Christopher Peak and New Haven Independent
Complainant(s) against
Principal, Amistad Academy; and Amistad Academy
Respondent(s)

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at 2:00 p.m. on Thursday, February 13, 2020. At that time and place you will be allowec to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission ON OR BEFORE February 10, 2020. Such request MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.

Although a brief or memorandum of law is not required, if you decide to submit such a document, an original and fourteen (14) copies must be filed ON OR BEFORE February 10, 2020. PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that fifteen (15) copies be filed ON OR BEFORE February 10, 2020 and that notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.

By Order of the Freedom of Information Commission

Wendy R.B. Paradis
Acting Clerk of the Commission

Notice to: Christopher Peak and New Haven Independent
Attorney Melika S. Forbes

FIC# 2019-0369/ITRA/KKR/DLMWRBP/2020-01-30
FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by
Christopher Peak and New Haven Independent,
Complainants

against

Principal, Amistad Academy; and
Amistad Academy,
Respondents

Docket #FIC 2019-0369
January 30, 2020

The above-captioned matter was heard as a contested case on November 7, 2019, at which time the complainants and the respondents appeared and presented testimony, exhibits and argument on the complaint.

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

1. The respondents are public agencies, within the meaning of §1-200(1), G.S.

2. It is found that, by email dated April 9, 2019, the complainants requested “records of any alleged misconduct regarding...Achievement First employees...Simon Obas and Morgan Barth...” from their initial date of hire. The complainants identified the types of records they were seeking as “written complaints, investigatory findings, supporting statements or corrective action.”

3. It is found that, by email dated April 15, 2019, the respondents acknowledged receipt of the request, and informed the complainants that they would gather and review the requested records and contact them when the “request is complete.”

4. It is found that, on May 22, 2019, the respondents provided some responsive records but withheld others, including records pertaining to an incident that occurred on October 18, 2018, involving Mr. Barth.

5. By email dated April 20, 2019, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide them with copies of all records responsive to the request, described in paragraph 2, above.
6. 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.

7. Section 1-219(a), G.S., provides in relevant part that:

[ex]cept as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours or . . . (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by the subsection shall be void.

8. 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.”

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

10. The respondents claimed that the records they withheld from the complainants are exempt from disclosure pursuant to §§1-210(b)(10), 1-210(b)(17), and 1-210(b)(1), G.S.

11. The hearing officer ordered the respondents to submit the records described in paragraph 10, above, to the Commission for in camera inspection. Such records were submitted on December 2, 2019, and consist of 153 pages. The records shall be referenced herein as IC 2019-0369-001 through IC 2019-0369-153.

12. After careful in camera inspection of the records, it is found that the following records are not responsive to the request described in paragraph 2, above, and therefore shall not be further considered herein: IC 2019-0369-003 through 008; IC 2019-0369-012 through 016; IC 2019-0369-023 through 026; IC 2019-0369-027, lines 1 through 26 (i.e., the first two emails on the page) only: IC 2019-0369-036 through 037; IC 2019-0369-039 through 071; and IC 2019-0369-120 through 153.
13. With regard to the remainder of the in camera records (i.e., IC 2019-0369-001 through 002; IC 2019-0369-009 through 011; IC 2019-0369-017 through 022; IC 2019-0369-027, lines 27 through 42 (i.e., the third email on the page) only; IC 2019-0369-028 through 035; IC 2019-0369-038; and IC 2019-0369-072 through 119), the respondents claimed, first, that such records are exempt from disclosure because they contain communications privileged by the attorney-client relationship.

14. Section 1-210(b)(10), G.S., provides that disclosure is not required of “communications privileged by the attorney-client relationship.”

15. The applicability of the exemption contained in §1-210(b)(10), G.S., is governed by established Connecticut law defining the privilege. Maxwell v. FOI Commission, 260 Conn. 143 (2002). In Maxwell, 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.

16. 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. . . .

17. The Supreme Court has also 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 at 149.

18. After careful in camera inspection of each of the records, identified in paragraph 13, above, it is found that none contains communications between an attorney and a public agency client.

19. Accordingly, it found that the records, identified in paragraph 13, above, are not exempt from disclosure pursuant to §1-210(b)(10), G.S.

20. Next, the respondents claimed that the in camera records identified in paragraph 13, above, are exempt from disclosure pursuant to §1-210(b)(17), G.S., and the Family Educational Rights and Privacy Act (“FERPA”).
21. Section 1-210(b)(17), G.S., provides that disclosure is not required of “[c]ducatinal
records which are not subject to disclosure under [FERPA], 20 USC 1232g.”

22. “[E]ducation records” is defined at 20 USC §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.

23. After careful in camera inspection of the records identified in paragraph 13, above,
it is found that such records are teacher/employee disciplinary records. It is also found that
some of these records contain the name or other identifying information of a student or students.

24. Section 1-210(b)(17), G.S., permits nondisclosure of the records at issue only if
such records are, in the first instance, “education records,” within the meaning of 20 USC
§1232g(a)(4)(A).

25. The respondents cited no Connecticut court decision interpreting the phrase
“directly related to a student,” in 20 USC §1232g(a)(4)(A), in the context of disclosure of
teacher/employee disciplinary records.

26. Courts in other jurisdictions, however, have examined the phrase “directly related to
a student,” and concluded that records of complaints and investigations of misconduct by
teachers, administrators or staff, in cases where students are the alleged victims and witnesses
and therefore are identified in the records, are not education records protected by FERPA,
because they do not contain information “directly related to a student.” Rather, such
disciplinary records are “directly related” to the subject of the complaint, and only tangentially
related to the student. See e.g., Easton Area School District v. Miller, 191 A.3d 75 (Pa.
2019) (video of teacher who roughly disciplined a student was “directly related” to the teacher
and only tangentially related to the student); Cummerlander v. Patriot Preparatory Academy,
2013 WL 12178140 (S.D. Ohio 2013) (student witness statements are not education records
because they do not directly relate to student witnesses but rather to the person who is the
subject of the complain.); Briggs v. Board of Trustees Columbus State Community College,
2009 WL 2047899 (S.D. Ohio 2009) (records of student complaints about a teacher are
“directly related” to the teacher and not to the students who complained); Young v. Pleasant
about a teacher are not “directly related to a student,” but rather are directly related to the
teacher and only tangentially related to the student); Wallace v. Cranbrook Educational
a teacher are not “education records” because they are not “directly related to a student”); Baker
teachers do not directly relate to students); Ellis v. Cleveland Municipal School District, 309
F.Supp.2d 1019 (N.D. Ohio 2004) (records of allegations of teacher misconduct directly relate
to the activities and behaviors of the teachers and do not directly relate to the students
involved). But see Rhea v. District Board of Trustees of Santa Fe College, 109 So.3d 852 (Fla.
Dist. Ct. App. 2013) (email written by student complaining about inappropriate classroom
behavior of teacher is an “education record” protected by FERPA because the record is “directly related” to the student, even though it may also be “directly related” to the teacher).

27. In prior Commission decisions, the Commission employed a broader construction of the term “education records,” largely relying upon the phrase “Personally Identifiable Information” as set forth in the regulations at 34 CFR §99.3, to identify what information is protected under FERPA. Utilizing that analysis, if a record “personally identified” a student, the Commission generally concluded that the record was exempt under FERPA and that the agency was prohibited from disclosing it. See Jeffrey Roets and the Wethersfield Federation of Teachers v. Superintendent of Schools, Wethersfield Public Schools, et al., Docket #FIC 2010-069 (portions of report of investigation into allegations of misconduct by school officials that personally identify a student are protected by FERPA); Jay Hardison v. Superintendent of Schools, Darien Public Schools, et al., Docket #FIC 2016-0853 (written witness statements made in connection with an investigation into an incident involving school football coach and a student, wherein student is personally identified in the statements, are records that are “directly related to a student” and therefore are “education records” protected by FERPA); Jay Hardison v. Superintendent of Schools, Darien Public Schools, et al., Docket #FIC 2017-0036 (video depicting incident in which school football coach struck a student, where video was part of misconduct investigation, constituted an “education record” of the student that was protected under FERPA, as it targeted an already identified student and contained information that personally identified that student and other students); but see e.g., Linda Lambeck and the Connecticut Post v. Chairman, Board of Education, Bridgeport Public Schools, et al., Docket #FIC 2013-677 (video depicting school principal dragging a student, wherein student is not personally identifiable, is not “directly related to a student” and therefore is not an “education record” protected under FERPA).

28. More recently however, looking to burgeoning and relevant law in other jurisdictions, the Commission employed the narrower analysis utilized in the decisions cited in paragraph 26, above. See Jay Hardison v. Superintendent of Schools, Darien Public Schools, et al., Docket #FIC 2017-0615 (parent emails that relate directly to complaints about school procedures, are not “directly related to a student” and therefore are not “education records” protected by FERPA). Upon careful consideration, and a review of current relevant law on the topic, it is found that the teacher/employee disciplinary records in this case, identified in paragraph 13, above, are not “education records” because they relate directly to teacher/employee discipline and are not “directly related to a student.”

29. It is concluded that such records therefore are not exempt from disclosure pursuant to §1-210(b)(17), G.S., and FERPA. This conclusion is consistent with, and the Commission hereby adopts, the line of reasoning in cases from other jurisdictions, as described in paragraph 26, above, related to teacher/employee disciplinary records, where such disciplinary records include the images, names and/or other information that identifies a student.

30. Finally, the respondents claimed that IC 2019-0369-017 through 022 are exempt from disclosure pursuant to §1-210(b)(1), G.S.
31. Section 1-210(b)(1), G.S., provides that disclosure is not required 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 disclosure.”

32. It is found that the respondents did not offer evidence that the public agency had
determined that the public interest in withholding IC 2019-0369-017 through 022 clearly
outweighed the public interest in disclosure.

33. Accordingly, it is found that the respondents failed to prove that the records
identified in paragraph 13, above, are exempt from disclosure pursuant to §1-210(b)(1), G.S.

34. Based on upon the foregoing, it concluded that the respondents violated §§1-210(a)
and 1-212(a), G.S., by withholding the records, identified in paragraph 13, above.

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

1. Forthwith, the respondents shall provide a copy of the records described in paragraph
13, above, to the complainant, free of charge.

2. Although not raised by the respondents, the Commission notes that §1-210(b)(11),
G.S., permits non-disclosure of the names or addresses of students enrolled in any public school
or college. In complying with paragraph 1 of the order, the respondents may redact the names,
addresses, email addresses, and other identifying information, of students and parents of
students contained in the records.

3. Henceforth, the respondents shall strictly comply with §§1-210(a) and 1-212(a), G.S.

Kathleen K. Ross
as Hearing Officer