

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Lynn Ezzo and Gary Ezzo,

Complainants

Docket # FIC 2018-0012

against

Superintendent of Schools,  
Berlin Public Schools; Principal,  
Berlin High School, Berlin Public  
Schools; and Berlin Public Schools,

Respondents

October 10, 2018

The above-captioned matter was heard as a contested case on March 21, 2018, at which time the complainants and respondents appeared, stipulated to certain facts 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, on December 18, 2017, the complainants sent the following email to the respondents:

Our son, John Ezzo, has told us that notes were taken by school personnel when he was questioned by Kelly Maio on October 3<sup>rd</sup>, in the presence of John Carras. The contents of these notes were shared with other individuals.

Under the provisions of the Family Educational Rights and Privacy Act and Connecticut Law, I wish to inspect the following education record: I would like a copy of any notes taken that contained information regarding John on and surrounding the October 3<sup>rd</sup> event that led to his suspension and were used to reveal information to others, i.e., the school resource officer, other school administrators, etc....

3. It is found that, by email sent on December 20, 2017, the respondents denied the

records request contained in the complainants' December 18, 2017 email, claiming that the personal notes of a school employee are not an educational record of a student, and are also exempt from disclosure under the Freedom of Information ("FOI") Act.

4. By letter dated January 9, 2018, the complainants appealed to this Commission, alleging that the respondents failed to provide them with copies of records responsive to their December 18<sup>th</sup> request, described in paragraph 2, above, in violation of the FOI Act.

5. Section 1-200(5), G.S., defines "public records or files" as:

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.

6. 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 . . . (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 "any 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 requested by the complainants are public records and must be disclosed in accordance with §§1-200(5), 1-210(a) and 1-212(a), G.S., unless they are exempt from disclosure.

9. It is found that as part of an investigation into an incident that occurred at Berlin High School on October 3, 2017, Vice Principal Kelly Maio, who serves as the high school's Safe School Climate Coordinator, interviewed various students, including the complainants' son, about the incident. It is found that during such interviews Ms. Maio took handwritten notes. It is further found that she used such notes as a personal memory aid. In addition, it is found that although Ms. Maio spoke to Berlin High School's Resource Officer about the incident immediately after interviewing the complainants' son, she did not share her notes with the Resource Officer nor any other individuals, but retained them in her sole possession.

10. At the hearing, the respondents testified that they read the records request in the

second paragraph of the December 18<sup>th</sup> email in conjunction with the statement in the first paragraph, and interpreted the complainants' December 18<sup>th</sup> request as a request for the handwritten notes prepared by Ms. Maio during her October 3, 2017 interview of only the complainants' son.

11. It is found that the respondents' interpretation of the complainants' request was reasonable.

12. On August 6, 2018, pursuant to an order of the hearing officer, the respondents submitted one page of unredacted handwritten notes to the Commission for in camera review. On the in camera index, the respondents claim that such notes are exempt from disclosure pursuant to §1-210(b)(1), G.S.

13. Section 1-210(b)(1), G.S., provides that “[n]othing in the Freedom of Information Information 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.”

14. The Supreme Court ruled in Shew v. Freedom of Information Commission, that “the concept of preliminary [drafts or notes], as opposed to final [drafts or notes], should not depend upon...whether the actual documents are subject to further alteration...” but rather “[p]reliminary drafts or notes reflect that aspect of the agency’s function that precede formal and informed decision making.... It is records of this preliminary, deliberative and predecisional process that...the exemption was meant to encompass.” Shew v. Freedom of Information Commission, 245 Conn. 149, 165 (1998), citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1989). In addition, once the underlying document is identified as a preliminary draft or note, “[i]n conducting the balancing test, the agency may not abuse its discretion in making the decision to withhold disclosure. The agency must, therefore, indicate the reasons for its determination to withhold disclosure and those reasons must not be frivolous or patently unfounded.” State of Connecticut, Office of the Attorney General v. Freedom of Information Commission, 2011 WL 522872, \*8 (Conn. Super. Ct. Jan. 20, 2011) (citations omitted).

15. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, and added to the FOI Act the language now codified in §1-210(e)(1), G.S.

16. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part:

Notwithstanding the provisions of subdivisions (1) and (16) of subsection (b) of this section, disclosure shall be required of...

(1) 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 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....

17. Based upon a careful in camera review of the handwritten notes and the testimony provided at the hearing, it is found that such records are “preliminary drafts or notes” within the meaning of §1-210(b)(1), G.S. See Lee B. Smith v. Superintendent, Middletown Public Schools (April 14, 2014) (where the FOI Commission concluded that notes of the assistant Superintendent’s interviews with witnesses during an investigation of a bullying complaint were preliminary drafts or notes within the meaning of §1-210(b)(1), G.S.).

18. It is also found that the respondents determined that the public interest in withholding the handwritten notes clearly outweighed the public interest in disclosure. Specifically, the respondents determined that the disclosure of such records would have a chilling effect on an administrator’s ability to effectively conduct investigations into student matters.

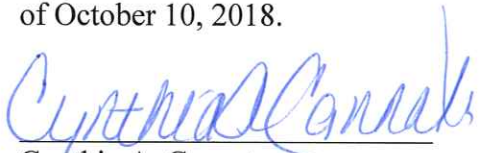
19. It is further found that the handwritten notes are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, within the meaning of §1-210(e)(1), G.S.

20. It is concluded, therefore, that the in camera records are exempt from disclosure pursuant §1-210(b)(1), G.S., and that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., in this matter.

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

1. The complaint is hereby dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of October 10, 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 AND GARY EZZO**, 163 Castlewood Drive, Berlin, CT 06037

**SUPERINTENDENT OF SCHOOLS, BERLIN PUBLIC SCHOOLS; PRINCIPAL, BERLIN HIGH SCHOOL, BERLIN PUBLIC SCHOOLS; AND BERLIN PUBLIC SCHOOLS**, c/o Attorney Alyce L. Alfano, and Attorney Benjamin P. FrazziniKendrick, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103



Cynthia A. Cannata  
Acting Clerk of the Commission