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# FREEDOM OF INFORMATION



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Marissa Lowthert,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2014-400

Gary Richards, Superintendent of Schools, Wilton Public Schools; Ann Paul, Director of Special Services, Wilton Public Schools; and Wilton Public Schools,  
Respondent(s)

May 13, 2015

### Transmittal of Proposed Final Decision

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

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, June 10, 2015**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE May 29, 2015**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE May 29, 2015**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE May 29, 2015**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of Information Commission

W. Paradis  
Acting Clerk of the Commission

Notice to: Marissa Lowthert  
Anne Littlefield, Esq.  
Jessica Richman Smith, Esq.

2015-05-13/FIC# 2014-400/Trans/wrbp/KKR//CAL

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Marissa Lowthert,

Complainant

against

Docket #FIC 2014-400

Gary Richards, Superintendent of Schools,  
Wilton Public Schools; Ann Paul, Director  
of Special Services, Wilton Public Schools;  
and Wilton Public Schools,

Respondents

May 4, 2015

The above-captioned matter was heard as a contested case on April 7, 2015, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint.

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

1. The respondents are public agencies, within the meaning of §1-200(1), G.S.
2. It is found that, by email dated June 9, 2014, the complainant requested from the respondents copies of settlement agreements between the respondent Wilton Public Schools and the parents of students, which agreements resulted in the out-of-district placement of those students at Marvelwood School, Harvey School, Wooster, Solebury School and Waypoint Academy in 2013-14 and 2014-15.
3. It is found that, by email dated June 22, 2014, the respondents provided the complainant with copies of seven settlement agreements, with certain information, such as students' and parents' names, names of schools, school years/dates, and descriptions of services to be provided to the students, redacted. The respondents informed the complainant that such information was redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"). It is found that the respondents implied, in their June 22<sup>nd</sup> letter, that the seven settlement agreements were responsive to her June 9<sup>th</sup> request, and that they constituted all records responsive to such request.
4. It is found that, by email dated June 23, 2014, the complainant informed the respondents that, because the copies were "so heavily redacted, it is unclear which agreement matches up with which school or year," thereby making it "impossible to verify [that] any of the

[records] are responsive to my FOI request.” The complainant also requested that the respondents “match each settlement agreement. . . with the school name and school year.”

5. By email dated and filed June 25, 2014, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by over-redacting the records, described in paragraph 2, above.

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

“Public records or files” means any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

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

8. 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.”

9. It is found that the records, described in paragraph 2, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

10. At the hearing in this matter, the respondent Ann Paul, testified, and it is found, that she personally was involved in responding to the request, described in paragraph 2, above. It is found that Ms. Paul either directed others in her office to search for such records, or conducted the search for such records herself. Ms. Paul testified that she redacted the copies of the records based upon her experience in dealing with, and knowledge of, FERPA, and that she checked the redactions “very carefully, and in fact, checked them twice.” She also testified that she reviewed the redactions with the former superintendent before the copies were provided to the complainant. Ms. Paul further testified that she provided the complainant with redacted copies of all records responsive to such request, and that such records were, in fact, responsive to the request.

11. At the hearing, the respondents claimed that the redactions, described generally in paragraph 3, above, are required pursuant to §1-210(b)(17), G.S., and FERPA.

12. The complainant argued, at the hearing in this matter, that she is entitled to know the names of the schools and the dates contained in the settlement agreements because, without them, she cannot determine whether the records provided to her were responsive to the request, described in paragraph 2, above. She also argued that the respondents improperly redacted the names of the schools and the dates because that information was “published...on the BOE website.” Further, the complainant argued, in her complaint, that the names of “all parties to any settlement must be disclosed for every Public Settlement agreement in Connecticut” (capitalization in original). The hearing officer ordered the respondents to provide the settlement agreements, described in paragraphs 2 and 3, above, to the Commission for in camera inspection by April 28, 2015.

13. On April 28, 2015, the respondents requested additional time, until May 5, 2015, to submit the in camera records to the Commission. The hearing officer granted such request until May 1<sup>st</sup>.

14. By letter dated April 29, 2015, counsel for the respondents informed the hearing officer and the complainant, that, “in preparing the in camera submission, the [r]espondents discovered that...some of the agreements provided to the complainant on June 22, 2014, do not appear to be responsive” to her request. Attached to the April 29<sup>th</sup> letter were redacted copies of nine other settlement agreements that previously were not provided to the complainant, along with a letter from the current superintendent, Dr. Kevin Smith, to the complainant, and affidavits of Dr. Smith and Ms. Paul. Counsel requested that the attachments to the April 29<sup>th</sup> letter be marked as after-filed exhibits in this matter, as permitted by the Commission’s regulations. The respondents also, on April 29, 2015, submitted all 16 settlement agreements to the Commission for in camera inspection. Such records are identified herein as IC 2014-400-01 through IC 2014-400-74.

15. Without objection from the complainant, the hearing officer hereby grants the request to admit the following exhibits into evidence, pursuant to §1-21j-38 of the regulations:

After-filed Exhibit F – April 29, 2015 letter from respondents’ counsel

After-filed Exhibit G – April 28, 2015 letter from Kevin Smith

After-filed Exhibit H – Copies of nine redacted settlement agreements

After-filed Exhibit I – Affidavit of Kevin Smith

After-filed Exhibit J – Affidavit of Ann Paul

16. Based upon the foregoing, and after careful inspection of the in camera records, it is found that none of the records provided to the complainant on June 22, 2014,<sup>1</sup> are responsive to the request, described in paragraph 2, above, despite Ms. Paul’s sworn testimony to the contrary. It is further found the nine additional settlement agreements were provided to the complainant in redacted form on April 28<sup>th</sup>, and are responsive to such request.

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<sup>1</sup> IC-2014-400-01 through IC-2014-400-29 are the non-responsive records.

17. Based upon the after-filed exhibits, it is found that Ms. Paul failed to perform, or to direct others in her office to perform, a thorough and diligent search for the records responsive to the request, described in paragraph 2, above, prior to the respondents June 22<sup>nd</sup> production of records to the complainant. Ms. Paul's testimony that she "takes her responsibilities seriously," that she "reads the documents," and that she checked and re-checked the redactions and discussed them with the superintendent before providing the redacted copies to the complainant, lacks credibility, as it seems highly unlikely that an experienced administrator such as Ms. Paul could have performed such tasks without noticing that the documents she was reviewing, redacting and discussing were not responsive to the request. Counsel for the respondents informed the hearing officer in her April 29<sup>th</sup> letter (after-filed Exhibit F), that "the respondents do not wish to speculate as to the specific reasons for the inconsistency in the June 22, 2014 production," but noted, and it is found, that the school district was attempting to respond to multiple FOI requests from the complainant at the same time, and that a new superintendent was transitioning in to the district. However, it is found that such evidence is insufficient to explain why the respondents provided the complainant with records that were not responsive to her request, and why the responsive records were not provided to her on June 22<sup>nd</sup>. It is found that Ms. Paul's failure initially to perform, or to direct others in her office to perform, a thorough and diligent search for responsive records, resulted in the respondents' failure to provide copies of the nine settlement agreements that are responsive to the request, described in paragraph 2, above, to the complainant promptly, as required by §§1-210(a) and 1-212(b), G.S.

18. It is therefore concluded that the respondents violated the promptness provisions of §§1-210(a) and 1-212(b), G.S.

19. With regard to the respondents' claim that the redacted information is exempt from disclosure, §1-210(b)(17), G.S., provides that nothing in the FOI Act shall require the disclosure of: "[e]ducation records which are not subject to disclosure under...[FERPA], 20 USC 1232g."

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

21. This Commission has concluded that 20 U.S.C. §1232g prohibits public schools that receive federal funds from disclosing information concerning a student that would personally identify that student, without the appropriate consent. See e.g., Brenda Ivory v. Vice-Principal Griswold High Sch., Griswold Pub. Sch.; and Griswold Pub. Sch., Docket #FIC 1999-306 (January 26, 2000).

22. "Personally identifying information," includes, but is not limited to:

- (a) The student's name;
- (b) The name of the student's parent or other family members;

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

34 C.F.R. §99.3.

23. As noted in paragraph 16, above, IC 2014-400-01 through IC 2014-400-29 are not responsive to the request, and therefore, the redactions contained in such records shall not be addressed herein. With regard to the remainder of the in camera records (IC 2014-400-30 through IC 2014-400-73), it is found that such records are “education records,” within the meaning of 20 U.S.C. §1232g (a)(4)(A). It is also found that redactions consist of the names of students, parents, and parents’ advocates, students’ dates of birth and references to their ages, diagnoses, grade levels, the names of the out-of-district schools, the dates of anticipated attendance at such schools, and descriptions of the services to be provided.

24. Ms. Paul testified that all of the redacted information either identifies a student or can be linked to a particular student. It is found that the following redacted information constitutes “personally identifying information”: the names of students, parents, and parents’ advocates, students’ dates of birth and references to their ages, grade levels, dates of anticipated attendance at such schools, diagnoses, and descriptions of the services to be provided. It is further found that no consent from the parents or students was obtained for the disclosure of this information.

25. Ms. Paul further testified that, in making the decision as to what information to redact, she took into consideration that the budget documents reflect that only one student was placed at each of four of the schools the complainant inquired about, and only two students were placed at the fifth school, in each of the school years at issue. She testified that she considered the complainant’s request as a “targeted request” because the complainant asked for settlement agreements pertaining to only five specific out-of-district schools. She considered the fact that Wilton is a very small community. In response to counsel’s question as to how a reasonable person in the school community, who does not have personal knowledge of the

relevant circumstances, could identify a student with reasonable certainty if the names of the schools and the dates of attendance were disclosed, Ms. Paul responded:

if there was known to be one student in the 10<sup>th</sup> grade attending 'X' school, and it became clear that that student is no longer attending the high school, it's a small town, transportation might be seen in town picking the student up, I think there are many ways it can be linked in a very small community....

if you knew school year, in a similar fashion, if we're looking at one student being out of a grade and we're a relatively small district, you could begin to link it back to a particular student.

26. It is unclear, however, from this testimony, how a reasonable person in the community without personal knowledge of the relevant circumstances could identify a student with reasonable certainty if the names of the schools and the dates of attendance are disclosed. Accordingly, it is found that the respondents failed to prove that the names of the schools and the dates constitute "personally identifying information."

27. Accordingly, it is concluded that the respondents violated the FOI Act by redacting the names of the schools and the anticipated dates of attendance from the settlement agreements.

28. With regard to the complainant's claim that the Board of Education ("BOE") "posted this information on its website," and that they therefore waived their right to claim it is exempt from disclosure under FERPA, it is found that the BOE did not post the settlement agreements on its website. It is found, rather, that the BOE posted its budget documents for various budget years on its website, which documents include a line item identifying the cost to the school district for out-of-district placements. In a footnote to this line, each budget document identifies the particular out-of-district schools at which students were placed, and the number of students placed at each school for that budget year. It is found that the budget documents do not contain any information that personally identifies a student.

29. Finally, the complainant cited to no law in support of her claim that disclosure is required of the names of the parties to all settlement agreements to which a public agency is a party.

30. Accordingly, it is concluded that the respondents did not violate the FOI Act with regard to the redactions described in paragraph 24, above.

31. With regard to the complainant's request for civil penalties, §1-206(b)(2), G.S., provides, in relevant part, that:

...upon the finding that a denial of any right created by the Freedom of Information Act was without reasonable

grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars.


32. It is found that the denial of the complainant's right to receive the records responsive to her request promptly, was without reasonable grounds. It is found that Ms. Paul is the custodian or official directly responsible for this violation. It is further found that Ms. Paul was provided an opportunity to be heard in accordance with §§4-176e to 4-184, G.S.

33. The Commission takes administrative notice of its decision in Docket #FIC 2014-148, Marissa Lowthert v. Superintendent of Schools, Wilton Public Schools; and Wilton Public Schools (February 25, 2015), in which it was concluded that the respondents failed to provide the requested records to this same complainant, promptly. The Commission takes particular note of the following language in that decision:

The respondents further argue that they should not be found to have violated the promptness requirements of the FOI Act because they provided records to the complainant "on a rolling basis." However, it is found that the respondents never informed the complainant that they were continuing to search for records and would provide copies to her as they located them; rather, they repeatedly represented to the complainant that they had provided all responsive records to her, when in fact, they had not. It is found that, if not for the complainant's insistence that the respondents maintained additional records responsive to her request, such records might never have been located.

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

1. Within 14 days of the Notice of Final Decision in this case, the respondent Ann Paul, shall remit a civil penalty in the amount of \$1000.00 (one thousand dollars) to the Commission.
2. Henceforth, the respondents shall strictly comply with the requirements of the FOI Act.

  
Kathleen K. Ross  
as Hearing Officer