that you indicated she violated;

[c] the approved curriculum for the entire Accelerated Reading Program as this school and every school in CTECS system for this school year and the past 5 school years;

[d] lesson plans that have been approved at this school for all reading programs in this school for this school year and the past 5 school years;

[e] lesson plans that have been approved at this school for all reading programs in every school in the CTECS system for this school year and the past 5 school years;

[f] lesson plans that have been approved at this school for all English programs for this school year and the past 5 school years;

[g] lesson plans that have been approved at every school for all English programs in the CTECS system for this school year and the past 5 school years;

[h] all documents showing who approved lesson plans in this school and the approval process, including all signatures for this school year and the past 5 school years;

[i] documents showing the approval of any of Ms. Axon's lesson plans for this school year and the past 5 school years; and

[j] all documents showing that you had any conversations with students or parents concerning the reasons you terminated Ms. Axon, such as letters, notes, emails, texts, etc. This would include letters or statements written by students. It is my understanding that you had an intern taking the statements of students and then had a second set of statements taken from the same students. I will need both sets of statements. ("June 7th request").

10. It is found that the respondents responded to the June 7th request on July 1, 2019, and provided the complainant with some records responsive to such request including, but not limited to copies of sample lesson plans from a reading teacher at Platt Technical High School. The complainant was also again informed that CTECS is not required to retain lesson plans, and that the respondents had already provided the complainant with a copy of her personnel file on June 19, 2019, as described in paragraph 5, above. It is unclear from the record as to when the parties last communicated regarding the June 3rd request specifically, prior to the filing of the complaint.

11. It is found that by email dated July 8, 2019, the complainant's attorney, on her behalf, informed the respondents that she was "missing a few documents that either I didn't ask for yet or have not received," and identified such documents as follows:

[a] student statements with name of student on each...were they signed by the student?

[b] student statements that were not used (taken by intern). Need the names of each of those students as well;

[c] list of all students she had during the 2018-2019 school years and the 2017-2018 school years;

[d] discipline records for any of the students who made complaints ... both the first set and the second set of students;

- [e] discipline records for teachers Grande and Christensen;
- [f] my client's attendance record, including late arrivals for her entire tenure;
- [g] guidelines and procedures for progressive discipline for tenured teachers for last 10 years; and
- [h] class lists with contact information (phone and address) of all the students in her classes for the 2018-2019 year so I can contact them about testifying and/or issuing subpoenas.

The complainant's attorney also informed the respondents that her client no longer had access to her student lesson plans which were kept on "Google.docs that the school uses," and requested copies of "all of her lesson plans." ("July 8th request").

12. It is found that by two separate emails sent on July 8, 2019, respectively, the respondents provided the complainant (through her attorney) with some records responsive to the July 8th request including, but not limited to, copies of her lesson plans that were saved on the complainant's school computer. These were the same files that had been provided directly to the complainant in response to the May 2019 request, described in paragraph 6, above. It is found that the last written communication between the parties regarding the July 8th request specifically, was on or about July 8, 2019. The complainant testified that there were additional oral communications between the parties regarding the July 8th request, prior to the filing of the complaint, but she did not provide specific dates.

13. It is found that by emails dated July 11 and July 12, 2019, respectively, the complainant requested access to her "nancy.axon@cttech.org" and "nancy.axon@cthss.org" accounts. ("July 11th and 12th requests"). By separate emails dated July 12, 2019, the respondents re-sent all of the files (a total of 119 files) that were in the Google Docs link (nancy.axon@cttech.org) that they had previously sent to the complainant including but not limited to lesson plans, as described in paragraphs 6 and 12, above.

14. It is found that by email dated July 15, 2019, the complainant requested the following:

- [a] name/address/telephone number of the female intern that worked at Platt Tech. during the 2018-2019 school year;
- [b] copy of "all email correspondence between Lisa Hylwa and Mr. Cavallaro (Principal of Bullard Havens) between July 2009 and September 2011 regarding Nancy Neller/N Neller/NN and Nancy Axon/N Axon/ NA". ("July 15th request").

15. It is found that on July 17, 2019, the respondents responded to the July 15th request and advised the complainant that "due to the age of the emails, it will take some time to locate and review this material."

16. It is found that on July 28, 2019, the complainant emailed the respondents to follow-up on multiple requests including, but not limited to, her requests for “access to my school email account- nancy.axon@ct.gov... [and] ... my school account- nancy.axon@cthss.org”, and copies of all emails between Lisa Hylwa and Richard Cavallaro (“Hylwa-Cavallaro emails”), as described in paragraphs 13 and 14, above. It is found that by email dated August 9, 2019, the respondents informed the complainant that the request for the Hylwa-Cavallaro emails was being processed and that such emails would be provided when they became available. In addition, the respondents informed the complainant that the FOI Act does not require a public agency to permit access to school accounts as requested by the complainant.

17. It is found that by email dated August 9, 2019, the complainant’s attorney, on her behalf, requested the following:

[a] All communications of any type (email, notes, memo, voicemail, etc.) between and/or among any persons dealing with the events leading up to the termination of Nancy Axon and the termination of Nancy Axon. This is to include all communications related to the reports by any and all students, directions to interview and/or take statements from students, communications about the statements from any and all persons related in any way to taking of statements; communications with all human resources person, administration, interns, union persons, etc.

[b] Any and all procedures, policies, guidelines or any other written document relating in any way to actions to be taken with respect to any tenured teacher in the district for violations of any type of expected behaviors. For example, what action does the district and specifically Platt School take if there is late arrival or early departure from school, inappropriate contact with a student, discriminatory behavior, failure to submit grades, or any other behavior that the administration deems unacceptable. (“August 9th request”).

18. It is found that on or about August 14, 2019, the respondents provided the complainant with approximately 293 pages of documents in response to the August 9th request. Among the records provided were emails sent to and from Principal Telesca and Mr. Palacio, and emails on which Superintendent Wihbey was copied. The respondents claimed that some of the records including such emails were exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(9), 1-210(b)(10), 1-210(b)(11) and 1-210(b)(17), G.S.

19. It is found that at some point between August 14, 2019, and the filing of the complaint on August 21, 2019, the complainant’s attorney during discussions with the respondents’ attorney regarding the August 9th request, described in paragraph 17, above, requested copies of “notes” taken by investigators during the investigation into the alleged misconduct by the complainant. (“mid-August 2019 request”). The respondents withheld such notes from the complainant pursuant to §1-210(b)(1), G.S.

20. It is found that subsequent to the filing of the complaint, the respondents provided the complainant with additional records, including: (1) emails which had previously been withheld; (2) complainant's lessons plans from when she taught at the Prince Technical High School which had been saved by the high school's principal and discovered by the respondents while preparing for arbitration; (3) "complaints" about the complainant which by agreement of the parties had previously been removed from her personnel file pursuant to a provision within her collective bargaining agreement, and subsequently placed in an administrative labor relations file separate from her personnel and disciplinary records; and (4) "notes" taken by investigators LaWanda Scott, Ellen Morris and David Telesca which were subsequently provided through arbitration.

21. Section 1-206(b)(1), G.S., provides, in relevant part:

Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial....

22. Section 1-200(5), G.S., defines "public records or files" as:

any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, ...whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

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, ... or (3) receive a copy of such records in accordance with section 1-212.

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

25. It is concluded that the records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S., to the extent such records exist.

JURISDICTION

26. With respect to the May 23rd, May 25th, May 29th, June 3rd, June 7th and July 8th requests, described in paragraphs 4, 6, 7, 9 and 11, above, it is found that there was insufficient evidence provided by the complainant to show that such specific requests were each denied by the respondents within 30 days prior to the filing of her complaint with the Commission. It is found that the notice of appeal in this matter was filed more than thirty days after the alleged denials of the requests, within the meaning of §1-206, G.S. Accordingly, it is concluded that the Commission lacks subject matter jurisdiction with respect to the May 23rd, May 25th, May 29th, June 3rd, June 7th and July 8th requests.

27. With respect to the July 11th, July 12th, July 15th, August 9th and mid-August 2019 requests described in paragraphs 13, 14, 17 and 19, above, it is found that the complainant filed her notice of appeal in this matter less than thirty days after the alleged denials of such requests, within the meaning of §1-206, G.S. Accordingly, it is concluded that the Commission has subject matter jurisdiction with respect to the July 11th, July 12th, July 15th, August 9th and mid-August 2019 requests.

“FULL WITNESS STATEMENTS”

28. With respect to the complainant’s May 23rd request for “full witness statements,” as already found in paragraph 26, above, the Commission does not have jurisdiction over such request.

INVESTIGATORS’ NOTES

29. At the hearing, the complainant contended that her May 23rd, June 7th, August 9th and mid-August 2019 requests, described in paragraphs 4, 9, 17 and 19, above, included notes taken by Principal Telesca and Human Resource employees, Ellen Morris and LaWanda Scott, during their interviews of teachers Jessica Grande and Sue Christensen, and Prince Technical High School Principal Annabelle Diaz (“investigators’ notes”), and that the respondents failed to promptly provide her with copies of such records.

30. With respect to the May 23rd and June 7th requests, as already found in paragraph 26, above, the Commission does not have subject matter jurisdiction over such requests.

31. With respect to the August 9th request, the complainant contended that such request was broad and encompassed *any* records relating to her termination including the investigators’ notes. The respondents testified that they did not consider the investigators’ notes to be responsive to such request. It is found that such interpretation was reasonable.

32. With respect to the mid-August 2019 request for investigators’ notes, it is found that the respondents originally withheld such records claiming that they were exempt from disclosure as “preliminary drafts or notes”, within the meaning of §1-210(b)(1), G.S. As already found in

paragraph 20, above, such notes were ultimately provided to the complainant through arbitration.³

33. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure....

34. The Supreme Court ruled in Shew v. Freedom of Information Commission, that “the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration...” but rather “[p]reliminary drafts or notes reflect that aspect of the agency’s function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass.” Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, “[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, *8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

35. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S.

36. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part:

Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of...

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency....

³ At the hearing, the complainant and her attorney repeatedly contended that they had never been provided with the notes of LaWanda Scott prior to the hearing in this matter. However, by letter dated January 5, 2020, to the hearing officer and copied to the respondents (Complainant’s Exhibit J), the complainant’s attorney confirmed that such records had been provided to her through arbitration.

37. The respondents testified that the requested notes were in the sole possession of the individual investigators who used them as memory aides and were preliminary to the affirmative action report that was the basis for the discipline. They contended that disclosing the investigators' personal notes would have a chilling effect on and undermine the entire investigation process. They contended that memory aides are vital to the investigation and ensuring the accuracy of an investigation. In addition, they contended that it is important that witnesses feel comfortable coming forward.

38. It is found that the requested investigators' notes are "notes" within the meaning of §1-210(b)(1), G.S. It is further found that the respondents made the necessary determination that "the public interest in withholding such [notes] clearly outweighs the public interest in disclosure", within the meaning of §1-210(b)(1), G.S.

39. It is further found that the notes do not consist of "memoranda, letters, advisory opinions, recommendations or reports," and therefore §1-210(e)(1), G.S., does not apply. Accordingly, it is concluded that such notes are exempt from disclosure pursuant to §1-210(b)(1), G.S., and thus, the respondents did not violate the FOI Act when they denied access to such records.

PERSONNEL AND DISCIPLINARY RECORDS

40. With respect to the records described as the personnel and disciplinary records of the complainant and David Telesca, the complainant contended at the hearing that she requested such records in her May 23rd, June 7th and August 9th requests, described in paragraphs 4, 9 and 17, above, and that the respondents failed to promptly provide her with all responsive records.

41. With respect to the May 23rd and June 7th requests, as already found in paragraph 26, above, the Commission does not have subject matter jurisdiction over such requests.

42. With respect to the August 9th request, as already noted in paragraph 31, above, the complainant contended that such request was broad and encompassed *any* records relating to her termination including past disciplinary history, and would therefore include her personnel and disciplinary-related records. The respondents testified that they did not interpret the August 9th request to include a request for the complainant's personnel and disciplinary-related records. It is found that such interpretation was reasonable.

43. Additionally, even assuming that the August 9th request could be interpreted to include a request for personnel and disciplinary-related records, it is found that the respondents searched for, but did not locate any disciplinary records for Principal Telesca. Also, as already found in paragraph 5, above, the respondents had provided the complainant with copies of her personnel and disciplinary records in June 2019.

44. It is found that as of the time of the hearing in this matter, the respondents had provided the complainant with all personnel and disciplinary-related records of the complainant and Principal Telesca that the respondents maintained. Accordingly, it is concluded that the respondents did not violate the FOI Act with respect to such records.

HYLWA-CAVALLARO EMAILS

45. With respect to the Hylwa-Cavallaro emails, the complainant contended at the hearing that the respondents failed to provide her with any responsive records.

46. It is found that upon receipt of the complainant's July 15th request, described in paragraph 14, above, the respondents through the Division of Legal and Governmental Affairs within the State Department of Education, requested that DAS/BEST eDiscovery Services conduct a search for responsive emails dating back more than ten years. The respondents testified that they had to go through DAS/BEST due to the age of the emails and the special technology required. It is found that DAS/BEST searched mailboxes lisa.hylwa@ct.gov and richard.cavallaro@ct.gov, utilizing the search terms "Nancy" OR "Neller" OR "Axon" OR "NN" OR "NA", and for the time period 7/1/2009 through 9/30/2011. It is found that in early August 2019, the respondents were provided with some emails in response to the request. The respondents found the response to be illogical and requested that a second search be conducted. It is found that in late August 2019 DAS/BEST informed the respondents that "there were no records found for [the] request" and "lisa.hylwa@ct.gov is not an email box on our system." It is found that in September and October 2019, the respondents sought further clarification from DAS/BEST regarding the request for the Hylwa-Cavallaro emails.

47. It is found that after the hearing in this matter, pursuant to an order of the hearing officer, the respondents communicated again with DAS/BEST regarding the July 15th request. The respondents were informed by DAS/BEST that the phrase "lisa.hylwa@ct.gov is not an email box on our system" means that there is no email on the system because this email had been changed to another email in the system. It is found that a search of that second email associated with Lisa Hylwa was conducted and no records were found. It is found that an additional search was also done using only Richard Cavallaro's email account, and again, there were no records found.

48. It is found that the respondents conducted a diligent search for and did not locate any records responsive to the complainant's requests for the Hylwa-Cavallaro emails. Accordingly, it is concluded that the respondents did not violate the FOI Act with respect to such requests.

TELESCA-PALACIO-WIHBEY EMAILS

49. With respect to the Telesca-Palacio-Wihbey emails, the complainant contended at the hearing that the respondents failed to provide her with all emails responsive to her June 3rd and August 9th requests, described in paragraphs 7 and 17, above.

50. With respect to the June 3rd request, as already found in paragraph 26, above, the Commission does not have subject matter jurisdiction over such request.

51. With respect to the August 9th request, the respondents testified that, as of the time of the hearing, they had provided the complainant with all responsive Telesca-Palacio-Wihbey emails, except for an email claimed to be exempt from disclosure pursuant to the attorney-client privilege. The respondent Legal Director testified that she requested that all individuals to whom

the request applied, search for and provide her with their emails, which she then collected and reviewed. It is found that the respondents located emails between Principal Telesca and Mr. Palacio, and emails on which Superintendent Wihbey was “cc’ed”.

52. With respect to the email claimed to be exempt from disclosure and described in paragraph 51, above, on December 10, 2019, the respondents submitted a two-page unredacted email for in camera inspection, along with an in camera Index.⁴ Such email has been marked as IC-2019-0519-1 through IC-2019-0519-2. On the in camera Index, the respondents claim that portions of such email are exempt from disclosure pursuant to §§1-210(b)(4) and 1-210(b)(10), G.S.⁵

53. With respect to the respondents’ claim that portions of IC-2019-0519-1 through IC-2019-0519-2 are exempt from disclosure pursuant to §1-210(b)(10), G.S., such statute permits a public agency to withhold from disclosure records of “communications privileged by the attorney-client relationship.”

54. 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.

55. 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

⁴ The in camera records reference “attachments” which were not included with the in camera submission. Therefore, on July 24, 2020, the hearing officer ordered the respondents to clarify whether the respondents are claiming that such attachments are exempt from disclosure. On July 29, 2020, the respondents submitted a letter informing the hearing officer that they are not claiming that such attachments are exempt from disclosure; enclosed unredacted copies of the attachments; and noted that unredacted copies of the same attachments were previously provided to the complainant and hearing officer on December 18, 2019. The attachments provided on December 18, 2019, have been marked as Respondents’ Exhibit 4 (after-filed). The July 29th letter with the same attachments has been marked as Respondents’ Exhibit 9 (after-filed).

⁵ On the in camera Index, the respondents claim that lines 13-19 and 24-25 of page one of the email is exempt from disclosure, but did not number the lines. Therefore, by orders dated July 24 and November 17, 2020, respectively, the respondents were ordered to provide the hearing officer with written clarification as to which line is line 1 on page 1. In response to such orders, the respondents submitted a redacted copy of the email with line numbers, which has been marked as Respondents’ Exhibit 7 (after-filed). The Commission notes that lines 13-19 and 26-27 of such email were redacted; lines 24-25 were not redacted. Given that such redacted email was submitted by the respondents pursuant to the hearing officer’s orders requesting clarification, the Commission will address herein whether lines 13-19 and 26-27 of IC-2019-0519-1 are exempt from disclosure.

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. . . .

56. The Supreme Court has also 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*, 260 Conn. 149.

57. In addition, the privilege is waived when the communications are voluntarily disclosed to third parties. See Berlin Public Schools v. Freedom of Information Commission, HHB-CV-15-6029080-S, 2016 WL 785578 (Conn. Super. Ct. February 2, 2016) (Berlin voluntarily disclosed a portion of a report prepared by attorney concerning an investigation, in meeting minutes, and court held that at a minimum what was “actually disclosed” should be made public as a waiver of the attorney-client privilege). “[I]t is the client’s responsibility to insure continued confidentiality of his communications.” In re Von Bulow, 828 F. 2d 94, 101 (2d Cir. 1987).

58. With respect to IC-2019-0519-1 (line 13, words 1-9; lines 17-19; lines 26-27), based upon a careful in-camera review and the evidence provided, it is found that such record was transmitted in confidence between the respondents and their counsel relating to legal advice sought by the respondents. It is found that the respondents have not waived their claim of privilege with respect to IC-2019-0519-1 (line 13, words 1-9; lines 17-19; lines 26-27). It is found that IC-2019-0519-1 (line 13, words 1-9; lines 17-19; lines 26-27) is exempt from disclosure pursuant to §1-210(b)(10), G.S. Accordingly, it is concluded that the respondents did not violate the FOI Act by withholding such record from the complainant.⁶

59. With respect to IC-2019-0519-1 (line 13, starting at the 10th word, to end of line 16), based upon a careful in-camera review and the evidence provided, it is found that such record was initially transmitted in confidence between the respondents and their counsel relating to legal advice sought by the respondents. It is found however that the language in IC-2019-0519-1 (line 13, starting at the 10th word, to end of line 16) was taken verbatim from the attachments described in paragraph 52 (footnote 4), above, and submitted by the respondents as after-filed exhibits. It is found that the respondents voluntarily disclosed IC-2019-0519-1 (line 13, starting at the 10th word, to end of line 16). It is concluded that such disclosure constituted a waiver of the attorney-client privilege.

60. The respondents also claim that IC-2019-0519-1 (line 13, starting at the 10th word, to end of line 16) is exempt from disclosure pursuant to §1-210(b)(4), G.S., providing that “nothing in the FOI Act shall require the disclosure of... Records pertaining to strategy and negotiations

⁶ In light of the conclusion in paragraph 58, above, there is no need to address any further exemption.

with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled....”

61. Section 1-200(8), G.S., defines a “pending claim” as:

a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted.

62. Section 1-200(9), G.S., defines “pending litigation” as:

(A) a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action before a court if such relief or right is not granted by the agency; (B) the service of a complaint against an agency returnable to a court which seeks to enforce or implement legal relief or a legal right; or (C) the agency's consideration of action to enforce or implement legal relief or a legal right.

63. Strategy is defined as “a careful plan or method and the art of devising or employing plans or stratagems toward a goal. ... Negotiations is a broad term ... but in general it means the deliberation which takes place between the parties touching a proposed agreement.” (Citations omitted; internal quotation marks omitted.) Bloomfield Education Association v. Frahm, 35 Conn. App. 384, 390, cert. denied, 231 Conn. 926 (1994).

64. Based upon a careful review of IC-2019-0519-1 (line 13, starting at the 10th word, to end of line 16), it is found that the respondents failed to prove that such records are records pertaining to “strategy and negotiations”, within the meaning of §1-210(b)(4), G.S. Accordingly, it is concluded that the requested records are not exempt from disclosure pursuant to §1-210(b)(4), G.S.

65. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., with respect to IC-2019-0519-1 (line 13, starting at the 10th word, to end of line 16).

COMPLAINANT'S LESSON PLANS

66. With respect to the complainant's lesson plans, the complainant contended at the hearing that she requested such records in her May 25th, May 29th, June 3rd, June 7th, July 8th, July 11th and July 12th requests, described in paragraphs 6, 7, 9 and 11, above. The complainant acknowledged that she had received copies of responsive lesson plans, but contended that her lesson plans for January through March 2019 kept on her school computer at Platt Technical High School were missing. The complainant testified that the missing January and February 2019 lesson plans, in particular, were critical because she was terminated for allegedly engaging in an “unapproved lesson plan” in February 2019. The complainant testified that she kept all her

lesson plans on her work computer, and requested that the Commission issue an order for an independent forensic examination of such computer to locate the missing records.

67. As already found in paragraph 26, above, the Commission does not have subject matter jurisdiction over the May 25th, May 29th, June 3rd and July 8th requests.

68. With respect to the June 7th, July 11th and July 12th requests for lesson plans, the respondents testified that they provided all lesson plans that they located on the complainant's work computer, as well as the lesson plans that they discovered while preparing for arbitration as described in paragraph 20, above. The respondent Legal Director testified that she communicated with the Principal at Platt Technical High School regarding the requests for the complainant's computer files (including her lesson plans), who then provided her with the records through a file sharing network. The respondent Legal Director testified that to her knowledge, a diligent search has been conducted for the complainant's lesson plans. The respondent Legal Director, however, did not know who actually carried out the search. She also testified that she did not request that the IT Department conduct a search for lesson plans because having already located responsive lesson plans, she had no reason to believe that there were any other lesson plans in the complainant's school computer files. The respondent Legal Director further testified that it would have also been in the respondents' interest to find the alleged missing lesson plans because they would have been useful for the disciplinary proceedings.

69. It is found that the complainant's requested lesson plans were retained on her school computer and therefore constitute public records subject to disclosure. Compare to Docket #FIC 1999-408; Marvin B. Edelman v. Superintendent of Schools, Windham Public Schools; and Board of Education, Windham Public Schools (March 22, 2000) (Commission found that the requested lesson plans for certain courses offered at Windham High School were not "records maintained or kept on file", within the meaning of §1-210(a), G.S., and were not "prepared, owned, used, received or retained", within the meaning of §1-200(5), G.S.).

70. It is found that the respondents provided the complainant with all lesson plans that they located on her work computer at Platt Technical High School and the lesson plans retained at Prince Technical High School. However, it is also found that the respondents failed to prove that they conducted a diligent search for all responsive lesson plans kept at Platt Technical High School.

PROMPTNESS

71. At the hearing, the complainant also alleged for the first time that the respondents failed to *promptly* respond to all of her records requests. The complainant contended that the respondents intentionally skirted the requirements under the FOI law, and failed to provide her with certain records until subpoenaed or ordered by the arbitrator. She contended that the requested records were critical to and would have been helpful to have at the arbitration hearing in September 2019.

72. The Commission has previously opined that the meaning of the word "promptly" is a

particularly fact-based question. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982), the Commission advised that the word “promptly,” as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request. The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; 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 the loss of the personnel time involved in complying with the request.

73. The respondent Legal Director testified that she spent a “huge amount of time” (i.e., approximately 20-25% of her time between May 2019 and September 2019) responding to the complainant’s numerous records requests. She also testified that during this time, CTECS, which consists of approximately 2,000 employees, 1,200 teachers, 17 schools and three adult programs, was in the process of creating a legal department and she was the only person working on records requests.

74. Although the Commission recognizes that the complainant filed numerous requests and that such requests were filed during a period in time when the respondents were short staffed, it is found that with respect to the requests for the complainant’s lesson plans on her school computer, as described in paragraph 66, above, the respondents failed to promptly comply with such requests. Accordingly, it is concluded that the respondents violated the promptness and disclosure provisions §§1-210 and 1-212, G.S., with respect to the requests for the complainant’s lesson plans.

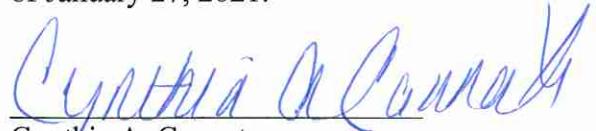
75. Notwithstanding the conclusion in paragraph 74, above, the Commission in its discretion declines to order the various remedies and sanctions requested by the complainant as described in paragraph 3, above.

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

1. Forthwith, the respondents shall provide copies of the record described in paragraph 65, above, to the complainant, free of charge.
2. In addition, the respondents shall have a member of their IT staff undertake an additional search for the January 2019, February 2019 and March 2019 lesson plans described in paragraph 66 of the findings, above. If the respondents discover additional lesson plans that they have not provided to the complainant, they shall provide copies of such records to the complainant, free of charge. If the respondents do not locate any additional lesson plans, they shall provide the complainant with an affidavit detailing the results of their search including the individual(s) who conducted the search.
3. Henceforth, the respondents shall strictly comply with the disclosure requirements

of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 27, 2021.



Cynthia A. Cannata
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

NANCY AXON, c/o Attorney Maria McKeon, McKeon Law Group, LLC, 117 Senate Brook Drive, Amston, CT 06231

LEGAL DIRECTOR, STATE OF CONNECTICUT, TECHNICAL EDUCATION AND CAREER SYSTEM; AND STATE OF CONNECTICUT, TECHNICAL EDUCATION AND CAREER SYSTEM, c/o Assistant Attorney General Daniel Shapiro, Office of the Attorney General, 165 Capitol Avenue, PO Box 120, Hartford, CT 06141-0120



Cynthia A. Cannata
Acting Clerk of the Commission