FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jessica Stedman,

Complainant

against

Docket #FIC 2018-0293

Pam Vogel, Superintendent of Schools,
Regional School District #1; and
Regional School District #1,

Respondents

February 13, 2019

The above-captioned matter was heard as a contested case on August 2, 2018, and November 15, 2018, at which time the complainant and the respondents appeared and presented testimony, exhibits and argument on the complaint. At the request of the hearing officer, the parties submitted after-filed exhibits, which have been marked as follows – Respondents' Exhibit 6 (after-filed): Emails re: FOI Process Description, with attachment; Respondents' Exhibit 7 (after-filed): Affidavit of Dr. Pamela K. Vogel.

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 four separate letters, each dated April 10, 2018, the complainant requested from the respondents copies or the opportunity to inspect the following records:

> (a) any and all emails that were sent, received, cc'd or bcc'd between any and all of the following Region One Board Members and Region One Administration including Board Chairperson Robert/Bob Whelan, Jonathan Moore, Jenifer Weigel, John Sanders, Douglas Humes, Patricia Mechare, Dr. Pam Vogel and Lisa Carter during the period of January 1, 2018 through April 10, 2018;
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> (b) the superintendent's current contract and the mutually agreed upon goals set forth between Dr. Vogel and the Board of Education;

> (c) any and all emails that were sent, received, cc'd or bcc'd between any and all of the following Region One Board Members and Region One Administration including previous Board Chairperson Andrea Downs, Jonathan Moore, Jenifer Weigel, Bob Whelan, John Sanders, Edwin Gow, Patricia Chamberlain and Assistant Superintendent Pam Vogel (at that time) during the period of February 23, 2017 through March 15, 2017;
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> (d) all agreements, payments made, invoices received for the payment of services…to CABE and/or Ann Baldwin…from September 1, 2017 through April 10, 2018;
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> (e) all emails to and from Ann Baldwin to any and all members of the school board, Dr. Vogel and Lisa Carter between September 1, 2017 and April 10, 2018.

3. It is further found that the complainant requested that any copies be provided to her electronically via email.

4. It is found that, by letter dated April 13, 2018, the respondent superintendent acknowledged receipt of the requests, and informed the complainant that, because the requests were broad in scope, she would not be able to provide the requested records within four business days. However, the superintendent further informed the complainant that the district would begin to search for, and review, any responsive records and notify her when such review was completed. In a separate letter to the complainant, also dated April 13, 2018, the superintendent requested that the complainant identify certain topics or search words that might narrow the search for emails, in order to facilitate the response to the requests.

5. It is found that, by email dated May 2, 2018, the respondents provided the complainant with an electronic copy of the superintendent's contract, in response to the request described in paragraph 2(b), above, and informed the complainant that goals for the superintendent had not yet been established and that therefore, no record existed that set forth the superintendent's goals. However, the respondents did provide the complainant with an electronic copy of the superintendent's job description, in draft form.

6. By letter dated May 31, 2018 and filed June 4, 2018, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to fully comply with the requests, described in paragraph 2, above.

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…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 found that the records responsive to the requests, described in paragraph 2, above, maintained or kept on file by the respondents at the time of the request, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

11. At the hearing in this matter, the complainant withdrew her complaint with regard to the allegations contained in paragraph 2(b) and (d), above. Therefore, such allegations shall not be further considered herein.

12. With regard to the remainder of the allegations, it is found that the complainant did not immediately respond the superintendent's request to narrow the scope of the requests for emails.[1] It is also found that the complainant never indicated to the respondents that she needed the requested records by a date certain, and did not request that the respondents prioritize any one of her four requests.

13. It is found that, in the absence of specific direction from the complainant, the superintendent first provided copies of records that were easily located and did not need to be reviewed for redactions, such as her contract, and provided those records to the complainant electronically (see paragraph 5, above). With regard to the emails, the superintendent decided to work on the emails responsive to the request, described in paragraph 2(c), above, first, because they were the oldest. She immediately contacted the district's network administrator,

[1] By email dated September 13, 2018, approximately five months after the superintendent asked the complainant to narrow or clarify her request, the complainant informed the superintendent that she believed she had been "pretty clear that the main focus was the schedule & grading policies, as well as Ann Baldwin's involvement"; however, by this time, several searches for responsive emails had already been completed using the original broader requests as the basis for such searches.

who conducted the search for these emails. It is found that such search resulted in approximately 3,000 pages of records.

14. It is found that the respondents reviewed and produced thousands of responsive emails to the complainant for her inspection on the following dates: June 11, June 12, June 28, July 23, July 27, August 3, August 24, September 11, September 21, October 1, October 19, October 28, and November 5, 2018. It is found that the complainant (or her agent) inspected the records, which the respondents had printed out, and indicated that she wanted copies of certain pages. It is found that the complainant was charged a copying fee of $.25 per page for unredacted copies, and $.75 per page for redacted copies.

15. It is found that, as of the date of the second hearing in this matter, the respondents were prepared to begin to search for and review the emails responsive to the request, described in paragraph 2(a), above. In addition, although the superintendent had not yet conducted a search of her personal email account for records responsive to the complainant's requests, she agreed to do so. She further agreed to ask the members of the board and the administrators identified in the requests, to also search their personal email accounts.

16. At the hearing in this matter, the complainant claimed that, because she requested that the emails be provided to her electronically, the respondents improperly printed out the emails and charged her a fee for unredacted copies, which could have provided to her at no cost. She also claimed that the respondents impermissibly charged her a flat "redaction fee" for records that were redacted, in addition to the copy fee. The complainant also argued that the redactions themselves were improper. Finally, the complainant claimed that the respondents failed to provide the records to her promptly.

17. With regard to the claim that the respondents improperly charged her a copy fee when she requested that the emails be provided to her electronically, §1-211(a), G.S., provides, in relevant part, that "any public agency which maintains public records in a computer storage system shall provide, to any person making a request pursuant to the [FOI] Act, a copy of any...[record], including an electronic copy sent to the electronic mail address of the person making such request, if the agency can reasonably make any such copy or have any such copy made." Section 1-212(b), G.S., provides that "the fee for any copy provided in accordance with subsection (a) of 1-211 shall not exceed the cost thereof to the public agency."

18. It is found that the superintendent printed out the potentially responsive emails because it was easier for her to read them that way, rather than on her computer, and because she believed that some of the emails might need to be redacted. Although the Commission appreciates that it may be easier for some people to review emails when they are in printed form, as opposed to reading them on a computer screen, the FOI Act does not permit a public agency to charge a fee for a copy of a nonexempt electronic record, when the requestor has asked that such record be provided electronically. The Commission takes administrative notice of the fact that there is no cost associated with transmitting a record electronically. Accordingly, it is concluded that the respondents violated §§1-211(a) and 1-212(b), G.S., by charging the complainant a copy fee of $.25 per page for unredacted paper copies, rather than providing them to her electronically, free of charge, as she requested.

19. With regard to the claim that the respondents violated the FOI Act by charging her $.75 per page for the redacted copies, §1-212(a), G.S., provides that the fee charged by a municipal public agency for any copy may not exceed $.50 per page.

20. It is concluded, and the respondents conceded at the hearing in this matter, that they violated §1-212, G.S., by charging a flat "redaction fee" for redacted copies in addition to the copying fee, which resulted in the complainant being charged $.75 per page for redacted copies.[2] At the second hearing in this matter, the respondents represented that they had refunded the complainant the amount of this redaction fee.

21. With regard to whether the records at issue were provided to the complainant "promptly," the Commission has held that the meaning of the word "promptly" is a particularly fact-based question. In Advisory Opinion #51, In the Matter of a Request for Declaratory Ruling, Third Taxing District of the City of Norwalk, Applicant (Notice of Final Decision dated January 11, 1982), the Commission advised that the word "promptly," as used in §1-210(a), G.S., means quickly and without undue delay, taking into consideration all of the factors presented by a particular request.

22. The advisory opinion goes on to describe some of the factors that should be considered in weighing a request for records against other priorities: the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request.

23. The advisory opinion also states that "... timely access to public records by persons seeking them is a fundamental right conferred by the Freedom of Information Act. Providing such access is therefore a primary duty of all public agencies, and should be considered as much a part of their mission as their other major functions. Although each agency must determine its own set of priorities in dealing with its responsibilities within its limited resources, providing access to public records should be considered as one such priority."

24. It is found that the volume of records requested by the complainant in this matter was very large, and the complainant did not timely respond to the superintendent's request that she narrow the scope of the records she was seeking. There is no evidence in the record that the complainant made it known to the respondents that the requested records were needed by a particular date. It is also found that the respondent superintendent is the superintendent for Regional School District #1, as well as the superintendent for six local school districts,

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[2] The Commission notes, however, that if a public agency receives a request for a copy of, or to inspect, a record that contains information that is required by law to be redacted, and the public agency must make a copy of the record in order to redact such information, the public agency may charge the requestor the statutory fee for that copy. See Kozlowski v. Freedom of Information Commission, superior court, docket number CV-960556965 (judicial district of Hartford-New Britain at New Britain), July 29, 1997.

consisting of elementary and middle schools. During the month of April, when the records requests at issue were received, there were three vacancies for principal positions and the superintendent was helping to form search committees, and reviewing application materials. Also around that time, the superintendent was negotiating nine collective bargaining agreements, and working on changing the school district's health insurance company. In addition to meetings held during the day, the superintendent, also had evening meetings 14 out of 16 evenings in April (one week was school vacation), with a similar schedule in May and June; the superintendent therefore reviewed responsive records on the weekends. The superintendent testified that she is the only person who is authorized to review the emails because this is not within the job descriptions for assistant superintendent or director of special education. Although the business manager assisted her by locating invoices, she alone reviewed those records for redactions, in the absence of other personnel authorized to do so.

25. It is found that the respondents have made a diligent effort to comply with the complainant's voluminous records requests. It is found that the superintendent has taken her responsibilities under the FOI Act seriously and has dedicated time each week to fulfilling the complainant's requests.

26. Based on the specific facts of this case, it is found that the respondents provided the responsive records to the complainant promptly.

27. With regard to the portions of records claimed by the respondents to be exempt from disclosure, the respondents submitted such records for in camera inspection by the Commission. It is found that such records consist of 10 pages of emails, and shall be referenced herein as IC 2018-0293-01 through IC 2018-0293-10.

28. The respondents claimed that certain portions of the emails are exempt from disclosure pursuant to §1-210(b)(10), G.S., and §1-210(b)(17).

29. Specifically, the respondents claimed, on the index to the in camera records, that lines 15-21 of IC 2018-0293-01, are exempt from disclosure pursuant to §1-210(b)(10) G.S., which provides, in relevant part, that disclosure is not required of: "...communications privileged by the attorney-client relationship...."

30. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. That law is well set forth in Maxwell v. FOI Commission, 260 Conn. 143 (2002). In that case, the Supreme Court stated that §52-146r, G.S., which established a statutory privilege for communications between public agencies and their attorneys, merely codifies "the common-law attorney-client privilege as this court previously had defined it." Id. at 149.

31. Section 52-146r(2), G.S., defines "confidential communications" as:

> [a]ll oral and written communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her

> duties or within the scope of his or her employment and a government attorney relating to legal advice sought by the public agency or a public official or employee of such public agency from that attorney, and all records prepared by the government attorney in furtherance of the rendition of such legal advice…

32. A four-part test must be applied to determine whether communications are privileged: "(1) the attorney must be acting in a professional capacity for the agency; (2) the communications must be made to the attorney by current employees or officials of the agency; (3) the communications must relate to the legal advice sought by the agency from the attorney, and (4) the communications must be made in confidence." Lash v. Freedom of Information Commission, 300 Conn. 511, 516 (2011), citing Shew v. Freedom of Information Commission, 245 Conn. 149, 159 (1998).

33. It is found that the respondents did not offer any testimony or evidence other than the records themselves to support their claim of exemption. In Lash, the Court concluded that extrinsic evidence is not always required to prove the existence of the attorney-client privilege. However, the record at issue in that case was marked "CONFIDENTIAL Attorney-Client Communication DO NOT DISCLOSE" and was sent only to a small number of recipients, all of whom were employees or officials of the town. In addition, the communication in that case was made in the context of pending litigation and therefore, although it did not contain an express request for legal advice, "the surrounding facts and circumstances make it clear that the plaintiffs sought legal advice."

34. In the instant case, the respondents indicated on the index to the in camera records, that IC 2018-0293-01, lines 16-21, is an "internal discussion of counsel advice;" however, they did not identify the individual referenced in that record and did not offer evidence that such individual was an attorney acting in a professional capacity for the agency. Even if the Commission were to assume such fact, and further assume that there had been a request for legal advice made to this attorney by the Board, the communication at issue is not labeled "Confidential" and there is no instruction to the recipients not to disclose the information contained therein. Moreover, although the record was sent to seven recipients, who, by their email addresses appear to be Board members, it also was "cc'd" to three other individuals with different email addresses. The respondents offered no evidence as to who these individuals are, and although it appears they are in some way connected to a school, it is not clear that they were the attorney's "clients." Thus, it is found that the respondents failed to prove that this communication was made in confidence.

35. Based upon the foregoing, it is found that the respondents failed to prove that IC 2018-0293-01, lines 16-21, is exempt from disclosure pursuant to §1-210(b)(10), G.S.

36. The respondents claimed that certain portions of the remainder of the in camera records are exempt from disclosure pursuant to §1-210(b)(17), G.S. That provision exempts from disclosure "educational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g."

37. "Education records" is defined in 20 U.S.C. §1232g(a)(4)(A), as "those records, files, documents, and other materials which (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."

38. This Commission previously has concluded that 20 U.S.C §1232g prohibits public schools that receive federal funding from disclosing information concerning a student that would personally identify that student, without appropriate consent.

39. Pursuant to 34 U.S.C. §99. 3, "Personally Identifiable 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.

40. After careful in camera inspection of IC 2018-0293-02 through 10, it is found that such records are education records and that the portions thereof claimed to be exempt from disclosure are personally identifiable information.

41. Accordingly, it is found that the portions of IC 2018-0293-02 through 10, identified on the index to the in camera records are exempt from disclosure pursuant to §1-210(b)(17), G.S., are so exempt.

42. Thus, it is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding the records, described in paragraph 41, above, from 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 reimburse the complainant the amount she was charged for paper copies of unredacted records, and henceforth, shall strictly comply with the fee provisions in §§1-211(a) and 1-212(b), G.S.

2. Forthwith, the respondents shall provide to the complainant an unredacted copy of the record described in paragraph 35, above, free of charge.

3. The Commission anticipates that the respondents will continue to diligently work toward providing all additional responsive records to the complainant without undue delay. To the extent that any such records are claimed to be exempt from disclosure and therefore withheld from the complainant, the Commission suggests that the respondents so inform the complainant so that she may make a new request for such records.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 13, 2019.

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:

JESSICA STEDMAN, P.O. Box 1184, Canaan, CT 06018

PAM VOGEL, SUPERINTENDENT OF SCHOOLS, REGIONAL SCHOOL DISTRICT #1; AND REGIONAL SCHOOL DISTRICT #1, c/o Attorney Thomas B. Mooney, Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103-1919

Cynthia A. Cannata
Acting Clerk of the Commission

FIC 2018-0293/FD/CAC/2/13/2019