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Michael Savino and the
Manchester Journal Inquirer,
Complainant(s)
against

Commissioner, Dianna Wentzell,
State of Connecticut, Department of Education; and
State of Connecticut, Department of Education,
Respondent(s)

Notice of Meeting

Docket #FIC 2015-532

February 2, 2016

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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, February 24, 2016.** 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 February 11, 2016***. 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 February 11, 2016***. **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 February 11, 2016***, 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: Michael Savino and the Manchester Journal Inquirer
Assistant Attorney General Emily V. Melendez

2016-02-02/FIC# 2015-532/Trans/wrbp/KKR//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Michael Savino and the
Manchester Journal Inquirer,

Complainants

against

Docket #FIC 2015-532

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

Respondents

February 2, 2016

The above-captioned matter was heard as a contested case on November 6, 2015, at which time the complainants 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 August 19, 2015, the deputy commissioner of the respondent state department of education (department) informed all school superintendents, in relevant part, that:

> the department will provide **embargoed student assessment results** for the 2015 Smarter Balanced ELA and mathematics results through the Online Reporting System (ORP) on August 19, 2015....
>
> These results are under embargo until further notice, but no later than the week of August 31- September 4, at which point in time the data will be made public. You will receive notification of the precise day and time the data will be made public.
>
> As a courtesy, the embargoed results are made available for districts before results are made public. The [department] is continuing to conduct the final validation of these data.

> It is critical that districts do not make embargoed results public before the embargo is lifted. Releasing results (including discussing with the press or sharing results at Board of Education meetings) prior to the lift of the embargo jeopardizes your district's access to future embargoed releases. (Emphasis in original).

3. It is found that the "embargoed" information that the department made available to each superintendent consisted of individual student test results for each student in that district, as well as aggregate test results for that particular district only.

4. It is found that, after learning of the department's August 19, 2015 email to the superintendents, the complainants, by email dated August 19, 2015, requested from the respondents the results of the Smarter Balance [sic] Assessment Consortium tests administered this past school year." It is found that the complainants were seeking aggregate state-wide and aggregate district-wide test results, not individual student test results.

5. It is found that, on August 19, 2015, the respondents informed the complainants that the records, described in paragraph 4, above, were exempt from disclosure pursuant to §1-210(b)(1), G.S. By email also dated August 19, 2015, the respondents stated: "We set a high bar regarding accuracy of information that we generate and the public should expect nothing less from us. It is our duty to perform our due diligence before releasing it. We look forward to releasing the results once we have completed our final quality control check. As expected, these results will provide tough feedback on how well we are preparing our students to succeed in college and careers. Most importantly, these scores will serve as the basis for important, constructive conversations that we are eager to begin."

6. By email dated and filed August 20, 2015, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying their request for the records, described in paragraph 4, above.

7. It is found that, on August 28, 2015, the respondents publicly released the aggregate state-wide and aggregate district-wide test results on the Smarter Balanced Assessment tests. It is found that such test results do not identify any individual student. It is further found that the aggregate district-wide test results that were publicly released on August 28, 2015, were unchanged from those that the respondents released solely to the superintendents on August 19, 2015.

8. At the hearing in this matter, the respondents claimed that, pursuant to §10-10a, G.S., the requested records are not public records for purposes of the FOI Act, and that therefore this Commission lacks jurisdiction to order disclosure of such records. In addition, the respondents argued that the requested records did not exist at the time of the request and, alternatively, that, to the extent they existed, they are "preliminary drafts," exempt from disclosure pursuant to §1-210(b)(1), G.S.

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

... (b) The Department of Education shall develop and implement a state-wide public school information system. The system shall be designed for the purpose of establishing a standardized electronic data collection and reporting protocol that will facilitate compliance with state and federal reporting requirements, improve school-to-school and district-to-district information exchanges, and maintain the confidentiality of individual student and staff data. The initial design shall focus on student information, provided the system shall be created to allow for future compatibility with financial, facility and staff data. The system shall provide for the tracking of the performance of individual students on each of the state-wide mastery examinations under section 10-14n in order to allow the department to compare the progress of the same cohort of students who take each examination and to better analyze school performance. The department shall assign a unique student identifier to each student prior to tracking the performance of a student in the public school information system....

(e) The system database of student information shall not be considered a public record for the purposes of section 1-210. Nothing in this section shall be construed to limit the ability of a full-time permanent employee of a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, and that is organized and operated for educational purposes, to obtain information in accordance with the provisions of subsection (h) of this section....

(h) On and after August 1, 2009, upon receipt of a written request to access data maintained under this section by a full-time permanent employee of a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended, and that is organized and operated for educational purposes, the Department of Education shall provide such data to such requesting party not later than sixty days after such request, provided such requesting party shall be responsible for the reasonable cost of such request.... (Emphasis added).

10. Based upon the plain language of §10-10a, G.S., it is found that the purpose of the state-wide public school information system ("system") is to establish a standardized electronic data collection and reporting protocol that tracks the performance of individual students on each of the state-wide mastery examinations,[1] while maintaining the confidentiality of individual student and staff data.

11. It is also found that the respondents failed to prove that the aggregate district-wide test results that they made available to the superintendents on August 19, 2015, and the aggregate state-wide test results are part of the "system database of student information" that "shall not be considered a public record," pursuant to §10-10a(e), G.S.

12. Accordingly, it is concluded that the provision in §10-10a(e), G.S., referenced in paragraph 9, above, does not apply to the requested records, described in paragraph 4, above.

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

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

14. 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.

15. 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."

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[1] It is found that, although the statute makes reference to "state-wide mastery examinations," the department, beginning in 2015, requires Smarter Balanced Assessment tests, in lieu of such mastery examinations. It is further found that the system collects and tracks individual student test results on the Smarter Balanced Assessment tests.

16. It is found that, on August 19, 2015, the respondents maintained, owned, used, received, retained and/or kept on file a record containing the aggregate district-wide test results, which record relates to the conduct of the public's business.

17. It is concluded that the record containing the aggregate district-wide test results is a public record, within the meaning of §§1-200(5) and 1-210(a), G.S.

18. Alternatively, the respondents claimed that the record containing the aggregate district-wide test results was a "preliminary draft," and therefore was exempt from disclosure pursuant to §1-210(b)(1), G.S., at the time of the request.

19. Section 1-210(b)(1), G.S., provides that disclosure shall not be required 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."

20. Section 1-210(e), G.S., provides that "[n]otwithstanding the provisions of subdivision (1) and (16) of subsection (b) of this section, disclosure shall be required of: 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 that 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).

21. In Van Norstrand v. Freedom of Information Comm'n, 211 Conn. 339 (1989), the Court observed that "preliminary," means "something that precedes or is introductory or preparatory," and a "draft" is a "preliminary outline of a plan, document or drawing." Id. at 343. Citing to its decision in Wilson v. Freedom of Information Comm'n, 181 Conn. 324 (1980), the Court opined that:

> preliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed decisionmaking." We believe that the legislature, [in enacting the "preliminary drafts or notes" exemption], 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 this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass. Van Norstrand at 344.

The courts also have observed that "[a] preliminary document is one containing 'data not required or germane to the eventual purpose for which it was undertaken and it was thereafter modified to excise the material that was irrelevant to its...purpose.'" Strillacci v. Freedom of Information Comm'n, No. CV-084018120-S, 2009 WL 1334821, at *2 (New Britain Superior Court, April 20, 2009), citing Van Norstrand at 343.

22. The department's chief performance officer ("CPO") testified that during the time between August 19, 2015, when the request was made, and August 28, 2015, when the aggregate district-wide and aggregate state-wide test results were made public, he and a team of analysts worked to verify the individual student test results (and thereby the aggregate district-wide test results) that were disclosed to the superintendents. According to the CPO, the aggregate district-wide test results were sent to the superintendents on August 19, 2015, with the expectation that the superintendents would review the test results for accuracy. The CPO explained that, in the past, for example, a superintendent who reviewed the "preliminary" test results noticed that typically high achieving students had not scored well on the test, and that the department determined, from this information, that there was a problem with the test itself. He further testified that the department viewed, and continues to view, the superintendents' participation in reviewing the test results as an important part of the verification process. In addition, the CPO testified that verification of the data was particularly important in 2015, because that was the first year that the Smarter Balanced Assessment tests were given. The CPO further testified that the department determined that the public interest in withholding such records outweighed the public interest in disclosure because if inaccurate test results are made public, a particular perception of the test may result, which perception is difficult to erase once it has been created.

23. In essence, the respondents argued that the record containing the aggregate district-wide test results was a "preliminary draft," at the time it was requested because such results had not been verified by the superintendents and the department. However, the Commission does not credit the testimony of the CPO regarding the superintendents' role in verifying the test scores, in light of the conflicting evidence that the aggregate district-wide test results were sent to the superintendents "as a courtesy" (see paragraph 2, above), and in the absence of any evidence that the deputy commissioner directed, or even requested, that the superintendents verify the data and report any inconsistencies to the department by a particular date. Moreover, the respondents offered no evidence that the superintendents in fact provided any feedback to the department regarding the test results. Even if such test results were unverified, however, such fact alone did not transform the record containing such results into a "preliminary draft," as that term has been interpreted by the courts. It is found that the respondents offered no evidence that the record containing the aggregate district-wide test results reflected a "free and candid exchange of ideas…uninhibited proposition and criticism of options, or that such record contained "data not required or germane to the eventual purpose for which it was undertaken, and which was thereafter modified to excise the material that was irrelevant" to that purpose. Accordingly, it is concluded that the respondents failed to prove that the record containing the aggregate district-wide test results was a "preliminary draft," under §1-210(b)(1), G.S., at the time it was requested.

24. However, even if it could be concluded that such record was a "preliminary draft," it is found that such record was shared by the department with other public agencies (i.e., the superintendents), and is a "report comprising part of the process by which governmental decisions and policies are formulated," under 1-210(e)(1), G.S. It is further found that such record is not 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. Accordingly, it is concluded that such record would be required to be disclosed pursuant to §1-210(e), G.S.

25. Based upon the foregoing, it is concluded that the respondents violated the disclosure requirements in §§1-210(a) and 1-212(a), G.S., by failing to provide a copy of the record containing the aggregate district-wide test results to the complainants at the time it was requested.

26. With regard to the request for the record containing the aggregate state-wide test results, it is found that, during the time between August 19, 2015 and August 28, 2015, the chief performance officer and his team created the record containing the aggregate state-wide test results. Accordingly, it is found that such record did not exist at the time it was requested.

27. Accordingly, it is concluded that the respondents did not violate §§1-210(a) or 1-212(a), G.S., with regard to the request for the record containing the aggregate state-wide test results.

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

1. Henceforth, the respondents shall comply with the disclosure requirements in §§1-210(a) and 1-212(a), G.S.

Kathleen K. Ross
as Hearing Officer

FIC 2015-532/hor/kkr/02022016