

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Lynn Ezzo,

Complainant

against

Docket #FIC 2017-0633

Superintendent of Schools, Berlin
Public Schools; Assistant Superintendent,
Berlin Public Schools; and
Berlin Public Schools,

Respondents

March 14, 2018

The above-captioned matter was heard as a contested case on January 11, 2018, 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 October 13, 2017, the complainant requested that the assistant principal of Berlin High School provide her access to, or copies of, two cell phone videos that were in the assistant principal's possession depicting the complainant's son, as well as other students, in the school courtyard.
3. It is found that, by email dated October 17, 2017, the assistant principal denied the request, described in paragraph 2, above, citing student confidentiality.
4. By letter dated and filed October 20, 2017, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying the request, described in paragraph 2, above.
5. It is found that a student at the high school recorded two videos on his cell phone of other students in the school courtyard during school hours. In one of the videos, one student (Student A) is seen and heard "rapping" lyrics that included a reference to "shooting up the school," and other students are seen sitting at a picnic table in the background. In the second video, Student A and the complainant's son are heard "rapping" these same lyrics.

6. It is found that the student who recorded the video reported the incident to the school resource officer and also to the assistant principal. At the assistant principal's request, the student provided a copy of the two videos to the assistant principal. The assistant principal then used the videos as a basis on which to suspend Student A and the complainant's son from school for 10 days. The students subsequently were arrested. It is found that the respondents retained a copy of the videos.

7. 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, printed, photostated, photographed or recorded by any other method.

8. 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 inspect such records promptly during regular office or business hours...or (3) receive a copy of such records in accordance with section 1-212.

9. 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.”

10. It is concluded that the videos requested by the complainant are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

11. The respondents claimed that the videos are “educational record[s]” containing personally identifiable student information, which therefore are exempt from disclosure pursuant to §1-210(b)(17), G.S., and the Federal Educational Rights and Privacy Act, 20 U.S.C. §1232g. Specifically, the assistant principal testified that she denied the complainant's request because the videos depicted other students at the school in addition to the complainant's son, and believed that the records of these other students are confidential.

12. Section 1-217(b)(17), G.S., provides that disclosure is not required of “[e]ducational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g....”

13. The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g(b)(2), provides in relevant part that:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless – (A) there is written consent from the student’s parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student’s parents

14. “Education 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.” Further, Title 34, §99.3 of the Code of Federal Regulations provides that:

Personally Identifiable Information

The term 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.

15. Based upon the credible testimony of the assistant principal, it is found that the videos contain personally identifiable information of both Student A and the complainant’s son, in that the students’ faces and voices are depicted on them. Moreover, it is found that the school had a reasonable belief, at the time the request was made, that the complainant knew the identity of the students to whom the videos relate.¹

¹ In fact, the complainant included the name of Student A and her son in her request for such videos.

16. It is therefore concluded that the videos contain information “directly related” to both Student A and the complainant’s son.

17. The complainant argued, however, that the videos are not “maintained” by the school, as that term is used in 20 U.S.C. §1232g(a)(4)(A)(ii), because they were not created by the school or by an agent of the school. At the hearing in this matter, the complainant testified that she believed there were court decisions that support her interpretation. The hearing officer ordered the parties to brief this issue and to submit their briefs on or before January 30, 2018.

18. The parties submitted their briefs to the Commission on January 30, 2018. Although the complainant cited several court decisions in her brief, such decisions do not support the complainant’s narrow interpretation of “maintained.” To the contrary, the United States Supreme Court has observed that the “key language” of FERPA, including its definition of “education records,” is “broad and nonspecific.” See Gonzaga University and Roberta S. League v. John Doe, 536 U.S. 273, 292 (2002). The word “maintained” is not defined in FERPA; however, the ordinary meaning of the word “maintain” is “to keep in existence or continuance; preserve; retain.” Owasso Independent School Dist. No. 1-011 v. Falvo, 534 U.S. 426, 433 (2002) (citing Random House Dictionary of the English Language 1160 (2d ed. 1987)).

19. Because the respondents retained a copy of the videos, it is concluded that the videos are “maintained by an educational agency or institution,” within the meaning of 20 U.S.C. §1232g(a)(4)(A)(ii).

20. Accordingly, it is concluded that the videos are “education records,” within the meaning of 20 U.S.C. §1232g(a)(4)(A).

21. It is also found that Student A’s identity cannot be masked by redacting or blurring the student’s face or distorting his voice, as he already has been identified as a subject of the videos. No evidence that Student A or his parents consented to the release of the videos was offered by the complainant.

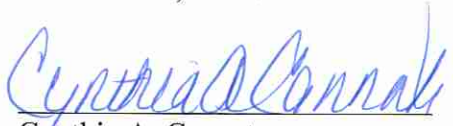
22. It is therefore concluded that the videos are exempt from disclosure pursuant to FERPA and §1-210(b)(17), G.S.

23. Accordingly, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., as alleged.

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

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of March 14, 2018.



Cynthia A. Cannata
Acting Clerk of the Commission

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

THE PARTIES TO THIS CONTESTED CASE ARE:

LYNN EZZO, 163 Castlewood Drive, Berlin, CT 06037

SUPERINTENDENT OF SCHOOLS, BERLIN PUBLIC SCHOOLS; ASSISTANT SUPERINTENDENT, BERLIN PUBLIC SCHOOL; BERLIN PUBLIC SCHOOLS; AND BERLIN PUBLIC SCHOOLS, c/o Attorneys Henry J. Zaccardi and Alyce L. Alfano, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103



Cynthia A. Cannata
Acting Clerk of the Commission