

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by

FINAL DECISION

Kevin Ollie,

Complainant

against

Docket #FIC 2018-0199

President, State of Connecticut,
Office of the President, University
of Connecticut; and State of
Connecticut, Office of the President,
University of Connecticut,

Respondents

February 27, 2019

The above-captioned matter was heard as a contested case on June 20, 2018, September 5, 2018 and November 28, 2018, at which times the complainant and the 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, by letter dated April 3, 2018, the complainant requested that President Susan Herbst provide him with access to, and selected copies of, the following records:
 - a. All public records, documents, and communications relating to the decision to initiate the procedure to terminate the employment of Kevin Ollie with the University of Connecticut;
 - b. All public records, documents, and communications relating to the factual basis for the 'University's determination that you [Kevin Ollie] violated NCAA bylaws or otherwise engaged in behaviors that violate the terms of your Employment Agreement and the

AAUP contract,' as stated in the March 10, 2018 letter from David Benedict to Kevin Ollie;

- c. All public records, documents, and communications relating to the factual basis for the claim in the March 10, 2018 letter from David Benedict to Kevin Ollie that "[t]he University believes that these violations include but are not limited to your [Kevin Ollie's] . . . failure to promote compliance. . . .";
- d. All public records, documents, and communications relating to the factual basis for the claim in the March 10, 2018 letter from David Benedict to Kevin Ollie that "[t]he University believes that these violations include but are not limited to your [Kevin Ollie's] . . . failure to timely report instances of noncompliance. . . .";
- e. All public records, documents, and communications relating to the factual basis for the claim in the March 10, 2018 letter from David Benedict to Kevin Ollie that "[t]he University believes that these violations include but are not limited to your [Kevin Ollie's]. . . intentional participation in an impermissible on-campus activity with a prospective student-athlete during an official visit. . . .";
- f. All public records, documents, and communications relating to the factual basis for the claim in the March 10, 2018 letter from David Benedict to Kevin Ollie that "[t]he University believes that these violations include but are not limited to your [Kevin Ollie's]. . . intentional facilitation of a prohibited contact between a prospective student-athlete and a representative of the institution's athletics interests for recruiting purposes";
- g. All public records, documents, and communications relating to the factual basis for the claim in the March 10, 2018 letter from David Benedict to Kevin Ollie that "[t]hese behaviors and others violate the terms of your Employment Agreement, including but not limited to Article 4, and constitute, individually and/or collectively, just cause as defined in Article 10.1(d), and/or Article 37.12 of the AAUP contract";
- h. All public records, documents, and communications relating to the employment of Kevin Ollie with the

University of Connecticut during the time period from the date of his initial hire as Head Coach to the present;

- i. All public records, documents, and communications relating to the recruitment and hiring of Dan Hurley by the University of Connecticut;
- j. All public records, documents, and communications relating to the recruitment or consideration of any individuals for employment as the Head Men's Basketball Coach of the University of Connecticut during the time period of January 1, 2017 to the present;
- k. All public records, documents, and communications relating to any potential or alleged NCAA violations involving the Men's Basketball program at the University of Connecticut during the period when Kevin Ollie was the Head Coach of that program;
- l. All public records, documents, and communications relating to the potential or alleged NCAA violations involving the Men's Basketball program at the University of Connecticut during the period when Jim Calhoun was the Head Coach of that program;
- m. All public records, documents, and communications relating to any NCAA rule violations involving the Men's Basketball program at the University of Connecticut during the period when Jim Calhoun was the Head Coach of that program;
- n. All public records, documents, and communications relating to any notice of inquiry from the NCAA involving the Men's Basketball program at the University of Connecticut during the period when Jim Calhoun was the Head Coach of that program;
- o. All public records, documents, and communications relating to any notice of allegations from the NCAA involving the Men's Basketball program at the University of Connecticut during the period when Jim Calhoun was the Head Coach of that program;
- p. All public records, documents, and communications relating to any discipline imposed against Jim Calhoun

by the University of Connecticut during the period when he was the Head Coach of the Men's Basketball program at the University of Connecticut;

- q. All public records, documents, and communications relating to any discipline or sanctions imposed by the NCAA against Jim Calhoun or the Men's Basketball Program at the University of Connecticut relating to the time period when Jim Calhoun was the Head Coach of the Men's Basketball team at the University of Connecticut;
- r. All public records, documents, and communications relating to any potential or alleged NCAA violations relating to any athletic program of the University of Connecticut since 1998;
- s. All public records, documents, and communications relating to any notice of inquiry from the NCAA relating to any athletic program of the University of Connecticut since 1998;
- t. All public records, documents, and communications relating to any notice of allegations from the NCAA relating to any athletic program of the University of Connecticut since 1998;
- u. All public records, documents, and communications relating to any discipline or sanctions imposed by the NCAA against [the] Head Coach of any athletic program of the University of Connecticut during the time period of 1998 to the present;
- v. All public records, documents, and communications relating to any discipline imposed by the University of Connecticut against the Head Coach of any athletic program of the University of Connecticut during the time period of 1998 to the present;
- w. All public records, documents, and communications relating to any training that was provided to Kevin Ollie relating to the compliance with NCAA rules and regulations during the period when he was employed by the University of Connecticut as the Head Men's Basketball Coach;

- x. All public records, documents, and communications reflecting that the University of Connecticut communicated any concerns to Kevin Ollie regarding his performance as the Head Men's Basketball Coach before March 10, 2018;
- y. All public records, documents, and communications reflecting that the University of Connecticut provided Kevin Ollie with any type of progressive discipline during his tenure as the Head Men's Basketball Coach before March 10, 2018;
- z. All public records, documents, and communications relating [to] any communication between any person employed by the University of Connecticut and Jim Calhoun since September 1, 2012;
- aa. All public records, documents, and communications relating to any payment from the University of Connecticut to Jim Calhoun since January 1, 2005;
- bb. All public records, documents, and communications relating to any contract between Jim Calhoun and the University of Connecticut covering any years from January 1, 2005 to the present;
- cc. All invoices from the firm of Lightfoot, Franklin & White, LLC;
- dd. All invoices from the firm Bond, Schoeneck & Kind, PLLC;
- ee. All invoices from any third party, firm, or vendor relating to any NCAA investigation during the period when Jim Calhoun was the Head Men's Basketball Coach of the University of Connecticut;
- ff. All invoices from any third party, firm, or vendor relating to any NCAA investigation during the period when Kevin Ollie was the Head Men's Basketball Coach of the University of Connecticut;
- gg. All public records, documents, and communications relating to any and all NCAA Major Rules violations **self-reported** by the University from January 1, 2009 through March 25, 2018 delineated by:

- i. Men's and Women's Head Coach self-reporting;
 - ii. UCONN Compliance Office self-reporting, (bold text in original);
 - hh. All public records, documents, and communications relating to any and all NCAA Major Rules violations **discovered** by the NCAA from January 1, 2009 through March 25, 2018, (bold text in original);
 - ii. All public records, documents, and communications relating to any and all NCAA Minor Rules violations **self-reported** by the University from January 1, 2009 through March 25, 2018 delineated by:
 - i. Men's and Women's Head Coach self-reporting;
 - ii. UCONN Compliance Office self-reporting; and
 - jj. All public records, documents, and communications relating to any and all NCAA Minor Rules violations discovered by the NCAA from January 1, 2009 [through] March 25, 2008.
(Bold text provided in the original).
3. It is found that, by email dated April 4, 2018, the respondents acknowledged the complainant's request.
4. By letter dated and filed April 25, 2018, the complainant appealed to this Commission, alleging that the respondents violated the FOI Act by failing to provide him with access to or copies of any of the requested records.
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, 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, (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.

7. 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.”

8. It is found that the records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S., and must be disclosed unless they are exempt from disclosure.

9. At the first contested case hearing, the complainant’s counsel represented that, on the afternoon of June 19, 2018, she received an email containing an electronic link from the respondents. It is found that the email stated, in relevant part, as follows:

In response to your April 3, 2018 request under the Freedom of Information Act, we are transferring the records responsive to Nos. 1-7. You may view the records by clicking on the link below. . . . Please note that the 1335 pages of records have been reviewed and redacted in order to remove any personally identifiable information of existing or former students as required by. . . FERPA [or the Family Education Rights and Privacy Act] As to the other numbered sections of your request, the work of compiling responsive records is proceeding and additional records will be transferred on a rolling basis when the necessary review and redaction work has been completed. . . .

The complainant’s counsel represented that she was concerned with the disclosure for several reasons: first, she had only received the records responsive to requests set forth in paragraphs 2.a through 2.g, above, on the day preceding the first contested case hearing and had not had an opportunity to review the records; second, she had not received any records responsive to requests set forth in paragraph 2.h through 2.jj, above; and third, she believed that the respondents had redacted the records so extensively that they were virtually unreadable. In fact, counsel contended that the redactions were far more extensive than was necessary to

comply with FERPA. (See Compl. Ex. C).¹

10. Attorney Paul McCarthy, the respondents' Director of Public Records in the Office of Communications, appeared and testified at the first and second contested case hearings.

11. It is found that, on the day the respondents received the instant request for records, they had 27 pending FOI requests. It is further found that it is the respondents' policy to process the FOI requests they receive on a first-in-first-out basis, with the exception of simple requests, which can be fulfilled within a day or two of receipt. It is further found that, at the time of the June 20, 2018 contested case hearing, the respondents had approximately 5 requests preceding the instant request and that four of the requests sought hundreds of pages of records.

12. With regard to the records that were disclosed to the complainants in response to requests set forth in paragraphs 2.a through 2.g, above, the respondents testified that compiling the responsive records entailed distributing the entire request to the following departments or offices: the Department of Labor Relations; the Division of Athletics; and the Office of Human Resources. The respondents further testified that all records responsive to the first seven requests were sent to Attorney McCarthy for review and redaction. The only exemption claimed with regard to the records responsive to these requests was FERPA.

13. Attorney McCarthy further testified that, while he was reviewing and redacting the records responsive to the requests set forth in paragraphs 2.a through 2.g, above, the Division of Athletics was in the process of gathering records responsive to the requests set forth in paragraphs 2.h through 2.o, above. It is found that, at the time of the first contested case hearing, the respondents had not yet begun to work on the requests set forth in paragraphs 2.p through 2.jj, above.

14. At the conclusion of the first contested case hearing, the complainant's counsel made a motion for the hearing officer to conduct an in camera inspection of the redactions made pursuant to FERPA in the records disclosed in response to the requests set forth in paragraphs 2.a through 2.g, above. The hearing officer, without objection², granted the complainant's motion and ordered that the respondents submit such records, without

¹ It was revealed during the second contested case hearing that the records that were disclosed to the complainant on June 19, 2018 were the same records that had been disclosed to the complainant and his union representative in *March 2018*. Accordingly, it is curious why the respondents waited from April 3, 2018 (the day they received the instant request) until June 19, 2018 (the day preceding the first contested case hearing) to re-disclose these records to the complainant. In fact, rather than re-disclosing these records, the respondents could have simply referred the complainant to the March 2018 disclosure.

² The Commission notes that, at the conclusion of the first contested case hearing, counsel for the respondents made the following suggestion: if the complainant would agree to withdraw the requests set forth in paragraphs 2.h through 2.jj, above, the Commission could proceed with adjudicating the FERPA redactions, including conducting an in camera inspection of such records, and, meanwhile, complainant could re-submit new requests to the respondents for the remainder of the requested records in two smaller blocks. However, the respondents' suggestion was rejected by the complainant.

redactions, to the Commission by July 20, 2018. The hearing officer also ordered that the respondents file a status report with him in four weeks and another in eight weeks concerning the progress of complying with the remaining requests—that is, one status report by August 17, 2018, with regard to the requests set forth in paragraphs 2.h through 2.o, above, and a second status report by September 14, 2018, with regard to the requests set forth in paragraph 2.p through 2.jj, above.³

15. By motion filed July 19, 2018, the respondents requested that the hearing officer suspend the in camera order that had issued on June 20, 2018. The respondents contended that, pursuant to the FERPA, 20 U.S.C. § 1232g, and associated regulations, they were prohibited from “disclosing” unredacted records to the Commission unless the Commission issued a subpoena for such records. In addition, the respondents contended that, once the Commission issued a subpoena for such records, UCONN would have a responsibility pursuant to 34 CFR §99(a)(9)(ii), to provide each student subject to such a “disclosure” order with notice in advance of compliance, so that the student (or students) could seek a protective order. The respondents requested that the hearing officer order that this legal issue, raised for the first time on July 19, 2018, be briefed by the parties and scheduled for oral argument.

16. By order dated July 20, 2018, the hearing officer ordered the parties to file legal briefs on this issue by August 3, 2018. By order dated August 8, 2018, the hearing officer notified the parties that he would entertain oral argument on this legal issue at the start of the second contested case hearing.

17. At the start of the second contested case hearing, which took place on September 5, 2018, the hearing officer entertained oral argument. At the conclusion of the arguments, the hearing officer denied the respondents’ motion for the issuance of a subpoena and reinstated his in camera order. See ¶ 21.a, below.

18. During the remainder of the second contested case hearing, the parties updated the hearing officer on the progress that had been made since the first contested case hearing, 77 days prior.

19. It is found that, between July 30, 2018 and August 5, 2018, the respondents had disclosed approximately 750 additional pages of records to the complainant. The respondents were not, however, prepared to testify at the second contested case hearing as to the exemptions that had been invoked with regard to such records.

20. It is further found that, at the time of the second contested case hearing, the complainant had yet to receive any records responsive to the requests set forth in paragraphs 2.j; 2.n through 2.z; and 2.cc through 2.jj, above. In addition, it is found that the requests set forth in paragraph 2.a through 2.g, above, had not been fully satisfied, as not all of the records responsive to these requests had been gathered and reviewed by the time of the second hearing. It is found that this information was contrary to the testimony that the respondents provided during the first contested case hearing. See ¶ 12, above. Finally, it is found that, at the time of the second contested case hearing, the respondents had been in possession of the

³ The respondents did not comply with the hearing officer’s order for status reports.

instant request for records for 155 days.

21. At the conclusion of the second contested case hearing, the hearing officer ordered the respondents to submit all records claimed exempt from disclosure to the Commission for an in camera review, as follows:

- a. first, the respondents were ordered to submit the records responsive to the requests set forth in paragraphs 2.a through 2.g, above, which had been redacted (or withheld in their entirety) pursuant to FERPA, to the Commission for an in camera inspection by the close of business on September 10, 2018, (see ¶ 17, above);
- b. the respondents were ordered to submit all records responsive to the requests set forth in paragraphs 2.a through 2.r, above, which records had been redacted (or withheld in their entirety) pursuant to any exemption, to the Commission for an in camera inspection by the close of business on September 24, 2018; and
- c. finally, the respondents were ordered to submit all records responsive to the requests set forth in paragraphs 2.s through 2.jj, above, which records had been redacted (or withheld in their entirety) pursuant to any exemption, to the Commission for an in camera inspection by noon on October 5, 2018.

22. In addition, before the second hearing concluded, the complainant narrowed the timeframe of the requests set forth in paragraphs 2.r and 2.v, above, from 1998 to the present to January 1, 2012 to the present.

23. The respondents did not submit records responsive to the requests set forth in paragraphs 2.a through 2.g, above, which had been redacted (or withheld in their entirety) pursuant to FERPA, to the Commission for an in camera inspection on September 10, 2018 or at any time. See ¶ 21.a, above.

24. The respondents did not submit the records responsive to the requests set forth in paragraphs 2.a through 2.r, above, which records had been redacted (or withheld in their entirety) pursuant to any exemption, to the Commission for an in camera inspection by the close of business on September 24, 2018. See ¶ 21.b, above. In addition, the respondents did not file a motion requesting that the September 24th deadline be extended.

25. The respondents did not submit the records responsive to the requests set forth in paragraphs 2.s through 2.jj, above, which records had been redacted (or withheld in their entirety) pursuant to any exemption, to the Commission for an in camera inspection by noon

on October 5, 2018. In addition, the respondents did not file a motion requesting that the October 5th deadline be extended.

26. In addition, despite the fact that the hearing officer had entertained oral argument on the respondents' contention that the Commission was required to issue a subpoena in order to conduct an in camera inspection of the records that allegedly contained FERPA information and had rejected such argument, see ¶¶ 15-17, above, by motion dated and filed September 7, 2018, the respondents filed a second motion requesting that the hearing officer issue a subpoena in order to conduct an in camera inspection of the records redacted pursuant to FERPA.

27. By order dated September 10, 2018, the hearing officer denied the respondents' motion.

28. By motion dated September 21, 2018 and filed September 25, 2018, the respondents filed a third motion requesting that the hearing officer issue a subpoena in order to conduct an in camera inspection of the records redacted pursuant to FERPA.

29. By order dated September 10, 2018, the hearing officer again denied the respondents' motion.

30. On October 16, 2018, the respondents appealed the hearing officer's denials of their motions concerning the contention that the Commission was required to issue a subpoena in order to conduct an in camera inspection of the records redacted pursuant to FERPA to the full Commission (the "Petition"). On November 14, 2018, at a regular meeting of the Commission, the full Commission considered and denied the respondents' Petition.

31. On October 10, 2018, the respondents submitted the records at issue, other than those redacted pursuant to FERPA, to the Commission for an in camera inspection. The in camera records shall be referred to as IC-2018-0199-2550 through IC-2018-0199-3801, and IC-2018-0199-2225, IC-2018-0199-2248, and IC-2018-0199-2273.

32. In addition to the records claimed exempt pursuant to FERPA, the respondents contended that the in camera records were exempt from disclosure pursuant to the following exemptions: §1-210(b)(1), G.S., (records that constitute preliminary drafts and notes); §1-210(b)(2), G.S., (records the disclosure of which would constitute an invasion of personal privacy); §1-210(b)(4), G.S., (records pertaining to strategy and negotiation with respect pending claims or pending litigation); §1-210(b)(9), G.S., (records with respect to collective bargaining); and §1-210(b)(10), G.S., (records privileged by the attorney-client privilege).

33. By order dated October 24, 2018, the hearing officer issued a notice of a continued hearing, which notice stated, in relevant part, as follows:

The respondents did not provide testimony (or any other evidence) at either of the contested case hearings with regard to any exemption claim on the [in camera] index.

Because “the burden of proving the applicability of an exemption rests upon the agency claiming it, see Wilson v. FOI Comm’n, 181 Conn. 324, 328 (1980), the hearing is continued so that the respondents have an opportunity to provide testimony or other evidence from which the hearing officer may determine whether the in camera records are exempt from public disclosure.

34. Attorney Nicole F. Gelston, the respondents’ General Counsel, and Megan Philippi, the respondents’ Director of Public Records appeared and testified at the third contested case hearing, which took place on November 28, 2018.

35. First, with regard to the records that have been redacted pursuant to FERPA, §1-210(b)(17), G.S., provides that nothing in the FOI Act shall be construed to require the disclosure of “[e]ducational records which are not subject to disclosure under [FERPA], 20 USC 1232b.”

36. “Educational 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. This Commission has concluded that 20 U.S.C. §1232g prohibits public schools that receive federal funds from disclosing information concerning a student that would personally identify that student, without the appropriate consent. See Brenda Ivory v. Vice-Principal Griswold High Sch., Griswold Pub. Sch.; and Griswold Pub. Sch., Docket #FIC 1999-306 (Jan. 26, 2000); see also 34 CFR §99.30(a) (“The parents or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student’s education records, except as provided in § 99.31.”).

37. The respondents contend that the Commission’s in camera order is akin to an order of disclosure and that, pursuant to 34 CFR §99.31(a)(9)(i), in order for the respondents to disclose FERPA protected records it must receive a lawfully issued subpoena. See 34 CFR §99.3(a)(9)(i) (stating that “[a]n educational agency or institution may disclose personally identifiable information from an education record of a student without the consent by §99.30 if the disclosure meets one or more of the following” . . . “[t]he disclosure is to comply with a judicial order or lawfully issued subpoena.”)

38. However, a public agency’s submission of records to the Commission for an in camera inspection is not a “disclosure” within the meaning of 20 U.S.C. §1232a, or associated regulations. See §1-21j-1(b)(10), Reg. of Conn. State Agencies (defining “in camera inspection” as “a review by the commission or a presiding officer of records received as evidence, or a proceeding during which such records are reviewed, in which unauthorized persons are not permitted to inspect, copy or otherwise learn of the contents of such records, except as provided in these regulations”); see also §1-21j-37(f)(1)-(15), Reg. of Conn. State Agencies. On the contrary, an in camera inspection is “a mechanism to address a claim that a document is entitled to confidentiality *without disclosing* the contents of the document.” See

Rosado v. Bridgeport Roman Catholic Church Diocesan Corp., Docket No. X06-CV-030157085-S, 2006 WL 3756521 (Conn Super. Ct. Dec. 6, 2006) (emphasis provided); State v. Peeler, 271 Conn. 338, 403 (2004) (In camera review is a means of examining allegedly privileged material without abrogating the privilege itself.). Not only does the Commission have the authority to conduct an in camera inspection of the subject records, when the nature of the records is at issue (as it is in this case), the Commission has an obligation to conduct such an inspection. See Wilson, 181 Conn. at 339-40 (“Where the nature of the documents, and, hence, the applicability of an exemption, is in dispute it is not only within the commission’s power to examine the documents themselves, it is contemplated by the act that the commission do so.”).

39. This Commission has on numerous occasions, when necessary, reviewed records claimed to be exempt pursuant to FERPA by way of an order for an in camera inspection. See, e.g. Jay Hardison v. Superintendent of Sch., Darien Pub. Sch., et al., Docket #FIC 2017-0036 (Nov. 12, 2017) (video claimed exempt from disclosure pursuant to FERPA submitted to Commission for an in camera inspection); Jay Hardison v. Superintendent of Sch., Darien Pub. Sch., et al., Docket #FIC 2016-0853 (Oct. 25, 2017) (records claimed exempt pursuant FERPA ordered submitted to Commission for an in camera inspection); Judith Shpak v. Super. of Sch., Oxford Pub. Sch., Docket #FIC 2015-566 (Mar. 9, 2016) (records claim exempt pursuant to FERPA submitted to Commission for in camera inspection); George Martocchio v. Superintendent of Sch., Regional Sch. Dist. #7, et al., Docket #FIC 2015-373 (Feb. 10, 2016) (incident report discussing student behavior and claimed exempt pursuant to FERPA submitted to Commission for an in camera inspection); Cindy L. Robinson v. Chief, Police Dep’t, Town of Trumbull, et al., Docket #FIC 2015-161 (Jan. 27, 2016) (hearing officer ordered respondents to submit various records claimed exempt pursuant to FERPA to the Commission for an in camera inspection); Marissa Lowthert v. Gary Richards, Superintendent of Sch., Wilton Pub. Sch., et al., Docket #FIC 2014-400 (June 10, 2015) (hearing officer ordered seven settlement agreements allegedly redacted pursuant to FERPA to be submitted to the Commission for an in camera inspection); Marissa Lowthert v. Gary Richards, Superintendent of Sch., Wilton Pub. Sch., et al., Docket #FIC 2014-276 (Apr. 8, 2015) (hearing officer granted complainant’s motion to have respondents submit records claimed to be protected by FERPA to the Commission for an in camera inspection); Marissa Lowthert v. Gary Richards, Superintendent of Sch., Wilton Pub. Sch., et al., Docket #FIC 2014-289 (Apr. 8, 2015) (hearing officer granted complainant’s motion to have respondents submit records claimed to be protected by FERPA to the Commission for an in camera inspection); Linda Lambeck and the Connecticut Post v. Chairman, Bd. of Educ., Bridgeport Pub. Sch., et al., Docket #FIC 2013-677 (Oct. 22, 2014) (three security video tapes claimed to be exempt from public disclosure pursuant to FERPA submitted to Commission for an in camera inspection); Leah F. Walsh v. Superintendent, Bethel Pub. Sch., et al., Docket #FIC 2012-047 (Dec. 12, 2012) (videotape made by a surveillance camera inside a school bus and claimed exempt pursuant to FERPA submitted to the Commission for in camera inspection); Frances Taylor, et al. v. Superintendent of Sch., East Hartford Pub. Sch., et al., Docket #FIC 2012-180 (Feb. 21 2013) (school district reports pertaining to an investigation of school pool drowning and claimed exempt pursuant to FERPA submitted to the Commission for an in camera inspection); M. Jeffrey Spahr v. Bd. of Educ, Norwalk Pub. Sch., Docket #FIC 2011-513 (Sept. 12, 2012) (various documents claim exempt pursuant to FERPA submitted to

Commission for an in camera inspection); Michael Puffer and the Waterbury Republican-American v. Superintendent of Sch., Waterbury Pub. Sch., et al., Docket #FIC 2010-360 (Apr. 13, 2011) (records contained within a personal file and claimed exempt pursuant to FERPA submitted to the Commission for an in camera inspection); Jeffrey T. Roets and the Wethersfield Federation of Teachers v. Superintendent of Sch., Wethersfield Pub. Sch., et al., Docket #FIC 2010-069 (Dec. 15, 2010) (investigative report into alleged grade-changing misconduct claimed exempt pursuant to FERPA submitted to the Commission for an in camera inspection); Daniel Schwartz v. Rachel Krinsky Rudnick, Assistant Director of Compliance/Privacy, State of Connecticut, University of Connecticut, Office of Audit, Compliance and Ethics, et al., Docket #FIC 2009-353 (Mar. 10, 2010) (monthly statements pertaining to two university-owned telephone numbers and two university-owned wireless devices claimed exempt pursuant to FERPA submitted to the Commission for an in camera inspection); Nancy Rossi v. Bd. of Educ., West Haven Pub. Sch., Docket #FIC 2005-018 (Dec. 14, 2005) (various records, including stipulated settlements with families of students, claimed exempt pursuant to FERPA submitted to the Commission for an in camera inspection); and Mary Baltimore v. Superintendent of Sch., Cromwell Pub. Sch., Docket #FIC 2004-551 (Sept. 14, 2005) (videotape depicting an incident that occurred in a high school cafeteria and other related records all claimed exempt pursuant to FERPA ordered submitted to the Commission for an in camera inspection).⁴

40. This Commission was not required to issue a subpoena in order to conduct an in camera inspection of the records claimed to be exempt pursuant to FERPA. As such, the respondents refused to comply with a lawfully issued in camera order.

41. Moreover, the respondents have failed to prove that information redacted from the responsive records is information “directly” related to a student, within the meaning of 20 U.S.C. §1232g(a)(4)(A)(i). As such, it is concluded that the respondents have failed to prove that the redacted information is exempt pursuant to FERPA. Therefore, it is further concluded that the respondents violated the disclosure provisions of the FOI Act when they refused to provide these records without redactions to the complainant.

⁴ At the February 27, 2019 full Commission meeting, the respondents requested that a letter sent from the United States Department of Education to the respondents, dated January 7, 2019, be admitted into evidence as post-hearing exhibit. The Commission ordered the respondents to submit the letter dated December 7, 2018, which the respondents sent to the Department. The Commission accepted both letters into evidence as Respondents’ Post Hearing Ex. 2 (with regard to the December 7th letter) and Respondents’ Post Hearing Ex. 3 (with regard to the January 7th letter). The Commission notes that the letter from the Department contains serious misstatements of law and fact. Specifically, the respondents reported to the Department that there was “no dispute between the University and the Commission that the records in question are ‘education records’ as defined by FERPA.” In fact, determining whether or not the records at issue are subject to FERPA is the sole reason why the Commission ordered the records be submitted for an in camera inspection. In addition, the respondents reported to the Department that “the complainant did not question the University’s assertion that the records were education records subject to FERPA” In fact, the complainant directly challenged the respondents’ claim that the records at issue are education records subject to FERPA. Because the premise upon which the Department’s opinion is based is severely flawed, the Department’s letter does not advance the respondents’ legal argument with regard to FERPA.

42. Next, the respondents redacted IC-2018-0199-2225, IC-2018-0199-2248, and IC-2018-0199-2273 to remove the complainant's social security number from such records. The complainant is not challenging such redactions and, accordingly, the Commission is not required to address these redactions.

43. Next, the respondents contended that the following records are exempt pursuant to §1-210(b)(4), G.S.: IC-2018-0199-2962 through IC-2018-0199-2964⁵; IC-2018-0199-3543 through IC-2018-0199-3544; IC-2018-0199-3788 and IC-2018-0199-3789; IC-2018-0199-3794 through IC-2018-0199-3796; and IC-2018-0199-3798 and IC-2018-0199-3799.

44. Section 1-210(b)(4), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require the disclosure of:

[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled.

45. Section 1-200(8), G.S., defines a "pending claim" as "a written notice to an agency which sets forth a demand for legal relief or which asserts a legal right stating the intention to institute an action in an appropriate forum if such relief or right is not granted."

46. Nicole F. Gelston, General Counsel for the respondents, and Megan Philippi, Director of Public Records for the respondents, both appeared and testified at the third contested case hearing.

47. It is found that, on or around March 10, 2018, the respondents initiated the process to terminate the complainant from his position as the Head Coach of the men's basketball team.

48. It is found that, at the time the instant request for records was issued, the complainant had issued multiple written notices to the respondents setting forth demands for legal relief and asserting legal rights pertaining to his employment contract. It is further found that the complainant had stated his intention to institute an action in an appropriate forum if the requested relief or the asserted rights were not granted. Finally, it is found that such pending claims had not been finally adjudicated or otherwise settled at the time the contested case hearings took place.

49. It is found that the records identified in paragraph 43, above, pertain to strategy and negotiations with respect to the complainant's pending claims to which the respondents are a party and, as such, are permissibly exempt from disclosure pursuant to §1-210(b)(4),

⁵ At the third contested case hearing, the respondents withdrew their claims of exemption regarding IC-2018-0199-2965, IC-2018-0199-2966, IC-2018-0199-3545 and IC-2018-0199-3546. However, at the time of the third hearing, these records had not yet been disclosed to the complainant.

G.S.⁶

50. Next, the respondents contended that following records are exempt pursuant to §1-210(b)(1), G.S.: IC-2018-0199-2552 through IC-2018-0199-2556; IC-2018-0199-2558 through IC-2018-0199-2560; IC-2018-0199-2563 through IC-2018-0199-2565; IC-2018-0199-2573; IC-2018-0199-2600; IC-2018-0199-2646 and IC-2018-0199-2647; IC-2018-0199-2691 and IC-2018-0199-2692; IC-2018-0199-2701 through IC-2018-0199-2703; IC-2018-0199-2709 through IC-2018-0199-2711; IC-2018-0199-2762 through IC-2018-0199-2764; IC-2018-0199-2773 through IC-2018-0199-2776; IC-2018-0199-2786 through IC-2018-0199-2789; IC-2018-0199-2808 through IC-2018-0199-2841; IC-2018-0199-2913 through IC-2018-0199-2920; IC-2018-0199-2925 through IC-2018-0199-2938; IC-2018-0199-2949 through IC-2018-0199-2961; IC-2018-0199-2967 through IC-2018-0199-2972; IC-2018-0199-2978 through IC-2018-0199-2986; IC-2018-0199-2991⁷ through IC-2018-0199-3018; IC-2018-0199-3021 through IC-2018-0199-3023; IC-2018-0199-3046 through IC-2018-0199-3048; IC-2018-0199-3051 and IC-2018-0199-3052; IC-2018-0199-3073 and IC-2018-0199-3074; IC-2018-0199-3100 through IC-2018-0199-3133; IC-2018-0199-3258 and IC-2018-0199-3259; IC-2018-0199-3273 through IC-2018-0199-3277; IC-2018-0199-3284 through IC-2018-0199-3288; IC-2018-0199-3301 through IC-2018-0199-3351; IC-2018-0199-3354 through IC-2018-0199-3360; IC-2018-0199-3362 through IC-2018-0199-3369; IC-2018-0199-3379 through IC-2018-0199-3394; IC-2018-0199-3429 and IC-2018-0199-3430; IC-2018-0199-3434 through IC-2018-0199-3437; IC-2018-0199-3444 through IC-2018-0199-3459; IC-2018-0199-3464 through IC-2018-0199-3475; IC-2018-0199-3494 through IC-2018-0199-3506; IC-2018-0199-3510 through IC-2018-0199-3542; IC-2018-0199-3547 and IC-2018-0199-3548; IC-2018-0199-3554 and IC-2018-0199-3555; IC-2018-0199-3560 through IC-2018-0199-3574; IC-2018-0199-3576; IC-2018-0199-3579 through IC-2018-0199-3587; IC-2018-0199-3591; IC-2018-0199-3595 and IC-2018-0199-3596; IC-2018-0199-3598 and IC-2018-0199-3599; IC-2018-0199-3619 through IC-2018-0199-3634; IC-2018-0199-3744 through IC-2018-0199-3749; IC-2018-0199-3754 through IC-2018-0199-3758; IC-2018-0199-3760 through IC-2018-0199-3765; and IC-2018-0199-3777 through IC-2018-0199-3787.

51. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in

⁶ On the index accompanying the in camera records, the respondents had also claimed that all of the records identified in paragraph 43, above, were also exempt pursuant to §1-210(b)(9), G.S., and that IC-2018-0199-3788 and IC-2018-0199-3789; IC-2018-0199-3794 through IC-2018-0199-3796; and IC-2018-0199-3798 and IC-2018-0199-3799 were also exempt pursuant to §1-210(b)(1), G.S. Because the Commission has determined that these records are all permissibly exempt pursuant to §1-210(b)(4), G.S., these additional claims of exemption will not be addressed.

⁷ On the index accompanying the in camera records, the respondents identify this document as “2291”; however, based on the overall numbering system, the actual number for this document is “2991.”

disclosure.

52. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts and notes” in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) (“Wilson”). The Wilson court ruled that “preliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.” Wilson, 181 Conn. at 332. In addition, the Wilson court interpreted the phrase “preliminary drafts and notes” in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut’s FOI Act, the public agency carried the additional burden to show that “the public interest in withholding such document clearly outweighs the public interest in disclosure.” See Wilson, 181 Conn. at 333-340.

53. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 55, below.

54. It is found that with adoption of Public Act 81-431, the Connecticut Legislature made clear that the Connecticut FOI Act required more robust disclosure than is required by the deliberative process privilege permitted at the federal level.

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

Notwithstanding the provisions of [§1-210(b)(1), G.S.], 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.

56. It is found that, in response to the complainant’s claims, referred to in paragraph 48, above, the respondents assembled a legal team to evaluate and defend the university’s position. It is found that the team consisted of inside and outside counsel, as well as non-attorney individuals at the university with knowledge of the complainant, his contract, and his employment activities.

57. It is found that the legal team communicated primarily through email on issues related to the complainant’s termination, the subsequent claims that he raised with the respondents, and the respondents’ legal position. It is found that many of the respondents’

email communications attached documents that were in the process of being drafted, and contained a team member's comments or notes regarding the draft documents.

58. After a careful review of the in camera records, it is found that the following records are preliminary drafts or notes, within the meaning of §1-210(b)(1), G.S.: IC-2018-0199-2552 through IC-2018-0199-2556; IC-2018-0199-2558 through IC-2018-0199-2560; IC-2018-0199-2563 through IC-2018-0199-2565; IC-2018-0199-2573; IC-2018-0199-2701 through IC-2018-0199-2703; IC-2018-0199-2709 through IC-2018-0199-2711; IC-2018-0199-2762 through IC-2018-0199-2764; IC-2018-0199-2773 through IC-2018-0199-2776; IC-2018-0199-2786 through IC-2018-0199-2789; IC-2018-0199-2808 through IC-2018-0199-2841; IC-2018-0199-2913 through IC-2018-0199-2920; IC-2018-0199-2925 through IC-2018-0199-2928; IC-2018-0199-2930 through IC-2018-0199-2932 (lines 1 through 24); IC-2018-0199-2934 through IC-2018-0199-2938; IC-2018-0199-2949 through IC-2018-0199-2961; IC-2018-0199-2967 through IC-2018-0199-2972; IC-2018-0199-2978 through IC-2018-0199-2986; IC-2018-0199-2991 through IC-2018-0199-3018; IC-2018-0199-3021 through IC-2018-0199-3023; IC-2018-0199-3046 through IC-2018-0199-3048; IC-2018-0199-3051 and IC-2018-0199-3052; IC-2018-0199-3073 and IC-2018-0199-3074; IC-2018-0199-3258 and IC-2018-0199-3259; IC-2018-0199-3273 through IC-2018-0199-3277; IC-2018-0199-3284 through IC-2018-0199-3288; IC-2018-0199-3354 through IC-2018-0199-3360; IC-2018-0199-3362 through IC-2018-0199-3369; IC-2018-0199-3379 through IC-2018-0199-3394; IC-2018-0199-3429 and IC-2018-0199-3430; IC-2018-0199-3434 through IC-2018-0199-3437; IC-2018-0199-3444 through IC-2018-0199-3459; IC-2018-0199-3464 through IC-2018-0199-3475; IC-2018-0199-3494 through IC-2018-0199-3506; IC-2018-0199-3510 through IC-2018-0199-3542; IC-2018-0199-3547 and IC-2018-0199-3548; IC-2018-0199-3554 and IC-2018-0199-3555; IC-2018-0199-3560 through IC-2018-0199-3574; IC-2018-0199-3579 through IC-2018-0199-3587; IC-2018-0199-3595 and IC-2018-0199-3596; IC-2018-0199-3598 and IC-2018-0199-3599; IC-2018-0199-3619 through IC-2018-0199-3634; IC-2018-0199-3744 through IC-2018-0199-3749; IC-2018-0199-3754 through IC-2018-0199-3758; IC-2018-0199-3760 through IC-2018-0199-3765; and IC-2018-0199-3777 through IC-2018-0199-3787.⁸

59. It is found that the respondents determined⁹ that the public interest in withholding such documents and notes clearly outweighed the public interest in the disclosure of such records.

60. It is further found that such documents and notes are not interagency or intra-agency memorandum, letters, advisory opinions, recommendation or reports within the

⁸ At the third contested case hearing, the respondents withdrew all of their claims of exemption with regard to IC-2018-0199-2600, and withdrew their §1-210(b)(1), G.S., claim of exemption with regard to IC-2018-0199-2646, IC-2018-0199-2647, IC-2018-0199-2691, and IC-2018-0199-2692. However, at the time of the third hearing, these records had not yet been disclosed to the complainant.

⁹ Specifically, the respondents determined that, in order to effectively execute their roles as part of the legal team, the staff members comprising such team had to be able to review, comment and frankly assess the complainant's termination and the subsequent claims. The respondents further determined that disclosure of initial comments among team members and their preliminary documents would have a chilling effect on the respondents' ability to assemble such a team in the future.

meaning of §1-210(e)(1), G.S. It is therefore concluded that the records identified in paragraph 58, above, are permissibly exempt pursuant to §1-210(b)(1), G.S.

61. Based upon a careful in camera inspection, it is found that, other than the records specifically identified in paragraph 58, above, the remainder of the requested records referenced in paragraph 50, above, are not exempt from public disclosure as preliminary drafts or notes, and therefore must be disclosed.

62. Finally, on the index accompanying the in camera records, the respondents contended that all of the in camera records, with the exception the records that were redacted to remove the complainant's social security number, see ¶ 42, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S., because such records contain privileged attorney-client communications. Thus, the respondents claim in this regard is that the following records, in their entirety, are exempt pursuant to the attorney-client privilege: IC-2018-0199-2550 through IC-2018-0199-3801.

63. In relevant part, §1-210(b)(10), G.S., permits the nondisclosure of “communications privileged by the attorney-client relationship. . . .”

64. 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.

65. Section 52-146r(2), G.S., defines “confidential communications” as:

all 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. . . .

66. The Supreme Court has stated that “both the common-law and statutory privileges protect those communications between a public official or employee and an attorney that are confidential, made in the course of the professional relationship that exists between the attorney and his or her public agency client, and relate to legal advice sought by the agency from the attorney.” Maxwell, *supra*. at 149.

67. After a careful inspection of the in camera records, the hearing officer convened the third contested case hearing. The hearing officer raised concerns with regard to the application of the attorney-client privilege to the following records or portions thereof:

- a. IC-2018-0199-2582 (lines 26-35);
- b. IC-2018-0199-2583;
- c. IC-2018-0199-2585 (lines 14-32);
- d. IC-2018-0199-2586;
- e. IC-2018-0199-2591;
- f. IC-2018-0199-2594 and IC-2018-0199-2595;
- g. IC-2018-0199-2611;
- h. IC-2018-0199-2613 (lines 7-31);
- i. IC-2018-0199-2623 through IC-2018-0199-2625;
- j. IC-2018-0199-2626 (all lines except lines 19 and 20);
- k. IC-2018-0199-2628 through IC-2018-0199-2629;
- l. IC-2018-0199-2630 (lines 24-39);
- m. IC-2018-0199-2631;
- n. IC-2018-0199-2633 through IC-2018-0199-2634;
- o. IC-2018-0199-2635 (lines 31-36) through IC-2018-0199-2636;
- p. IC-2018-0199-2638 (lines 12-39) through IC-2018-0199-2639;
- q. IC-2018-0199-2641 (lines 17-34) through IC-2018-0199-2642;
- r. IC-2018-0199-2644 (lines 8-39) through IC-2018-0199-2645;
- s. IC-2018-0199-2646 (lines 29-35) through IC-2018-0199-2647;
- t. IC-2018-0199-2649 through IC-2018-0199-2650;
- u. IC-2018-0199-2654 through IC-2018-0199-2656 (lines 28-38);
- v. IC-2018-0199-2657 through IC-2018-0199-2659;
- w. IC-2018-0199-2660 (lines 31-37) through IC-2018-0199-2663;
- x. IC-2018-0199-2665 through IC-2018-0199-2666;
- y. IC-2018-0199-2708;
- z. IC-2018-0199-2712 through IC-2018-0199-2714;
- aa. IC-2018-0199-2716 through IC-2018-0199-2719;
- bb. IC-2018-0199-2721 (lines 8-29) through IC-2018-0199-2724;
- cc. IC-2018-0199-2747 (lines 29-35) through IC-2018-0199-2749;
- dd. IC-2018-0199-2793 through IC-2018-0199-2796;
- ee. IC-2018-0199-2855 through IC-2018-0199-2867;
- ff. IC-2018-0199-2868 through IC-2018-0199-2880;
- gg. IC-2018-0199-2884 through IC-2018-0199-2886;
- hh. IC-2018-0199-2890 (lines 22-33) through IC-2018-0199-2892;
- ii. IC-2018-0199-2903 through IC-2018-0199-2904;
- jj. IC-2018-0199-2939 through IC-2018-0199-2946;
- kk. IC-2018-0199-3053;
- ll. IC-2018-0199-3068 (lines 22-37) through IC-2018-0199-3070;
- mm. IC-2018-0199-3075 (lines 25-35) through IC-2018-0199-3076;
- nn. IC-2018-0199-3077 (lines 18-38) through IC-2018-0199-3078;
- oo. IC-2018-0199-3079 (lines 36-39) through IC-2018-0199-3080;
- pp. IC-2018-0199-3082 (lines 19-37) through IC-2018-0199-3084;
- qq. IC-2018-0199-3085 (lines 8-40) through IC-2018-0199-3086;
- rr. IC-2018-0199-3088;
- ss. IC-2018-0199-3090 (lines 21-38) through IC-2018-0199-3092;

tt. IC-2018-0199-3094 through IC-2018-0199-3096;
uu. IC-2018-0199-3098 through IC-2018-0199-3099;
vv. IC-2018-0199-3137 (lines 27-35) through IC-2018-0199-3138;
ww. IC-2018-0199-3163 through IC-2018-0199-3165;
xx. IC-2018-0199-3167 (lines 4-40) through IC-2018-0199-3169;
yy. IC-2018-0199-3171 through IC-2018-0199-3176;
zz. IC-2018-0199-3171 through IC-2018-0199-3174;
aaa. IC-2018-0199-3175 (lines 27-35) through IC-2018-0199-3176;
bbb. IC-2018-0199-3183 (lines 27-35) through IC-2018-0199-3184;
ccc. IC-2018-0199-3185 through IC-2018-0199-3190;
ddd. IC-2018-0199-3206;
eee. IC-2018-0199-3233 (lines 24-25) through IC-2018-0199-3234;
fff. IC-2018-0199-3241;
ggg. IC-2018-0199-3246 (lines 6-36) through IC-2018-0199-3247;
hhh. IC-2018-0199-3252 (lines 11-37) through IC-2018-0199-3253;
iii. IC-2018-0199-3271 (lines 14-34) through IC-2018-0199-3272;
jjj. IC-2018-0199-3373 (lines 6-36) through IC-2018-0199-3375;
kkk. IC-2018-0199-3377 through IC-2018-0199-3378;
lll. IC-2018-0199-3442 (lines 23-34) through IC-2018-0199-3443;
mmm. IC-2018-0199-3460 through IC-2018-0199-3463;
nnn. IC-2018-0199-3489 (lines 27-34) through IC-2018-0199-3493;
ooo. IC-2018-0199-3600 through IC-2018-0199-3603;
ppp. IC-2018-0199-3608 through IC-2018-0199-3618;
qqq. IC-2018-0199-3644 through IC-2018-0199-3646;
rrr. IC-2018-0199-3658;
sss. IC-2018-0199-3667;
ttt. IC-2018-0199-3668 (lines 15-35) through IC-2018-0199-3669;
uuu. IC-2018-0199-3674 (lines 21-37) through IC-2018-0199-3677;
vvv. IC-2018-0199-3685 through 3703;
www. IC-2018-0199-3707 through IC-2018-0199-3716;
xxx. IC-2018-0199-3719 through IC-2018-0199-3721;
yyy. IC-2018-0199-3736 through IC-2018-0199-3738;
zzz. IC-2018-0199-3740 through IC-2018-0199-3743;
aaaa. IC-2018-0199-3750 (which is a blank document);
bbbb. IC-2018-0199-3759 (which is a blank document);
cccc. IC-2018-0199-3766 (which is a blank document); and
dddd. IC-2018-0199-3778 (which is a blank document).

68. In addition, complainant's counsel, without having seen the in camera records, raised concerns about the application of the attorney-client privilege to the following records:

- a. IC-2018-0199-2929;
- b. IC-2018-0199-3576 through IC-2018-0199-3577; and
- c. IC-2018-0199-3591 through IC-2018-0199-3592.

69. With regard to the in camera records, or portions thereof, set forth in paragraphs 67 and 68, above, the respondents withdrew each and every claim of the attorney-client privilege, with the exception of the subject line and the “cc” line in IC-2018-0199-2591, (see ¶67.e), and the subject lines and the “cc” lines in IC-2018-0199-2594 and IC-2018-0199-2595, (see ¶¶67.f) In addition, the respondents claimed that IC-2018-0199-3644 through IC-2018-0199-3646, (see ¶67.qqq), might be attorney-client privileged.

70. It is found that the respondents failed to prove that any portion of IC-2018-0199-2591, IC-2018-0199-2594, IC-2018-0199-2595, or IC-2018-0199-3644 through IC-2018-0199-3646 constitute records containing communications written in confidence between a public agency and a government attorney relating to legal advice sought by the public agency or provided by such attorney, or records prepared by the attorney in furtherance of the rendition of such legal advice, within the meaning of §52-146r(2), G.S. Accordingly, it is concluded that none of these in camera records is exempt from public disclosure. Therefore, it is further concluded that the respondents violated the disclosure provisions of the FOI Act when they refused to provide these records to the complainant.

71. However, it is found that, with regard to the remaining records for which the respondents asserted a claim of attorney-client privilege, such records do contain legal advice that the respondents sought and/or received from their attorneys. It is further found that the respondents were acting within the scope of their duties with regard to current agency business when they sought and/or received this advice. It is further found that the communications were made in confidence. It is further found that the respondents did not waive their attorney-client privilege. Accordingly, it is concluded that the respondents did not violate the FOI Act when they denied the complainant these remaining records.

72. Finally, it is found that the records responsive to the request set forth in paragraph 2.z, above, have not been disclosed to complainant or claimed exempt in any way from public disclosure. It is found that, in response to request 2.z, above, the respondents gathered approximately 3,000 emails. It is further found that, on or about November 14, 2018, the respondents emailed the complainant’s counsel, requesting that she narrow this particular request, so that the respondents could re-run the search in a manner that would net fewer responsive records. It is found that, at the time of the third contested case hearing, the complainant’s counsel was not sure whether she received the November 14th email.

73. In any event, the respondents did not provide any evidence at any of the contested case hearings from which the Commission could find that any of the records responsive to the request set forth in paragraph 2.z, above, are exempt from public disclosure and, therefore, they have failed to prove that such records are exempt from public disclosure. Accordingly, it is concluded that the respondents violated the disclosure provisions of the FOI Act when they refused to provide these records to the complainant.

74. The Commission notes that the request in this case was large and responding to it was no small task. Recognizing that the gathering and reviewing of the requested records was a time-intensive task, the hearing officer, to the extent possible, extended the dates between hearings and staggered the dates by which in camera records were required to be submitted

for in camera review. The Commission further notes, however, that the respondents ignored orders issued by the hearing officer; filed multiple motions on a matter that had been briefed, argued and ruled upon by the hearing officer; and arrived to evidentiary hearings without being prepared to proceed. The Commission further notes that, in a manner that was unprecedented, the respondents submitted well over 100 pages of in camera records, claiming that such records were exempt in their entirety as privileged, attorney-client communications, only to withdraw such claims when the hearing officer questioned the validity of the exemption. Because the complainant indicated on the record at the first contested case hearing that he was not pursuing a promptness violation in this case, the Commission will not address this issue. However, based on the record in this case, it is appears that the respondents could benefit from a FOI training session and one is so ordered.

75. Based on the foregoing, it is found that, other than the in camera records specifically referenced in paragraphs 42 and 58, above, and those referred to in paragraph 71, above, the remainder of the in camera records; the records that were disclosed with redactions alleged to have been made pursuant to FERPA; and the records responsive to the request set forth in paragraph 2.z, above, are not exempt from public disclosure. Accordingly, it is concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they refused to provide the complainant with copies of such records.

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

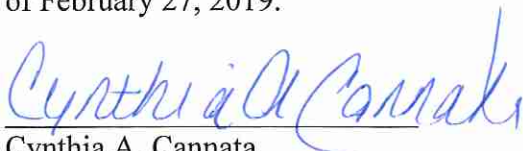
1. The respondents shall forthwith disclose to the complainant, free of charge, a copy of the in camera records, except for those in camera records (or portions thereof) specifically referenced in paragraphs 42 and 58, above, and those in camera records (or portions thereof) referred to in paragraph 71, above.

2. The respondents shall forthwith disclose to the complainant, free of charge, an unredacted copy the records allegedly redacted pursuant to FERPA.

3. The respondents shall forthwith disclose to the complainant, free of charge, a copy of the records responsive to the request set forth in paragraph 2.z, in the findings, above.

4. The respondents, or their designee, shall forthwith arrange for a FOI Act training session to be conducted by the staff of the FOI Commission. The respondents, or their designee, shall forthwith contact the FOI Commission to schedule such training session.

Approved by Order of the Freedom of Information Commission at its regular meeting of February 27, 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:

KEVIN OLLIE, c/o Attorney Jacques Parenteau, Madsen, Prestley & Parenteau, LLC, 105 Huntington Street, New London, CT 06320 and Attorney Claire Howard, 402 Asylum Street, Hartford, CT 06103

PRESIDENT, STATE OF CONNECTICUT, OFFICE OF THE PRESIDENT, UNIVERSITY OF CONNECTICUT; AND STATE OF CONNECTICUT, OFFICE OF THE PRESIDENT, UNIVERSITY OF CONNECTICUT, c/o Attorney Nathan LaVallee, UCONN, Office of the General Counsel, 343 Mansfield Road, Unit 1177, Storrs, CT 06238



Cynthia A. Cannata
Acting Clerk of the Commission