



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission · 18-20 Trinity Street, Suite 100 · Hartford, CT 06106
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John Spatola,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-453

Superintendent of Schools, New Milford Public Schools;
and New Milford Public Schools,
Respondent(s)

April 4, 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, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, April 27, 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 April 15, 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 April 15, 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 April 15, 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: Attorney Peter C. Bowman
Attorney Mark J. Sommaruga
Attorney Adrienne R. DeLucca and
Attorney Melanie I. Kolek

2016-04-04/FIC# 2015-453/Trans/wrbp/LFS//PSP

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

John Spatola,

Complainant

against

Docket #FIC 2015-453

Superintendent of Schools, New Milford
Public Schools; New Milford Public
Schools; New Milford Teachers'
Association; and the Connecticut
Education Association,

Respondents

March 24, 2016

The above-captioned matter was heard as a contested case on November 30, 2015, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The hearing officer granted the unopposed motion to intervene by the New Milford Teachers' Association and the Connecticut Education Association.

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

1. The Superintendent of Schools, New Milford Public Schools and the New Milford Public Schools ("respondents") are public agencies within the meaning of §1-200(1), G.S.
2. It is found that on June 25, 2015, the complainant requested copies for the current and previous school years (i.e., 2013-2014 and 2014-2015) of "the aggregate data-type records that were filed with the State Department of Education (hereinafter "SDE") that contain the aggregate counts of educators in the respondents' school district by their final summative ratings i.e. 'Exemplary,' 'Proficient,' 'Developing,' and 'Below Standard.'"
3. It is found that the respondents denied the complainant's request, contending that the records he requested were not public records, pursuant to §10-151c, G.S.
4. By letter filed July 10, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of the records he requested.
5. 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, ... whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

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.

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

8. Section 10-151c, G.S., provides:

Any records maintained or kept on file by the Department of Education or any local or regional board of education that are records of teacher performance and evaluation shall not be deemed to be public records and shall not be subject to the provisions of section 1-210, provided that any teacher may consent in writing to the release of such teacher's records by the department or a board of education. Such consent shall be required for each request for a release of such records. Notwithstanding any provision of the general statutes, records maintained or kept on file by the Department of Education or any local or regional board of education that are records of the personal misconduct of a teacher shall be deemed to be public records and shall be subject to disclosure pursuant to the provisions of subsection (a) of section 1-210. Disclosure of such records of a teacher's personal misconduct shall not require the consent of the teacher. For the purposes of this section, "teacher" includes each certified professional employee below the rank of superintendent employed by a board of education in a position requiring a certificate issued by the State Board of Education. (Emphasis added.)

9. Section 10-151c, G.S., "is part of a larger statutory scheme requiring evaluations of teachers. General Statutes §10-151b(a) requires superintendents to evaluate teachers on an annual basis and provides in relevant part that 'an evaluation pursuant to this subsection shall include, but need not be limited to, strengths, areas needing improvement, strategies for

improvement and multiple indicators of student academic growth...” Jay R. Lieberman v. Michael Aronow and FOI Commission (“Lieberman”), 319 Conn. 748, 760 (2015).

10. It is found that each teacher for the New Milford Public Schools is evaluated according to guidelines set by the SDE. It is found that each teacher’s evaluation is a months-long process and reflects ratings in two main areas: teacher practice and student outcomes. It is found that the ratings in the two main areas are based on numerous factors and information derived from various sources. It is found that the teacher is given a final summative rating that reflects the scores in the two main areas. It is found that the summative rating is one of four performance levels: exemplary, proficient, developing, and below standard. (It is found that the respondents use the word “accomplished” instead of “proficient.”)

11. It is found that each teacher only has access to his or her evaluation, which is maintained in an electronic database. It is found that at least part of each teacher’s evaluation, including his or her summative rating, is printed out and maintained in his or her personnel file.

12. It is found that the records sought by the complainant show the aggregate summative ratings in each of the four performance levels for all of the teachers in New Milford for each of the two years requested.

13. It is found that the records sought by the complainant consist of two single-page documents, one for each year requested. It is found that the complainant seeks a form completed by the respondent superintendent entitled “Educator Evaluation Data Collection, 2014-15, Part A” (for the previous year, the form would have the same title, except for the year: 2013-2014). It is found that the form requires the superintendent to enter the district name, the contact person, the contact email, and to sign and date the form. It is found that the substance of the information contained in the form is what is at issue in this matter: a table that indicates the “total count of educators” who received a “final rating” of “Exemplary,” “Proficient,” “Developing,” and “Below Standard,” as well as the total count who received an “In Process” rating or who were not rated.

14. It is found that the SDE requires a superintendent to complete the form and to send a copy of the completed form to the state. It is found that the respondents maintain the original completed form in the superintendent’s office, and only the superintendent, the assistant superintendent and the director of Human Resources have access to the form. It is found that the director of Human Resources has access because it is the director’s responsibility to make sure that every teacher is evaluated.

15. It is found that the form is not maintained in any teacher’s personnel file, nor is it considered by the respondents to be part of any teacher’s personnel file.

16. The respondents and the intervenors claim that the requested records are “records of teacher performance and evaluation,” within the meaning of §10-151c, G.S., and therefore are deemed not to be public records that must be disclosed pursuant to §1-210(a), G.S. The respondents and intervenors claim that because a teacher’s summative, or final, rating is part of

that teacher's evaluation, the aggregate number of teachers in each rating category is a record of teacher performance and evaluation.

17. The complainant, however, contends that §10-151c, G.S., applies only to individual teacher evaluations, not to aggregate numbers on a form submitted to SDE that does not identify any individual teacher.

18. It is concluded that the sole issue in this matter is whether the phrase "records of teacher performance and evaluation" as used in §10-151c, G.S., encompasses the four numbers representing the aggregate number of teachers in each of the four performance levels.

19. Connecticut appellate courts have construed §10-151c, G.S., most recently in Lieberman, supra, 319 Conn. 748. Lieberman held that records relating to resolution of a grievance were not records of "performance and evaluation" of a faculty member within the meaning of §10a-154a, G.S. The Court looked to §10-151c, G.S., for guidance in determining the meaning of the phrase "record of the performance and evaluation" as used in §10a-154a, G.S., because the statutes share "substantially similar language and structure... Specifically, both statutes contain an exemption from the general rule of disclosure under the act for records of 'performance and evaluation.' Despite the fact that these statutes appear in different titles of the General Statutes, they address the same subject matter, namely, records of performance and evaluation of educators." Id., 760.

20. Lieberman reaffirmed that §10-151c, G.S., is to be narrowly construed; id., n.19; in light of the general policy of openness expressed in the FOI Act. "[T]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records." (Internal quotation marks omitted.) Board of Selectmen v. FOI Commission, 294 Conn. 438, 450, 984 A.2d 748 (2010). [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act].... [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.) Director, Dept. of Information Technology v. FOI Commission, 274 Conn. 179, 187, 874 A.2d 785 (2005)." Lieberman, supra, 319 Conn. 754.

21. Lieberman, too, emphasized examination of the nature and purpose of the requested records to determine whether records are records of performance and evaluation within the meaning of §10-151c, G.S. The context in which a record was created, the Court reasoned, is highly relevant. "One must consider "the primary purpose behind the creation of the [record] ... rather than limiting ... analysis to the content of the [record]." Id., 772. The Court rejected Lieberman's claim that the grievance reports were protected from disclosure. Instead, the Court, affirming the trial court's decision, looked to the purpose of the reports, which was to resolve a workplace dispute; the purpose was "not primarily to create a record of performance and evaluation of an individual faculty member." Id., 753.

22. Applying a "functional review" of the records requested in this matter, it is found that the records are forms completed by the superintendent to provide to the SDE. It is found that the forms are not used to make employment decisions about any individual teacher, and they

are not even maintained in any teacher's personnel file. It is found that the form does not identify any teacher. It is found that the nature of the requested records is quite different from an individual teacher's performance evaluation as set forth in §10-151b, G.S., which documents a months-long, in-depth focus on an individual employee's development, achievements and adherence to established practice goals and guidelines.

23. Furthermore, the Connecticut Appellate Court observed that in enacting §10-151c, G.S., in 1984, the legislature intended to shield the personnel files of teachers from disclosure under the FOI Act, specifically in order "to prevent parents from 'teacher shopping' in public schools by looking at evaluations and then demanding that their children be placed with one specific teacher. See 45 H.R. Proc., Pt. 13, 2002 Sess., pp. 3981-82, remarks of Representative Lawrence F. Cafero, Jr." Wiese v. FOI Commission, 82 Conn.App. 604, 609 (2004).

24. It is found that the requested records in this matter, which do not identify individual teachers or individual schools, cannot be used for "teacher shopping."

25. The respondents and intervenors rely on the Commission's final decision in Lisa Treat-Perry v. Superintendent of Schools, East Haddam Public Schools; and East Haddam Public Schools, Docket #FIC2013-034 (September 24, 2014), in which the Commission found that the raw data from parent and student surveys used as a component of teacher evaluations was a record of teacher performance and evaluation within the meaning of §10-151c, G.S. The Commission found that a teacher's annual evaluation "is inextricably linked to and derives from information contained in [the]... surveys." Unlike the records at issue in this matter, however, the surveys in Treat-Perry were, in effect, supporting evidence of part of a teacher's evaluation. Moreover, the facts in Treat-Perry indicate that the surveys were used in making employment decisions about individual teachers. Furthermore, the Commission found that the surveys in Treat-Perry permitted identification of individual teachers.

26. It is concluded that Treat-Perry does not support the respondents' claim that §10-151c, G.S., applies to the records requested in this matter.

27. The respondents and intervenors also point to changes made to §10-151c, G.S., by Public Act 2013-122, enacted in 2013. Prior to 2013, §10-151c, G.S., applied only to records maintained or kept on file by any local or regional board of education. P. A. 13-122 amended §10-151c, G.S., to include records maintained or kept on file by the SDE. The respondents and the intervenors claim that the history of the amendment reveals a legislative intent to shield a district's aggregate ratings from disclosure.

28. It is concluded that to determine whether P.A. 13-122 expanded the definition of "records of teacher performance and evaluation" within the meaning of §10-151c, G.S., to include the aggregate ratings at issue in this matter, as the respondents and the intervenors contend, the history of P.A.13-122 and the relationship of §10-151c, G.S., to other statutes must be examined.

29. P.A.13-122 began as Raised Bill 6624, "An Act Concerning Minor Revisions to the Education Statutes." Section 5 of Raised Bill 6624 proposed an amendment to §10-10a, G.S., to

require the SDE to develop and implement a “longitudinal data system” to use data collected in the pre-existing “state-wide public school information system.”

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

(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 ... maintain the confidentiality of individual student and staff data... 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.

(c) The state-wide public school information system shall:

(1) Track and report data relating to student, teacher and school and district performance growth ...:

(A) In addition to performance on state-wide mastery examinations ..., data relating to students shall include, but not be limited to, (i) the primary language spoken at the home of a student, (ii) student transcripts, (iii) student attendance and student mobility, (iv) reliable, valid assessments of a student’s readiness to enter public school at the kindergarten level, and (v) data collected, if any, from the preschool experience survey, described in section 10-515;

(B) Data relating to teachers shall include, but not be limited to, (i) teacher credentials, such as master’s degrees, teacher preparation programs completed and certification levels and endorsement areas, (ii) teacher assessments, such as whether a teacher is deemed highly qualified pursuant to the No Child Left Behind Act, P.L. 107-110, or deemed to meet such other designations as may be established by federal law or regulations for the purposes of tracking the equitable distribution of instructional staff, (iii) the presence of substitute teachers in a teacher’s classroom, (iv) class size, (v) numbers relating to absenteeism in a teacher’s classroom, and (vi) the presence of a teacher’s aide. The department shall assign a unique teacher identifier to each teacher prior to collecting such data 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.

31. It is concluded that §10-10a, G.S., authorizes the SDE to collect student and teacher data, but shields only “student information” in the system database from disclosure as a public record under the FOI Act.

32. Substitute Bill 6624 replaced Raised Bill 6624. Section 10 of the substitute bill proposed an amendment to §10-151c, G.S., to make the statute applicable to those records of the SDE that were part of the proposed “longitudinal data system” and were records of individual teacher performance and evaluation.

33. A subsequent amendment to Substitute Bill 6624 completely struck the proposed changes to §10-10a, G.S., including all reference to the proposed “longitudinal data system.”

34. The amendment also substituted a new proposed §10-151c, G.S., omitting the language that made the statute applicable to those records of the SDE that were part of the state longitudinal data system and were records of individual teacher performance and evaluation. Instead, §503 of Substitute Bill 6624 as Amended made §10-151c, G.S. applicable to “any records maintained or kept on file by the Department of Education ... that are records of teacher performance and evaluation...” (New language is underlined.)

35. It is found that proponents of Substitute Bill 6624 as amended explained that the new language for §10-151c, G.S., was necessary to be consistent with striking all reference to the “longitudinal data system.” House Proc., 2013 Sess. May 16, 2013, pp. 4680-81, remarks of Representative Tim Ackert.

36. Although the respondents and the intervenors attach great significance to the legislature’s striking of the word “individual” from the proposed change to §10-151c, G.S., in Substitute Bill 6624 as amended, it is found that throughout the long debate on the amended bill, no legislator in any way indicated that its purpose was to expand the statute’s scope to include aggregate teacher performance records.

37. As the respondents note, P.A. 13-122 mistakenly included the two separate proposed amendments to §10-151c, G.S: §10 of Substitute Bill 6624, which applied to individual teacher performance and evaluation records collected as part of the longitudinal data system (and which had been stripped by the amendment to the substitute bill); and §503 of the Amended Substitute Bill 6624, which applied to any record of the SDE that is a record of teacher performance and evaluation.

38. P.A. 13-247, the budget implementer, corrected the mistake by repealing the section of P.A.13-122 that applied §10-151c, G.S., to individual records of performance and evaluation in the longitudinal data system. The Office of Legislative Research Bill Analysis for P.A.13-122 explained: “This change has no legal effect, since existing law does not require SDE to develop a state longitudinal data system. (PA 13-247, § 389, deletes this provision.)”

39. It is concluded that, contrary to the respondents' and the intervenors' claim, nothing in either the language or history of P.A.13-122 demonstrates that the legislature intended to limit access to public records by expanding the definition of teacher performance and evaluation beyond that construed by the courts.

40. It is also concluded, moreover, that had the legislature intended to protect aggregate teacher data from disclosure, it could have done so in the same manner as it specifically requires the SDE to maintain the confidentiality of *individual* teacher data in §10-10a, G.S.

41. It is concluded, based on the plain language of §10-151c, G.S., and the statute's history, that §10-151c, G.S., ensures parity, so that as the SDE collects any kind of teacher data pursuant to any data system, records of teacher performance and evaluation that are deemed not to be public records in the hands of local and regional boards of education are similarly shielded when provided to and maintained by the SDE.

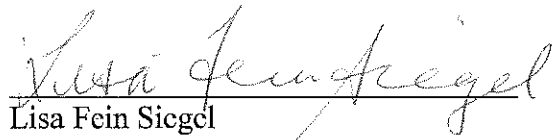
42. It is found that the requested records are not records of evaluation and performance within the meaning of §10-151c, G.S.

43. It is also found that the records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

44. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide such records to the complainant.

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

1. Forthwith, the respondents shall provide to the complainants, free of charge, a copy of the requested records, described in paragraph 2 of the findings of fact, above.


Lisa Fein Siegel
as Hearing Officer