STATE OF CONNECTICUT
FREEDOM OF INFORMATION COMMISSION

In the Matter of a Complaint by

Alicia Solow-Niederman,

Complainant

against

Commissioner, State of Connecticut, Department of Education; and State of Connecticut, Department of Education,

Respondents

FINAL DECISION

Docket # FIC 2022-0255

June 7, 2023

The above-captioned matter was heard as a contested case on March 27, 2023 and April 25, 2023, at which times the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

Prior to the hearings in this matter, on March 21, 2023, the respondents filed a motion to recuse the Commission's staff from presiding over such hearings. On March 22, 2023, such motion was denied.

Following the April 25, 2023 hearing, pursuant to the order of the hearing officer, the complainant and the respondents submitted after-filed exhibits, which were admitted into evidence as follows:

> Complainant's Exhibit S (after-filed): Letter from David Schulz to the Hearing Officer, dated May 17, 2023;
>
> Respondents' Exhibit 7 (after-filed): Affidavit of Matthew Venhorst, dated May 22, 2023; and
>
> Respondents' Exhibit 8 (after-filed): Affidavit of Robin Cecere, dated May 25, 2023.

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 letter dated April 5, 2021, the complainant requested that the respondents provide her with copies of the following records:

(a) All documents relating to the procurement of automated decision-making systems intended for use in the school lotteries, including but not limited to any requests for proposals.
(b) All agreements for the acquisition of software or services that provide an automated decision-making system to the Department of Education for use in the school lotteries.
(c) Documents sufficient to disclose all types of data inputs used in the school lotteries and how often the inputs are updated.
(d) All documents describing how an automated decision-making system used in the school lotteries uses or weighs its data inputs.
(e) All documents describing the validation procedure(s) completed before the use of an automated decision-making system used in the school lotteries.
(f) The source code of all automated decision-making systems used in the school lotteries.
(g) All correspondence with Capitol Region Education Council, Cooperative Educational Services, and/or Area Cooperative Educational Services referring to the use of any automated decision-making system in the Open Choice lotteries administered by Regional Education Service Centers.
(h) All training materials on the use of any automated decision-making system used in the school lotteries.
(i) All documents describing any of the following concerning the use of any automated decision-making system the school lotteries [*sic*]: a. the value, benefits, effectiveness, or successes of the automated decision-making system; b. the automated decision-making system's risks, limitations, flaws, or failures; c. disparate impact potentially or actually caused by the automated decision-making system; or d. the automated decision-making system's error rates.
(j) All documents shared between or among the Regional School Choice Office, Capitol Regional Education Council, Cooperative Educational Services, and/or Area Cooperative Educational Services addressing the effects of the 2020 *Sheff v. O'Neill* settlement on the use of automated decision-making systems in the school lotteries.
(k) All documents detailing the appeals process of the school lotteries.

3. It is found that, on October 14, 2021 and May 12, 2022, the respondents provided the complainants with copies of certain records responsive to the request described in paragraph 2, above. It is also found that the respondents notified the complainant that they were withholding other responsive records that the respondents claimed were exempt from disclosure pursuant to §1-210(b)(5), G.S.

4. It is found that, by email filed June 10, 2022, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying her request and failing to perform an adequate search for responsive records.[1]

[1] In the October 14, 2021 response described in paragraph 3, above, the respondents notified the complainant that they did not maintain any records responsive to the requests identified in paragraphs 2(g) and 2(k), above, and the complainant represented in her appeal and at the March 27, 2023 hearing that she was not challenging that claim. Accordingly, such requests will not be further addressed.

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, videotaped, 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 2, above, to the extent that they exist and are maintained by the respondents, are public records within the meaning of §§1-200(5), 1-210(a) and 1-212(a), G.S.

9. The Commission takes administrative notice of *Sheff v. O'Neill*, 238 Conn. 1 (1996). In *Sheff*, the Connecticut Supreme Court held that the state has an "affirmative responsibility" under the Connecticut Constitution "to remedy segregation in our public schools, regardless of whether segregation has occurred de jure or de facto." *Id.* at 30. The Court further held that "the existence of extreme racial and ethnic isolation in the [Hartford] public school system deprive[d] [Hartford's] schoolchildren of a substantially equal educational opportunity and require[d] the state to take further remedial measures." *Id.* at 25-26. However, the Court did not order any specific remedy in favor of the plaintiffs, but instead stayed further judicial intervention to allow the legislative and executive branches the opportunity to develop appropriate remedial measures. *Id.* at 46. The Court also directed the Superior Court to retain jurisdiction to grant further relief if necessary. *Id.* at 45-46.

10. It is found that, beginning in 2003, the parties to the *Sheff* litigation entered into a series of 5 stipulations regarding the remedial measures to be taken by the state to reduce racial, ethnic, and economic isolation among Hartford-resident public school students.

11. It is found that, pursuant to the stipulations described in paragraph 10, above, the primary means employed to reduce racial, ethnic, and economic isolation among Hartford-resident public school students is through voluntary interdistrict school programs. It is found that

such interdistrict programs include 43 interdistrict magnet schools and 3 regional technical schools, which are open to students from Hartford and surrounding towns. It is found that such interdistrict programs also include the Open Choice Program, which allows Hartford-resident students to attend certain school districts in surrounding towns.

12. It is found that the Regional School Choice Office ("RSCO") is an office within the respondent Connecticut State Department of Education ("CSDE"). It is found that, each year, the number of applicants seeking admission to the interdistrict programs described in paragraph 11, above, exceeds the number of available seats. It is found that RSCO is responsible for managing the application and placement process for such interdistrict school programs to ensure that the state is complying with its obligations under *Sheff*.

13. It is found that, on January 26, 2022, the parties to the *Sheff* litigation entered into the last of the 5 stipulations described in paragraph 10, above ("Phase V Stipulation"). It is found that, on March 17, 2022, the Phase V Stipulation was approved by the General Assembly pursuant to §3-125a, G.S.

14. It is found that, on March 21, 2022, the Superior Court entered the Phase V Stipulation as a judgment in the form of a Permanent Injunction. It is found that the Permanent Injunction requires the respondent CSDE to comply with the terms of the Comprehensive School Choice Plan ("CCP"), which was incorporated into the Permanent Injunction. It is found that entry of the Permanent Injunction ended the Court's supervisory jurisdiction over the *Sheff* litigation, except that the Court retained limited jurisdiction to allow the plaintiffs to seek Court intervention if the CSDE violates the "material terms" of the CCP. It is found that such "material terms" are specified in the Permanent Injunction.

15. It is found that the CCP sets forth a long-term plan for a system of education in the Hartford area designed to ensure that the respondents satisfy their obligation to provide Hartford-resident students a substantially equal educational opportunity in a desegregated setting. It is found that the CCP requires the respondents to adhere to a "socioeconomic diversity goal" when assigning students to the interdistrict school programs described in paragraph 11, above, to ensure that the population of each school achieves sufficient racial and socioeconomic diversity to comply with the Supreme Court's mandate in *Sheff*.

16. It is found that, in determining which students to place in each school, the respondents consider a number of factors to ensure that they are meeting the socioeconomic diversity goal described in paragraph 15, above. It is found that such factors include the applicant's address, school preferences, whether the applicant has a sibling already enrolled in a school, and various socioeconomic factors. It is found that, in order to achieve the socioeconomic diversity goal set forth in the CCP, the respondents developed a protocol ("Placement Protocol") that consists of a series of rules regarding the weight each factor is given and how such factors are to be applied.

17. It is found that the respondents utilize a software system developed by Blenderbox to administer the application and student placement process. It is found that the respondents provide the Placement Protocol to Blenderbox, and that Blenderbox codes the Protocol for use in the software system. It is found that applicants seeking admission to the interdistrict school programs

described in paragraph 11, above, submit applications through the Blenderbox system. It is found that the Blenderbox system automates the process of pulling relevant information from the applications and applying the Placement Protocol to that information to determine which students will be placed in each school.

18. It is found that the respondents have spent approximately $2.6 million to develop the Blenderbox system.

19. It is found that, during each application cycle, the respondents run simulations with applicant data, and make adjustments to the Placement Protocol as necessary to achieve the goals set forth in the CCP. It is found that, pursuant to the CCP, the respondents coordinate with a working group ("RSCO Working Group") during such simulation process. It is found that the respondents share information regarding the Placement Protocol with the RSCO Working Group on a confidential basis.

20. It is found that the respondents strictly limit the number of people who have access to the details of the Placement Protocol. It is found that the respondents exchange information about the Placement Protocol with Blenderbox through a secure system. It is found that the Blenderbox system is password protected. It is also found that there are various levels of permissions within Blenderbox that limit the information available to individual users. It is found that only three people have full access to the entire system.

21. It is found that, on April 21, 2023, the respondents provided the complainant with copies of additional records responsive to the requests identified in paragraph 2, above.

22. On April 25, 2023, pursuant to an order of the hearing officer, the respondents submitted unredacted copies of the records that they withheld from the complainant, except for records responsive to the request described in paragraph 2(f), above, for in camera inspection, along with an in camera Index. The in camera records consist of 124 pages of hard copy records and a USB flash drive containing 9 Microsoft Excel data files. The hard copy records shall be referenced hereafter as IC-2022-0255-HC-001 through IC-2022-0255-HC-124. The data files shall be referenced hereafter as IC-2022-0255-Excel-1 through IC-2022-0255-Excel-9.[2]

23. At the April 25, 2023 hearing, the respondents claimed for the first time that they do not maintain any records responsive to the complainant's request. On the in camera Index and in their post-hearing brief, the respondents also claimed that, to the extent they do maintain records that are responsive to the complainant's request, such records, or portions thereof, are exempt from disclosure pursuant to §§1-210(b)(1), 1-210(b)(2), 1-210(b)(4), 1-210(b)(5)(A), 1-210(b)(10), 1-210(b)(20), and 10-10a, G.S.

Scope of the Complainant's Request

24. With respect to the respondents' claim, referenced in paragraph 23, above, that they do not maintain any records responsive to the complainant's request, the respondents noted that

[2] The Commission notes that the Index referred to the Microsoft Excel data files by filename, rather than by reference number. Such files shall be referenced hereafter as IC-2022-0255-Excel-1 through IC-2022-0255-Excel-9 based on the order in which such files are listed in the Index.

the requests at issue sought copies of records relating to the respondents' use of an "automated decision-making system." The respondents contended that they do not maintain any records responsive to such requests because they do not use an "automated decision-making system" as that term is defined in the request.

25. The Connecticut Supreme Court held in *Perkins v. FOI Commission*, 228 Conn. 158, 167 (1993), that members of the public should not be denied access to public records "simply because of arguable imperfections in the form in which a request for public records is couched." In *Perkins*, the complainant requested sick leave records from the respondent agency, and the respondent denied the request on the basis that such records were exempt from disclosure. On appeal, the Court rejected the belated claim that the complainant's request did not sufficiently identify the records sought, noting that the respondent agency "treated the request as one for … sick leave records," and "[n]ever asked for any clarification regarding the specific information that [the complainant] sought." *Id.* at 164, 166. The Court recognized that interpreting records requests in an "overly formal and legalistic" manner would contradict "[t]he overarching legislative policy of the [FOI Act] … that favors the open conduct of government and free public access to government records." *Id.* at 166.

26. It is found that, in the April 5, 2021 letter described in paragraph 2, above, the complainant prefaced her request by stating that she sought "the following records pertaining to the administration of the Open Choice Program and the [RSCO] magnet school and technical school lotteries." The respondents testified, and it is found, that they initially understood the term "automated decision-making system" used in the request as referring to the Placement Protocol as used in Blenderbox system. It is found that the respondents consistently treated the complainant's request in accordance with such understanding. It is found that the respondents provided the complainant with copies of records on three separate dates, including just four days before the April 25, 2023 hearing. It is found that the respondents never asked the complainant to clarify her request, and never told the complainant that they did not maintain any responsive records until the day of the April 25, 2023 hearing.

27. Based on the foregoing, it is found that the request described in paragraph 2, above, adequately described the records sought by the complainant. It is found that the respondents understood that the complainant was seeking records related to the Placement Protocol. It is further found that the respondents have already provided and continue to maintain additional records responsive to such request.

<u>Section 1-210(b)(1), G.S.</u>

28. On the in camera index, the respondents contended that the following in camera records are exempt from disclosure pursuant to §1-210(b)(1), G.S.: IC-2022-0255-HC-001 through IC-2022-0255-HC-006, IC-2022-0255-HC-089 through IC-2022-0255-HC-093, and IC-2022-0255-HC-094 through IC-2022-0255-HC-098.

29. Section 1-210(b)(1), G.S., provides that "[n]othing in the [FOI] Act shall be construed to require disclosure of … [p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

30. In *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 332 (1980), the Connecticut Supreme Court held that:

> the term 'preliminary drafts or notes' relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated....
>
> ...[p]reliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative and predecisional process the exemption was meant to encompass.

31. The year following *Wilson*, the General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

> [n]otwithstanding [§1-210(b)(1), G.S.], disclosure shall be required of:
>
> [i]nteragency 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.... (emphasis added).

32. In *Van Norstrand v. Freedom of Information Commission*, 211 Conn. 339, 343 (1989), the Supreme Court provided further guidance regarding "preliminary drafts." Citing the dictionary definition, the court stated that the term "preliminary" means "something that precedes or is introductory or preparatory," and "something that is preceding the main discourse or business." *Id.* According to the Court, "[b]y using the nearly synonymous words 'preliminary' and 'draft', the legislation makes it very evident that preparatory materials are not required to be disclosed." *Id.*

33. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency's preliminary, predecisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public

interest in disclosing them, and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or reports comprising part of the process by which governmental decisions and policies are formulated. See *Shew v. Freedom of Information Commission*, 245 Conn. 149, 164-166 (1998) ("*Shew*").

34. With regard to the "balancing test" required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest rests with the agency that maintains the records. See *Van Norstrand,* 211 Conn. at 345. The agency must indicate the reasons for its determination, and those reasons may not be frivolous or patently unfounded. *Id.*, citing *Wilson*, 181 Conn. at 339. If the agency determines that the public interest in withholding the records clearly outweighs the public interest in disclosing them, the only determination for the Commission to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See *Lewin v. Freedom of Information Commission*, 91 Conn. App. 521, 522-523 (2005); *Coalition to Save Horsebarn Hill v. Freedom of Information Commission*, 73 Conn. App. 89, 99 (2002).

35. In their brief, the respondents contended that the records described in paragraph 28, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S., because they are "draft versions of guidance relating to the operation and implementation of the student assignment system," and that the respondents believe disclosure of such records would frustrate their ability to meet the goals of the CCP.

36. Based on the testimony presented and a careful in camera inspection, it is found that the records described in paragraph 28, above are preparatory and predecisional.

37. However, it is found that the respondents failed to prove that they conducted the "balancing test" required under §1-210(b)(1), G.S. The respondents did not present any testimony that the records described in paragraph 28, above, were reviewed to determine whether the public interest in withholding each such record clearly outweighs the public interest in disclosure. When asked, the respondents' sole witness, Robin Cecere, testified that she could not remember whether she was familiar with the in camera records that the respondents claimed were preliminary drafts. Accordingly, it is found that the respondents failed to prove that the public interest in withholding such records clearly outweighed the public interest in disclosure. See *Shew*, 245 Conn. at 165 (because the respondent town manager "never reviewed the documents ... he could not have conducted the balancing test mandated by the statute").

38. Even if the respondents had offered evidence to establish the applicability of §1-210(b)(1), G.S., it is found that the respondents failed to prove that the records described in paragraph 28, above, are not subject to disclosure pursuant to §1-210(e)(1), G.S. Based on the testimony presented and a careful in camera inspection, it is found that such records are "[i]nteragency or intra-agency memoranda ..., recommendations or ... report[s] comprising part of the process by which governmental decisions and policies are formulated." The respondents did not present any evidence from which it can be determined whether such records were "subject to revision prior to submission or discussion among members of [the] agency." In addition, the respondents' brief does not address the applicability of §1-210(e)(1), G.S.

39. Based on the foregoing, it is found that the respondents failed to prove that the records described in paragraph 28, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S. Accordingly, it is concluded that such records are not exempt from disclosure pursuant to §1-210(b)(1), G.S.

Section 1-210(b)(4)

40. On the in camera index and in their brief, the respondents claimed that all of the in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S.

41. Section 1-210(b)(4), G.S., provides that disclosure is not required of "[r]ecords pertaining to strategy and negotiations 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."

42. Section 1-200(8), G.S., defines "pending claim" to mean "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."

43. Section 1-200(9), G.S., defines "pending litigation" to mean "(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."

44. The respondents contended that all of the in camera records are exempt from disclosure pursuant to §1-210(b)(4), G.S., because such records pertain to strategy and negotiations with respect to the *Sheff* case. Specifically, the respondents contended that their efforts with respect to the student placement process "are aimed at devising strategies to comply with the CCP and to avoid active litigation" that could ensue if the respondents violated a material term of the CCP. The respondents further contended that the *Sheff* case constitutes "pending litigation" that has not been "finally adjudicated or otherwise settled" because the Superior Court retained jurisdiction to enforce the CCP.

45. In *Planning & Zoning Commission of Monroe v. FOI Commission*, 316 Conn. 1, 17 (2015) ("*Monroe*"), the Supreme Court held that "the term 'finally adjudicated' refers to the point at which a court has decided the matter in question, and that decision cannot be altered or modified on appeal." In so holding, the Court rejected the claim that litigation is not "finally adjudicated" merely because a court retains jurisdiction to enforce a judgment. *Id.* at 19-20. The Court explained that "interpreting 'finally adjudicated' as hinging on the possibility of postjudgment litigation would effectively remove the temporal limitation in [§1-210(b)(4), G.S.] and make the pending claims or pending litigation exception apply indefinitely to certain litigation." *Id.* "Because the term 'finally adjudicated' is used in [§1-210(b)(4), G.S.] to establish a temporal limitation" on a public agency's right to withhold public records, "it would not be reasonable to interpret that term as referring to an event that never may occur." *Id.* at 17 n.13.

46. It is found that, on March 21, 2022, the Superior Court entered judgment in the *Sheff* litigation in the form of a Permanent Injunction. It is found that, although the Court retained jurisdiction to allow the plaintiffs a judicial remedy should the respondents violate a material term of the CCP, whether litigation is "finally adjudicated" does not turn on the "possibility of postjudgment litigation" that may never occur. See *Monroe*, 316 Conn. at 19-20.

47. Moreover, it is found that there is no evidence in the record that the *Sheff* plaintiffs have claimed that the respondents are in violation of the CCP or have otherwise threatened to seek court intervention. It is found that the possibility that the plaintiffs may seek court intervention at some undefined point in the future does not negate the fact that the legal claims at issue in *Sheff* were "resolved and decided" when the Court entered the Permanent Injunction. See *id.* at 19.

48. Based on the foregoing, it is found that the *Sheff* litigation has been "finally adjudicated," as that term is used in §1-210(b)(4), G.S. Accordingly, it is concluded that the in camera records are not exempt from disclosure pursuant to §1-210(b)(4), G.S.

Section 1-210(b)(5)(A)

49. On the in camera index, the respondents contended that the following in camera records are exempt from disclosure pursuant to §1-210(b)(5)(A), G.S.: IC-2022-0255-HC-001 through IC-2022-0255-HC-124, IC-2022-0255-Excel-7, and IC-2022-0255-Excel-9.

50. Section 1-210(b)(5)(A), G.S., provides that disclosure is not required of:

> [t]rade secrets, which for purposes of the [FOI] Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy.

51. The definition of "trade secret" in §1-210(b)(5)(A), G.S., "on its face, focuses exclusively on the nature and accessibility of the information." *University of Connecticut v. FOI Commission*, 303 Conn. 724, 733 (2012) ("*UConn*"). The information claimed to be a trade secret must "be of the kind included in the nonexhaustive list contained in the statute." *Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59, 70 (1999). In addition, "to qualify for a trade secret exemption under §1-210(b)(5)(A)[, G.S.], a substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." (Citation omitted; internal quotation marks omitted.) *Director, Dept. of Information Technology of Town of Greenwich v. FOI Commission*, 274 Conn. 179, 194 (2005).

52. In *UConn*, 303 Conn. at 737, the Connecticut Supreme Court held that a public agency may hold a trade secret for purposes of §1-210(b)(5)(A), G.S., even if such agency is not principally engaged in a trade. "If the information meets the statutory criteria, it is a trade secret and the entity creating that information would be engaged in a trade for purposes of the act even if it was not so engaged for all purposes." *Id.* at 734.

53. However, the Supreme Court has also recognized that "the 'independent economic value' requirement … has been interpreted as a codification of the common-law requirement that a trade secret must give its owner a competitive advantage."[3] *Elm City Cheese Co.*, 251 Conn. at 88 n.27. See also *Robert S. Weiss & Assocs., Inc. v. Wiederlight*, 208 Conn. 525, 538 (1988) ("A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."); *Allco Renewable Energy Limited v. FOI Commission*, 205 Conn. App. 144, 158-59 (2021) ("[I]n accordance with the holding of *UConn*, to address the nature of the information at issue, the analysis must consider the competitive nature of the industry involved …." (Quotation marks omitted.))

54. Thus, courts and the Commission have found that a public agency had its own trade secret for purposes of §1-210(b)(5)(A), G.S., when such agency was a participant in a competitive market, and it was found that the information claimed to be a trade secret gave such agency a competitive advantage that would be lost if the information was disclosed. See *UConn v. FOI Commission*, 2010 WL 2106972 (April 21, 2010), at *10, (disclosing UConn Athletics customer list "would adversely affect [UConn Athletics'] sales by giving its competitors opportunity to pull away those regular ticket buyers it worked so hard to develop"), aff'd, 303 Conn. 724 (2012); *Allco*, 205 Conn. App. at 160 (Department of Energy and Environmental Protection was "a commercial actor [that] has made a significant investment within a heavily competitive [renewable energy] industry for the benefit of ratepayers across the state," and disclosing information used to analyze bids would harm agency's ability to obtain competitive rates); *Mike Savino, et al. v. Commissioner, State of Connecticut, Department of Economic and Community Development, et al.*, docket #FIC2018-0044 (Oct. 24, 2018) (disclosure of bid submitted to attract Amazon to build second headquarters in Connecticut "would enable states to better their offers in their competition with Connecticut to attract and keep private business, and give an advantage to private businesses in future negotiations with the state").

55. In their brief, the respondents contended that the Placement Protocol qualifies as a trade secret within the meaning of §1-210(b)(5)(A), G.S., because disclosing the specific factors used in the Protocol, and how such factors are weighted, would impair the effectiveness of the Protocol, which in turn would require the state to expend additional resources in order to maintain compliance with its obligations under *Sheff*. Specifically, the respondents contended that, if applicants knew all of the specific factors and weights that are used to determine student placements, such applicants might misrepresent information in their applications in an attempt to increase their chances of receiving a placement offer. The respondents contended that such

[3] The Commission notes that *Elm City Cheese* involved the definition of "trade secrets" under the Connecticut Uniform Trade Secrets Act ("CUTSA"), §35-51(d), G.S. However, as the Supreme Court noted in *UConn*, 303 Conn. at 735-36, "[t]he definition of a trade secret under §1–210(b)(5)(A) mirrors the definition under [CUTSA]," and "it makes no sense to construe the scope of the two acts differently."

misrepresentations would skew the results generated by the Placement Protocol, thereby requiring the respondents to make significant modifications to the system or devise a new approach in order to remain in compliance with *Sheff* and the CCP.[4]

56. The respondents also contended that the Placement Protocol derives economic value by remaining confidential because it allows the state "to capitalize on its multi-billion-dollar investment in *Sheff* infrastructure," and because the state would be "forced to incur significant costs to overhaul the *Sheff* system" if the Protocol was disclosed. The respondents further contended that applicants could obtain economic value by knowing the details of the Placement Protocol because they "could obtain a financial benefit – in the form of academic programming that otherwise would come at a cost …."

57. It is found that the Placement Protocol is part of the system developed by the state in response to *Sheff* to comply with its constitutional obligation to provide Hartford students a substantially equal educational opportunity. It is also found that the Placement Protocol aids the respondents in assigning students to public schools within such system in a manner that ensures the state is complying with *Sheff* and the provisions of the CCP.

58. It is found that the respondents do not have competitors in their administration of such system. Rather, it is found that the respondents work collaboratively with the City of Hartford, the magnet and regional technical school operators, and the participating school districts to accomplish the goals of the CCP. It is therefore found that, unlike in *UConn* and *Allco*, the Placement Protocol does not provide the respondents a competitive advantage that would be lost if the Protocol was disclosed.

59. It is found that, even if disclosure of the Placement Protocol would result in the state having to expend additional resources to maintain compliance with *Sheff* and the CCP, avoiding the expenditure of resources necessary to operate a public school system that complies with constitutional mandates is not "economic value," as that term is used in §1-210(b)(5)(A), G.S.

60. With respect to the respondents' contention that applicants who knew the specific factors and weights used in the Placement Protocol could obtain a "financial benefit" in the form of quality academic programming, it is found that the students and parents applying for a seat through the lottery process are not competitors or customers of the respondents. It is further found that receiving a quality public school education is not "economic value," as that term is used in §1-210(b)(5)(A), G.S.

---

[4] With respect to this contention, the respondents testified that, even without knowing the specific factors and weights used in the Placement Protocol, applicants already provide false information in order to increase their chances of receiving a placement offer. Specifically, the respondents testified that applicants are "often not truthful about their addresses," on the assumption that providing a different address might give them an advantage in the application process. The respondents also testified that, while they take steps to verify the accuracy of applicant information, they generally cannot verify that an applicant provided an accurate home address until after such applicant has accepted an offer and registered for school. Even so, the respondents testified that, as a matter of policy, they will not rescind a placement offer that has already been accepted, even if they later discover that an applicant provided an inaccurate address.

61. Based on the foregoing, it is found that the Placement Protocol does not "derive independent economic value" from its confidentiality, and that applicants to the student assignment system would not obtain "economic value" from knowing the factors and weights used in the Protocol. It is therefore found that the Placement Protocol is not a trade secret for purposes of §1-210(b)(5)(A), G.S. Accordingly, it is concluded that the records described in paragraph 49, above, are not exempt from disclosure pursuant to §1-210(b)(5)(A), G.S.[5]

Section 1-210(b)(10), G.S.

62. On the in camera index and at the April 25, 2023 hearing, the respondents claimed that certain in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., for two separate reasons.

63. Section 1-210(b)(10), G.S., provides that disclosure is not required of "[r]ecords, tax returns, reports and statements exempted by … the general statutes or communications privileged by the attorney-client relationship ….

64. First, the respondents claimed that the following in camera records are exempt from disclosure pursuant to §1-210(b)(10), G.S., because they are privileged by the attorney-client relationship: IC-2022-0255-HC-1 through IC-2022-0255-HC-6; IC-2022-0255-HC-12 through IC-2022-0255-HC-16; IC-2022-0255-HC-76 through IC-2022-0255-HC-80; IC-2022-0255-HC-89 through IC-2022-0255-HC-93; IC-2022-0255-HC-94 through IC-2022-0255-HC-98; and IC-2022-0255-HC-99 through IC-2022-0255-HC-124.

65. Section 52-146r(b), G.S., provides that "[i]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure."

66. Section 52-146r(a)(2), G.S., defines "confidential communications" to mean:

> 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

[5] In their brief, the respondents noted that the complainant did not appear personally to testify at the hearings in this matter, and asked to draw an adverse inference against the complainant with respect to their claim under §1-210(b)(5)(A), G.S. In support of that request, the respondents cited *UConn* for the proposition that while "disclosure under the [FOI Act] does not turn on the motive for the request … the question of whether … persons … could obtain economic value from the disclosure would be relevant in assessing whether the information constitutes a trade secret." The Commission notes that it is well-settled that "the burden of proving the applicability of an exemption rests upon the agency claiming it." *Allco*, 205 Conn. App. at 152. The Commission further notes that the respondents did not subpoena the complainant or ask the hearing officer to order her to appear to testify. Accordingly, the request to draw an adverse inference is denied.

by the government attorney in furtherance of the rendition
of such legal advice.

67. In *Maxwell v. FOI Commission,* 260 Conn. 143, 149 (2002), the Connecticut Supreme Court held that §52-146r, G.S., "merely codif[ies] the common law attorney-client privilege as this court previously had defined it." The Court further 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." *Id.*

68. The Supreme Court has adopted a four part test to determine whether communications are subject to the attorney-client privilege: "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." *Shew v. FOI Commission,* 245 Conn. 149, 159 (1998). In addition, "[voluntary] disclosure of confidential communications ... constitutes a waiver of [the] privilege as to those items." (Citation omitted.) *State v. Kosuda-Bigazzi,* 335 Conn. 327, 362 n.15 (2020).

69. "The burden of establishing the applicability of the privilege rests with the party invoking it." *Harrington v. FOI Commission,* 323 Conn. 1, 12 (2016). If it is clear from the face of the records, extrinsic evidence is not required to prove the existence of the attorney-client privilege. *Lash v. FOI Commission,* 300 Conn. 511, 516-17 (2011).

70. The Supreme Court has also recognized that "[n]ot every communication between attorney and client falls within the [attorney-client] privilege." *Harrington,* 323 Conn. at 14 (quoting *Ullmann v. State,* 230 Conn. 698, 713 (1994)). In *Harrington,* the Court held that, when an attorney provides both legal and nonlegal professional advice, communications containing such advice will be privileged "if the non-legal aspects of the consultation are integral to the legal assistance given and the legal assistance is the primary purpose of the consultation …." at 17. Under such circumstances, "it is not enough for the party invoking the privilege to show that a communication to legal counsel relayed information that might become relevant to the future rendering of legal advice. Instead, the communication must also either explicitly or implicitly seek specific legal advice about that factual information." (Citation omitted; internal quotation marks omitted.) *Id.* at 16. Moreover, when an attorney's primary role is that of a nonlegal professional advisor, there must be "a clear basis to conclude that information was being conveyed to [her] for the purpose of having [her] act in the role of legal advisor or that [she] was providing a legal opinion. Extrinsic evidence may undoubtedly provide context for making such an assessment." *Id.* at 23.

71. In their brief, the respondents contended that, although Robin Cecere currently serves in a non-attorney role, she is still a licensed attorney and occasionally "advise[s] her staff on issues related to the implementation of the CCP." The respondents contended that the records described in paragraph 64, above, contain such advice and are therefore subject to the attorney-client privilege. With respect to IC-2022-0255-HC-99 through IC-2022-0255-HC-124, the respondents contended that such records are privileged because they contain email

correspondence between Attorney Cecere and the respondents' former Legal Director, which the respondents characterize as "confidential communications … pertaining to the administration of the student assignment system."

72. It is found that Attorney Cecere is the Director of RSCO and the Education Director in the respondent SDE's Office of Strategic Planning. It is found that, in such position, Attorney Cecere's primary role is that of a manager and nonlegal professional advisor. However, it is also found that Attorney Cecere occasionally provides legal advice to employees of the respondent SDE, under the guidance of the respondents' Director of Legal Affairs.

73. With respect to IC-2022-0255-HC-1 through IC-2022-0255-HC-6, based upon careful in camera inspection, it is found that the following portions of such records are communications made by Attorney Cecere to employees of the respondent SDE relating to legal advice sought by the respondents, that Attorney Cecere was acting in her professional capacity as an attorney, and that such communications were transmitted in confidence:

(a) Page 1: entire page
(b) Page 2: entire page
(c) Page 3: from the beginning of the page through the end of the two sections with headings that begin with the word "Example."

74. It is found that the portions of IC-2022-0255-HC-1 through IC-2022-0255-HC-6 identified in paragraph 73, above, are privileged by the attorney-client relationship. It is therefore concluded that such portions are exempt from disclosure pursuant to §1-210(b)(10), G.S.

75. However, it is found that the remaining portions of IC-2022-0255-HC-1 through IC-2022-0255-HC-6 do not relate to legal advice sought by the respondents. It is therefore found that such portions of IC-2022-0255-HC-1 through IC-2022-0255-HC-6 are not privileged by the attorney-client relationship.

76. With respect to IC-2022-0255-HC-12 through IC-2022-0255-HC-16, IC-2022-0255-HC-76 through IC-2022-0255-HC-80, IC-2022-0255-HC-89 through IC-2022-0255-HC-93, and IC-2022-0255-HC-94 through IC-2022-0255-HC-98, it is found that such records were disclosed outside of the attorney-client relationship. It is therefore found that, even if such records were privileged by the attorney-client relationship, any such privilege was waived.

77. With respect to IC-2022-0255-HC-99 through IC-2022-0255-HC-124, based upon careful in camera inspection, it is found that such records, on their face, do not relate to legal advice sought by the agency. It is further found that the respondents did not present any testimony or other extrinsic evidence that would provide further context to establish that such records relate to legal advice sought by the agency. It is therefore found that IC-2022-0255-HC-99 through IC-2022-0255-HC-124 are not communications privileged by the attorney-client relationship.

78. Accordingly, it is concluded that, with the exception of the portions of those records identified in paragraph 73, above, the records described in paragraph 64, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S., based on the attorney-client privilege.

79. The respondents also contended that the following records are exempt from disclosure pursuant to §1-210(b)(10), G.S., because they are "records … exempted by … the general statutes": IC-2022-0255-HC-53 through IC-2022-0255-HC-124; and IC-2022-0255-Excel-1 through IC-2022-0255-Excel-6.

80. The respondents did not claim that any provision of the General Statutes directly provides that the records described in paragraph 79, above, are exempt from disclosure. Rather, the respondents contended that such records relate to the simulations that the respondents run each year as described in paragraph 19, above, and that the CCP requires the respondents to share such records with the RSCO Working Group "on a confidential basis." The respondents further contended that such requirement has the force of statute because the Phase V Stipulation, which requires the respondents to comply with the CCP, was approved by the General Assembly pursuant to §3-125a, G.S., and entered as a court order in the form of the Permanent Injunction. The respondents contended, therefore, that the records described in paragraph 79, above, are "exempted … by the general statutes" for purposes of §1-210(b)(10), G.S., as a result of the General Assembly's approval of the Phase V Stipulation.

81. Section 3-125a, G.S., provides:

> (a) Notwithstanding the provisions of subsection (m) of section 4-160, the Attorney General shall not enter into any agreement or stipulation in connection with a lawsuit to which the state is a party that contains any provision which requires an expenditure from the General Fund budget in an amount in excess of two million five hundred thousand dollars over the term of the agreement or stipulation, unless the General Assembly, by resolution, accepts the terms of such provision. The General Assembly may reject such provision by a three-fifths vote of each house. Such provision shall be deemed approved if the General Assembly fails to vote to approve or reject such provision within thirty days of the date of submittal pursuant to subsection (b) of this section.
>
> (b) Each such agreement or stipulation shall be submitted to the General Assembly by the Attorney General and shall be referred to the committees of cognizance which shall report thereon by resolution.

82. The general rule is "that a public agency may not contract away its statutory obligations, and any agreement that requires a public agency to act contrary to state law is null and void." *Council 4, American Federation of State, County & Municipal Employees, AFL-CIO v. State Ethics Comm'n*, 52 Conn. Supp. 304, 312 (July 26, 2010), aff'd, 304 Conn. 672 (2012) (adopting trial court's decision "as a statement of the facts and the applicable law"). See also *Lieberman v. Board of Labor Relations*, 216 Conn. 253, 271 (1990) (agreement requiring public agency to destroy personnel records in contradiction of state statute was void).

83. When the legislature intends to provide that a contract term may control over a conflicting statute or regulation if such contract is approved by the General Assembly, it has enacted legislation expressly stating that the terms of such contract "shall prevail." See §5-278(e)(1), G.S. ("where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining … and any general statute or special act, or regulations adopted by any state agency, the terms of such agreement or arbitration award shall prevail"). Interpreting that statute, the Supreme Court has held that "in order for the legislature to approve or reject a collective bargaining agreement term in conflict with law, the particular contract term must be stated distinctly and correctly by the [agency] in the transmittal of the contract to the legislature." (Quotation marks omitted.) *Board of Trustees for State Technical Colleges v. Federation of Technical College Teachers, Local 1942*, 179 Conn. 184, 197 (1979).

84. It is found that the General Assembly's approval of the Phase V Stipulation pursuant to §3-125a, G.S., did not render the CCP a statute that supersedes the disclosure requirements of the FOI Act. Legislative approval of the Phase V Stipulation was required by §3-125a, G.S., because such Stipulation "requires an expenditure from the General Fund budget in an amount in excess of two million five hundred thousand dollars over the term of the … stipulation." The plain meaning of §3-125a, G.S., demonstrates that the purpose of that statute is to ensure that the Attorney General does not enter into a settlement agreement that obligates the state to incur a substantial budgetary obligation without approval of the legislative branch. Nothing in §3-125a, G.S., suggests that legislative approval of such agreement operates to give every provision contained therein the force of statute.

85. In addition, it is found that the CCP does not prohibit the respondents from disclosing the records described in paragraph 79, above, in response to a records request under the FOI Act. Rather, it is found that the CCP requires the respondents to "share … simulations on a confidential basis with the RSCO Working Group." It is found that nothing in the CCP provides that such simulations are exempt from disclosure under the FOI Act.

86. Based on the foregoing, it is concluded that the records described in paragraph 79, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S., as a result of the General Assembly's approval of the Phase V Stipulation pursuant to §3-125a, G.S.

Section 1-210(b)(20), G.S.

87. On the in camera index, the respondents contended that the following in camera records are exempt from disclosure pursuant to §1-210(b)(20), G.S.: IC-2022-0255-HC-001 through IC-2022-0255-HC-0124, IC-2022-0255-Excel-7, and IC-2022-0255-Excel-9.

88. Section 1-210(b)(20), G.S., provides that disclosure is not required of "[r]ecords of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system."

89. In their brief, the respondents contended that the records at issue are exempt from disclosure pursuant to §1-210(b)(20), G.S., because the Placement Protocol is a "procedure" or "process," and that disclosing the Protocol would compromise the integrity of the Blenderbox system. The respondents contended that, if applicants knew all of the factors and weights of the Placement Protocol, such applicants might provide false information in an attempt to gain an advantage in the placement process, which in turn would render the placement results inaccurate. The respondents further contended that this would "distort the outcomes generated by the Blenderbox system," which "would compromise the integrity of the information technology system."

90. This Commission has not previously defined the term "integrity," as used in §1-210(b)(20), G.S. When referring to information technology systems or electronic data, the term "integrity" means "internal consistency or lack of corruption in electronic data," *New Oxford American Dictionary* (3d ed. 2010), or "unimpaired or uncorrupted condition; original perfect state; soundness." *Oxford English Dictionary Online*. Accord, 44 U.S.C. §3542(b)(1)(A) (as used in the Federal Information Security Management Act, 44 U.S.C. § 3541 et seq., "integrity" means "guarding against improper information modification or destruction, and includes ensuring information nonrepudiation and authenticity"); *Yoder & Frey Auctioneers, Inc. v. EquipmentFacts, LLC*, 774 F.3d 1065, 1072 (6th Cir. 2014) (interpreting "integrity" as used in the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 et seq., to mean "uncorrupted condition," "original perfect state," or "soundness").

91. Thus, §1-210(b)(20), G.S., allows public agencies to withhold "[r]ecords of standards, procedures, processes, software and codes, not otherwise available to the public," if disclosure of such records would risk compromising the internal consistency of an information technology system, or risk impairing or corrupting such system or the data contained therein.

92. It is found that the respondents did not present any evidence that disclosing the Placement Protocol would pose a risk to the technical functioning or soundness of the Blenderbox system, lead to corruption of such system or the data contained therein, or allow unauthorized access to such system. Rather, the respondents testified that knowledge of the specific factors and weights used in the Protocol might cause some applicants to provide inaccurate information, which could affect the validity of the placement results. It is found that such concern relates to the effectiveness of the Protocol, not to the integrity of the Blenderbox system itself.

93. It is therefore found that the respondents failed to prove that disclosure of the Placement Protocol would compromise the "integrity" of the Blenderbox system, as that term is used in §1-210(b)(20), G.S. Accordingly, it is concluded that the records described in paragraph 87, above, are not exempt from disclosure pursuant to §1-210(b)(20), G.S.

Student-identifying Information

94. On the in camera index and in their brief, the respondents contended that the following in camera records contain personally identifiable student information, and that such information is exempt from disclosure pursuant to §§1-210(b)(2) and 10-10a, G.S.: in IC-2022-0255-Excel-6, all spreadsheet cells containing positive values less than 6; in IC-2022-0255-

Excel-7, columns A through C in all rows; and in IC-2022-0255-Excel-8, all spreadsheet cells containing positive values less than 6.

95. Based upon careful in camera inspection, it is found that the portions of the in camera records described in paragraph 94, above, contain personally identifiable student information, in that such information could be used to identify individual students who applied to the interdistrict school programs described in paragraph 11, above.

96. Following the hearings in this matter, by letter dated May 17, 2023, the complainant confirmed that she is not seeking any personally identifiable student information, and that the respondents are entitled to redact or withhold any such information. Accordingly, the Commission need not address whether such information is exempt from disclosure pursuant to §§1-210(b)(2) or 10-10a, G.S.

Thoroughness of the Respondents' Search

97. Finally, the complainant claimed in her brief that the respondents failed to conduct an adequate search for responsive records.

98. At the April 25, 2023 hearing, Attorney Cecere testified that the respondents conducted an "extensive search," and that they provided copies of all records that they believed were responsive to the request, other than those for which they claimed an exemption. Prior to the close of cross-examination, the complainant asked to "take a short break before I go on to questions about the search." After the break, however, the complainant rested without asking any further questions on cross-examination. The complainant also did not present any testimony or other evidence to contradict the respondents' testimony that they conducted an extensive search.

99. Based on the testimony presented, it is found that the respondents conducted a thorough search for records responsive to the request described in paragraph 2, above.

100. Based on all of the foregoing, it is concluded that the respondents violated the FOI Act by failing to disclose all of the in camera records, with the exception of the portions of those records identified in paragraph 73, above, and personally identifiable student information not sought by the complainant, as described in paragraph 94, above.

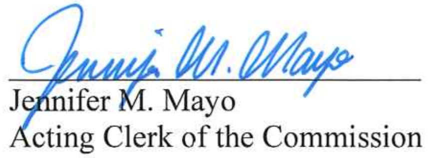
The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. Within 45 days of the date of the Notice of Final Decision in this matter, the respondents shall provide the complainant, free of charge, with copies of all of the in camera records, except as provided in paragraph 2 of the order, below.

2. In complying with paragraph 1 of the order, above, the respondents may redact the portions of those records described in paragraphs 73 and 94 of the findings and conclusions, above.

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 special meeting of June 7, 2023.



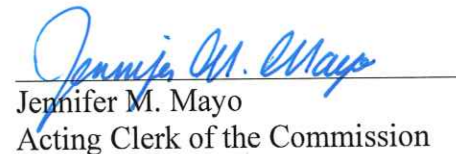
Jennifer M. Mayo
Acting Clerk of the Commission

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:

ALICIA SOLOW-NIEDERMAN, c/o David A. Schulz, Media Freedom and Information Access Clinic, 127 Wall Street, PO Box 208215, New Haven, CT 06511

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF EDUCATION; AND STATE OF CONNECTICUT, DEPARTMENT OF EDUCATION, c/o Attorney Michael P. McKeon, Legal and Governmental Affairs, Department of Education, 450 Columbus Boulevard, Hartford, CT 06103



Jennifer M. Mayo
Acting Clerk of the Commission

FIC 2022-0255/FD/JMM/6/7/2023