

**STATE OF CONNECTICUT  
FREEDOM OF INFORMATION COMMISSION**

IN THE MATTER OF A COMPLAINT BY	:	
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CHRISTOPHER PEAK AND THE NEW HAVEN INDEPENDENT	:	Docket # 2019-0369
	:	
V.	:	December 16, 2019
	:	
PRINCIPAL, AMISTAD ACADEMY, AND AMISTAD ACADEMY	:	Heard by: Attorney Kathleen Ross
	:	

**I. Introduction**

Amistad Academy (the “School”) and its Principal (collectively, the “Respondents”) respectfully request that the Freedom of Information Commission (the “Commission”) dismiss the Complaint in the above-captioned matter. Christopher Peak (the “Complainant”) alleges that Respondents violated the Connecticut Freedom of Information Act, Conn. Gen. Stat. § 1-200 *et seq.* (“FOIA”) by failing to provide all responsive public records. As set forth more specifically below, Respondents provided Complainant with all non-exempt public records responsive to his request at issue before the Commission and acted in accordance with the law when they redacted information from responsive records provided to Complainant as well as withheld exempt responsive records. Accordingly, Respondents have complied fully with the FOIA and this Complaint should be dismissed.

## II. Statement of Facts

The Complaint in this matter concerns a request for information by the Complainant stemming from an incident between one of Respondents' former employee and a current student that occurred in October 2018. Specifically, the request for information in this present matter relate to Complainant's request dated April 9, 2019 for the following:

“...records of any alleged misconduct regarding the following Achievement First employees, from their initial date of hire: 1. Simon Obas 2. Morgan Barth....”

(Complainant Ex. 1).

In response, Respondents timely acknowledged receipt of Complainant's request. (Complainant Ex. 2). Thereafter, Respondents conducted a diligent search of electronic and non-electronic records relating to the request. (Respondents Ex. F). As part of the search, Respondents notified the Director of Employee Relations as well as the current and former supervisor of the request, and inquired whether they had records responsive to the request. (*Id.*). Each individual responded—either by electronic mail or orally—to indicate s/he was not in possession of any responsive records or identifying potentially responsive records, including records from personnel files and those within their own files. (*Id.*). Respondents then conducted a meticulous review of each document culled from the search to determine whether the record was responsive to Complainant's request and if so, whether any FOIA exemption was applicable. (*Id.*).

Following Respondents' review of records, Respondents produced to Complainant 42 pages of records on May 22, 2019. (Complainant Ex. 2 and 3). Notably, Respondents informed Complainant that the produced records contained

redactions pursuant to Sections 1-210(b)(1), (b)(10) and (b)(17) of the Connecticut General Statutes. (*Id.*). Additionally, Respondents notified Complainant that it sought a public record from an external public agency and would provide that record upon receipt. (*Id.*).

Upon receipt of the records, Complainant inquired about the absence of records relating to the October 2018 incident. (*Id.*). In an effort to demonstrate transparency, Respondents provided Complainant with an explanation by noting that many records were withheld pursuant to FERPA, as set forth in Section 1-210(b)(17) of the General Statutes. (*Id.*).

On June 20, 2019, Complainant filed this present Complaint against Respondents with the Commission, claiming that Respondents violated the FOIA by failing to produce “records regarding Morgan Barth’s alleged misconduct in October 2018” and claiming that the records were disclosable [provided] “identifying student information [was] redacted.” (Complaint). The Complaint was docketed as #FIC 2019-0369.

The Commission scheduled a hearing on October 31, 2019, which was postponed until November 7, 2019. Hearing Officer Kathleen Ross heard this matter as scheduled on November 7, 2019. Hearing Officer Ross ordered Respondents to submit the records withheld from Complainant for *in camera* inspection by December 2, 2019, to which Respondents complied. The parties were also instructed to submit post-hearing briefs prior to close of business on December 16, 2019. Respondents now submit their Post-Hearing Brief. As Respondents made clear at the hearing and as is described more specifically below, the records (or where applicable, portions of records)

withheld from the Complainant are exempt from disclosure as preliminary drafts, attorney-client privileged communications, and/or education records or records containing personally identifiable information under Sections 1-210(b)(1), (b)(10) and (b)(17) of FOIA, respectively. Accordingly, Respondents respectfully submit that they have fully complied with the FOIA in responding to Complainant's request for records. For these reasons, Respondents respectfully request that the Commission dismiss the Complaint.

### **III. Argument**

The Complaint alleges that Respondents failed to provide all responsive public records. (See Complaint). Complainant's allegations are belied by the factual record, and thus, his complaint should be dismissed.

#### **A. Records Relating to the Achievement First, Inc.<sup>1</sup> Regional Superintendent Assigned to Respondents Are Outside the Scope of Complainant's Request, And Thus Are Not Responsive.**

As a threshold matter, Respondents respectfully submit that Complainant improperly asserts a violation of FOIA based on the alleged absence of records that are outside the scope of his April 9, 2019 request. As mentioned above, Respondents' search process included consulting with the Director of Employee Relations, reviewing the personnel files of each of the individuals named in the request as well as directly

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<sup>1</sup> Achievement First, Inc. ("AF Inc.") is a private non-profit charter management organization organized under the laws of Connecticut. Accordingly, AF Inc. is not a public agency as the term is understood under FOIA, and any records relating to the job performance of its employees are not public records subject to disclosure pursuant to FOIA.

requesting information from the named individuals' current and former supervisors, to the extent they were still employed at an Achievement First affiliated entity, concerning responsive records.

At the contested hearing, Complainant contended that Respondents violated the FOIA when they failed to include records relating to the job performance of the regional superintendent assigned to Respondents. (Complainant's Testimony). Respondents understand that Complainant may have obtained records from a public records request to a separate state entity, which may have included records relating to the job performance of the regional superintendent assigned to Respondents. However, Complainant's April 9, 2019 request did not request such records. (See Complainant Ex. 1). Rather, Complainant requested records relating to "any alleged misconduct regarding the following Achievement First employees, from their initial date of hire: 1. *Simon Obas* 2. *Morgan Barth*". (*Id.*) (emphasis added). In other words, to the extent that a record relates to the job performance of any person other than the two individuals named in the above-referenced request, such records are outside the scope of his April 9, 2019 request, and thus are not responsive.

In instances where records are outside the scope of a complainant's request, as is the case here, the Commission has found that such records need not be disclosed to the Complainant. (See *e.g.*, *Robinson v. Chief, Police Department Town of Trumbull et al.*, Docket #FIC 2015-161, at ¶¶ 25, 29, 52, 63, and fn. #22 (January 27, 2016); *McLaughlin v. Town of Greenwich*, Docket #FIC 2002-057, at ¶ 19 (May 22, 2002) and *Jennings v. Eason Chief of Police*, Docket #FIC 1989-131, at ¶¶ 18 and 46-7 (April 11, 1990)). Consequently, to the extent that Respondents failed to produce a report relating

to a former regional superintendent, they did not violate the FOIA as those records were not requested in the April 9, 2019 request.

To the extent that Complainant contends, and/or the Hearing Officer finds, that records relating to the job performance of the regional superintendent assigned by AF Inc. are within the scope of Complainant's request and subject to disclosure pursuant to FOIA despite AF Inc. not being a public agency, Respondents note that where a public agency makes a good faith effort to interpret and respond to a broad request for records, despite a lack of clarity in the request the Commission has found no violation of FOIA. (See *e.g.*, *FOIC Advisory Opinion #38* (noting "where a good faith effort is made to effectuate the guidelines...the Commission will not attempt to second-guess or substitute its judgment for that of the agency involved."); see also *Shahid v. Chief Court Administrator*, Docket #FIC 2014-296 (February 11, 2015) (finding no violation where respondents made a good faith effort to respond to a broad and unclear records request.)) Here, it is not clear from the face of Complainant's request that he sought records concerning individuals other than those named in the April 9, 2019 request. Rather, Respondents reasonably interpreted Complainant's request to seek records concerning only two individuals. Accordingly, Respondents respectfully request that the Commission find that they made a good faith effort to interpret Complainant's overbroad and unclear request.

**B. Following a Meticulous Search, Respondents Provided Complainant With Copies of All Non-Exempt Public Records Responsive to His Request.**

As noted above, the present matter before the Commission concerns Complainant's request to Respondents for records, which arose following an incident that occurred in October 2018 between a former employee of Respondents and a current student. Contrary to Complainant's allegation, the facts make clear that Respondents worked diligently and in good faith to locate and provide Complainant with all non-exempt records responsive to a request for information in compliance with FOIA. Indeed, despite Respondents' ongoing duties and responsibilities of efficiently operating a school, the documentary and testimonial evidence presented at the hearing leaves no question that Respondents made a prompt and good-faith effort to comply with their responsibilities under both FOIA and the Family Education Rights and Privacy Act ("FERPA").

In relevant part, Complainant made a request for the following public records on April 9, 2019:

“records of any alleged misconduct regarding the following Achievement First employees, from their initial date of hire: 1. Simon Obas 2. Morgan Barth...”

(Complainant Ex. 1).

Notably, at the time of the above request, Respondents were processing at least two other requests for information pursuant to FOIA, several requests for information from media outlets, and participating in two external investigations, one which was being conducted by the Connecticut State Department of Education. Despite their

obligation to run an efficient school, Respondents' promptly followed their usual process for responding to requests pursuant to FOIA. (Respondents Ex. F).

Specifically, Respondents acknowledged receipt of Complainant's request within the statutorily required timeframe. (Complainant Ex. 2). Next, Respondents requested the personnel files of the individuals named in the request from their Director of Employee Relations, Christi George. (Respondents Ex. F). In an effort to ensure a thorough search, Respondents also directed former and current supervisors of the individuals named in the April 9, 2019 request to review their records from any potentially responsive records. (Respondents Ex. F). Indeed, the request to supervisors made clear that the records being sought included both formal and informal complaints from both staff and parents irrespective of whether the matter resulted in a formal investigation. (*Id.*). Due to the above efforts, Respondents learned of the existence of a public record issued by a state agency relating to one of the named individuals in the April 9, 2019 request. (*Id.*). Although not required to do so, Respondents made a public records request to the state agency for a duplicate copy of the record. (*Id.*). Importantly, Respondents were transparent and notified Complainant that he would receive the responsive record once the state agency fulfilled the public records request.<sup>2</sup> (Complainant Ex. 2).

In addition to the above steps, and consistent with their practice concerning FOI requests, Respondents reviewed each record identified as potentially responsive to determine whether it was responsive to Complainant's request, and if so, whether an exemption prohibited disclosure. (Respondents Ex. F). On May 22, 2019, Respondents

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<sup>2</sup> To date, the Connecticut Department of Children and Families has not fulfilled the public records request made by Respondents on May 22, 2019.

provided Complainant with non-exempt public records responsive to his request. (Complainant Ex. 2). More importantly, Respondents also notified Complainant that records were redacted and withheld pursuant to applicable exemptions (e.g., FERPA, attorney-client communications and preliminary drafts). (*Id.*). Moreover, Respondents notified Complainant that it sought an additional record from a state agency. (*Id.*). Taken together, Respondents' search was appropriate in scope and depth. (See *Community Health Center v. Commissioner, Connecticut State Department of Social Services et. al*, Docket #FIC 2002-316 (July 9, 2003) (finding a records search thorough where respondents searched "all electronic files where records responsive to the request would reasonable have been maintained.")). Accordingly, as a result of Respondent's comprehensive search for responsive records, Respondents have provided Complainant with all non-exempt records responsive to this request.

### **C. Respondents Properly Redacted Portions of Responsive Records, As Required by FERPA.**

#### **1. Student Privacy and Confidentiality Rights are Recognized by Both Federal and State Law.**

As a recipient of federal funds, Respondents are bound by FERPA and its implementing regulations not to disclose *education records* relating to students absent written consent from a from a parent<sup>3</sup> or applicability of a specific exemption set forth in FERPA.<sup>4</sup> (See 20 U.S.C. § 1232g). Also, FERPA generally prohibits the disclosure of

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<sup>3</sup> The rights guaranteed by FERPA transfers to a student upon the age of majority or matriculation in a post-secondary institution. 34 C.F.R. § 99.3.

<sup>4</sup> Although subject to limited exceptions, there is no recognized exception applicable to the matter before the Commission. See 34 C.F.R. § 99.31.

*personally identifiable information* from records absent parental consent. (See 34 C.F.R. § 99.3). FERPA defines *personally identifiable information* as follows:

“The term includes, but is not limited to--

- a) the student’s name;
- b) the name of the student’s parent or other family members;
- c) the address of the student or student’s family;
- d) a personal identifier, such as the student’s date of birth, place of birth, and mother’s maiden name;
- e) other indirect identifier, such as the student’s social security number, student number, biometric record;
- 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.”

(*Id.*)

Both the legislature and courts in Connecticut have recognized the obligation to protect student privacy and confidentiality rights. Specifically, the FOIA exempts from disclosure “[e]ducational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g.” (C.G.S. § 1-210(b)(17)). FOIA also prohibits the disclosure of the “names or addresses of students enrolled in any public school or college without [the appropriate parental or student] consent....” (C.G.S. § 1-210(b)(11)). Similarly, Connecticut courts have recognized and echoed the mandate to protect student privacy and confidentiality. (See *e.g.*, *Goldberg v. Regional*

*Sch. Dist. No. 18*, 2014 WL 6476823, at \*4 (Conn. Super. Ct. 2014) (noting that the “releasing, or providing access to, any personally identifiable information in education records other than directory information is subject to no dispute of which this court is aware”).

2. Federal Law Mandates Redaction of Personally Identifiable Information In Order to Safeguard Student Privacy and Confidentiality Rights.

To the extent that a responsive public record directly relates to a student or contains personally identifiable information, schools are required to consider their dual obligations under FERPA and applicable freedom of information laws. Namely, under the broad definition of *education records* and *personally identifiable information*, schools are compelled to redact categories of personally identifiable information when satisfying their obligations to provide access to responsive public records pursuant to an open records law. (See 34 C.F.R. §99.31(b)(1)). Indeed, FERPA permits the disclosure of *educational records* or *personally identifiable information* without consent from a parent or eligible student only “after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.” (See *id.*)

Here, Respondents redacted the following categories of personally identifiable information from the responsive records provided to Complainant: student names, parent email addresses; student identification number; date of birth; disability, including

information relating to special education programming; and name of transferring school.<sup>5</sup>

It cannot be credibly argued that the information redacted by Respondents is not FERPA-protected. Given that the hearing record does not contain written parental consent<sup>6</sup> for the disclosure of records or personally identifiable information to a third-party, Respondents made the required assessment based on then-available information and reasonably determined that the students and their families referenced in the responsive records were not personally identifiable following the redactions to the categories of information referenced above. Accordingly, Respondents provided Complainant with redacted responsive records. Therefore, Respondents respectfully submit that redactions to the records provided to Complainant were mandatory to protect the confidentiality and privacy rights of Respondents' students and their families, in compliance with FERPA.

#### **D. Records Not Subject to Disclosure Under FOIA Were Properly Withheld From Complainant.**

In light of the federal proscription against disclosing education records or records containing personally identifiable student information, in circumstances where a responsive record directly relates to one of Respondents students or contains personally identifiable information, Respondents considered their dual obligations under

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<sup>5</sup> For ease of reference, and corresponding to the records submitted for *in camera* inspection, Respondents note that all redactions on the following pages of Record 19 are FERPA protected records: 71-119.

<sup>6</sup> The students at issue are not yet 18 years of age, and thus, their parents are the owner of the FERPA rights. See 34 C.F.R. § 99.3.

FERPA and FOIA. Consistent with FERPA, in instances where redaction safeguards the privacy rights of students and families, Respondents de-identify the record through redaction and provide the requested public records pursuant to FOIA. However, where redaction does not safeguard the federally guaranteed right to confidentiality and privacy, Respondents are compelled by both federal and state law to withhold records responsive to a public records request. (See (C.G.S. § 1-210(a)).

1. “Education Record” Is Broadly Construed, And FERPA Prohibits Disclosure of Such Records.

Under FERPA, a record is an *education record* where it satisfies the following two-prong definition: “(i) directly relate[s] to a student, and (ii) maintained by an educational agency or institution or by a party acting for the agency or institution.” (See 34 C.F.R. § 99.3). To satisfy the first element,<sup>7</sup> the record must contain information directly related to a student. Information directly relates to a student if it “has a close connection to that student.” (*Bryner v. Canyons Sch. Dist.*, 351 P.3d 852, 857 - 8 (Utah Ct. App. 2015) (quoting *Rhea v. Dist. Bd. of Trustees of Santa Fe Coll.*, 109 So. 3d 851, 857 (Fla. Dist. Ct. App. 2013)). Simply put, “[r]ecords therefore directly relate to a student if the matters addressed in the ... records pertain to actions committed or allegedly committed by or against the student and contain information identifying the student.” (*Id.* at 858. (quoting *U.S. v. Miami Univ.*, 91 F.Supp.2d 1132, 1149 (S.D. Ohio 2000), *aff’d*, 294 F.3d 797 (6th Cir.2002))). Moreover, courts addressing the question of what constitutes an *education record* have expressly found that FERPA’s definition of

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<sup>7</sup> It is not in dispute that Respondents maintain the records at issue. Accordingly, this brief will not address the second element of the statutory definition of *education record* under FERPA.

*education record* does not apply a content test. (See e.g., *U.S. v. Miami University*, 294 F.3d 797, 812 (6<sup>th</sup> Cir. 2002) (applying the plain language interpretation of *education record* because “Congress made no content-based judgments with regard to its education records definition.”) and *State ex rel. ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947 (Ohio 2012) (holding that the plain language of FERPA does not restrict the term *education record* “to academic performance, financial aid, or scholastic performance.”)). Rather, courts have uniformly found that Congress intended for the term *education records* to be broad in scope and applicable to any record that satisfies the two elements set forth in the statutory definition. (See *id.*; see also *Gonzaga University v. Doe*, 536 U.S. 273, 292 (Breyer, J., concurring) (observing that FERPA’s definition of *education record* is “broad and non-specific”) and *Bryner v. Canyons Sch. Dist.*, 351 P.3d 852, 857 (Utah Ct. App. 2015) (rejecting the argument that *education records* are limited to records academic in nature and concluding that “[a] plain reading of FERPA’s statutory language reveals that Congress intended for the definition of education records to be broad in scope.”)).

Indeed, this Commission has similarly applied the plain statutory meaning of *education records*. (See e.g., *In the Matter of a Complaint by Jeffrey T. Roets and the Wethersfield Federation of Teachers*, Docket No. FIC 2010-069 (Dec. 15, 2010) (finding that portions of an investigative report concerning the misconduct of board and school officials in an alleged grade changing affair were *education records* containing personally identifiable information)).

Here, there can be no question that the records at issue have a close connection to a specific student. As the review of the records of submitted *in camera* will reveal,

the many of the withheld records relate directly to an interaction between a specific student and a former employee during school hours in October 2018.<sup>8</sup> Notably, the interaction involved only one student whom is referenced repeatedly either directly or indirectly throughout the records. Moreover, the records addressed the actions committed or allegedly committed by as well as against the student. Accordingly, Respondents request that the Hearing Officer find that the records at issue have a close connection to a specific student, and are thus within the statutory definition of *education record* and exempt from disclosure under FOIA.

2. Complainant's Request Constitutes an Impermissible *Targeted Request* Under FERPA.

FERPA regulations address a school's heightened responsibility with respect to targeted requests. (See 34 C.F.R. § 99.3). Expressly, FERPA prohibits the disclosure of records relating to a student where the school *reasonably* believes the person requesting the records knows the identity of the student. (See 34 C.F.R. § 99.3(g)) (emphasis added). Additionally, the U.S. Department of Education made clear that the prohibition on the disclosure of information responsive to *targeted requests* "addresses a situation in which a requester seek what might generally qualify as a properly redacted record but the facts indicate that redaction is a useless formality because the subjects identity is already known." (See 34 Family Educational Rights and Privacy, 73 Fed. Reg. 74806-01, 74832) (Dec. 9, 2008)).

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<sup>8</sup> For ease of reference, and corresponding to the records submitted for *in camera* inspection, Respondents note that the following records have a close connection to the student involved in the incident: 2, 5, 7, 10, 14, 15, 17, and 18.

In fact, this Commission has found that withholding such records from disclosure in their entirety is proper and required as a matter of law. (See e.g., *Shpak v. Oxford Public Schools*, Docket #FIC 2015-566 (March 9, 2016)(finding that even in redacted form, the school could not adequately protect a student’s confidentiality where the requesting party knows the identity of the student); *Martocchio v. Regional Sch. Dist. #7*, Docket #FIC 2015-373 (February 10, 2016) (same) and *Gagnon-Smith v. Middletown Public Schools.*, Docket #FIC 2013-333 (January 30, 2014) (same)).

Here, Respondents reasonably believe that Complainant made a *targeted request* aimed at obtaining personally identifiable information relating to a specific student known to the Complainant despite Complainant’s denial of knowing the student’s identity. As an initial point, upon receipt of the responsive records, Complainant expressly reiterated that he was seeking “all documents from Barth’s personnel file related to the October [2018] incident and its aftermath” as well as questioned why such records were not being released. (Complainant Ex. 3). Moreover, the record makes clear that Complainant’s employer, the New Haven Independent, obtained—and still retains—an unredacted copy of the video depicting the October 2018 interaction between the former employee of Respondents and the student. (Testimony Complainant; Testimony A. Pinto). In other words, Complainant has direct access to a video with the unobscured face of the student. (Testimony A. Pinto). Further, in a published online news article authored by the Complainant, he acknowledged interviewing “more than 15 students, parents, recent graduates and former staff” concerning the interaction depicted on the video. (Respondents Ex. A). Notably, Respondents’ school community is small and almost all staff members as well

as most current students—and by extension their parents—know the identity of the student depicted in the video. (Testimony A. Pinto). Lastly, the record does not contain parental consent<sup>9</sup> for the disclosure of records directly relating to this specific student. In other words, had Respondents disclosed the records to Complainant, that disclosure would have violated FERPA as the school reasonably believes, based on the foregoing facts, that Complainant knows the identity of the student to which the records relates or can easily ascertain the student's identity. Therefore, to the extent that a record relates to this specific student, Respondents' withholding of such records was mandatory under FERPA to protect the confidentiality and privacy rights of the student and his/her family.

3. Education Records Containing Personally Identifiable Records Protected by FERPA Were Withheld Because Redaction Is Insufficient to Protect Student Confidentiality.

To the extent Complainant contends, and/or the Hearing Officer finds, that Respondents lack a reasonable belief that Complainant knows the identity of the student at the center of the October 2018 incident, FERPA also prohibits the disclosure of information that is linkable to a specific student that would allow a reasonable person in the school community to identify the student with reasonable certainty. (See 34 C.F.R. § 99.3(f); *see also* Dear Colleague Letter Regarding FERPA Final Regulations, (December 17, 2008) *available at* <https://www2.ed.gov/policy/gen/guid/fpco/hottopics/ht12-17-08.html>). FERPA also proscribes disclosure of records absent parental consent where even after the removal of all personally identifiable information a requesting party would nonetheless be able to

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<sup>9</sup> The student at issue is not yet 18 years of age, and thus, his/her parents are the owner of the FERPA rights. See 34 C.F.R. § 99.3.

ascertain the identity of the student. (See 34 C.F.R. § 99.31(b)(1); see also FERPA Final Regulations, 73 Fed. Reg. at 74831 (“The simple removal of nominal or direct identifiers, such as name and SSN (or other ID number), does not necessarily avoid the release of personally identifiable information.”)).

Courts have recognized the above proscription. (See e.g., *Wentzell v. Freedom of Information Commission*, 2017 WL 2539005, \*10 (Conn. Super. Ct. 2017) (noting that “FERPA protects not only information that *directly* identifies students, but also information that, when combined with other information, allows by *indirect* means the identification of individual students) (emphasis in the original) and *Robinson v. Disney Online*, 152 F.Supp.3d 176, 183 at fn. 3 (S.D.N.Y. 2015) (recognizing that “[FERPA regulations] are concerned with context only to the extent that multiple pieces of information disclosed by a[n educational] provider, none of which themselves amount to [personally identifiable information], could, when combined with one another, prove identifying.”)). In fact, one federal court compelled the return of aggregate data inadvertently disclosed to a third-party because such data was linkable to over 300,000 students even though the data did not contain student names, birth dates, ethnicity, race, ages, gender, social security numbers, or any other direct identifier. (*CG v. Pennsylvania Dept. of Educ.*, 2009 WL 691186 (M.D. Pa, 2009)). In reaching its conclusion, the court agreed that the release of the data was violative of FERPA<sup>10</sup> because the information in the data set allowed a third-party to identify specific students despite the absence of direct identifiers and the size of the data set. (*Id.*).

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<sup>10</sup> The court also found that the disclosure was violative of the Individuals with Disabilities Education Act.

Here, the circumstances at play in the present matter necessarily triggered Respondents' withholding of some of the records at issue. Many of the records at issue concern an interaction that occurred in October 2018 involving a single student and a former employee. (Testimony A. Pinto). The interaction was captured on school surveillance video and released—in violation of FERPA by an unidentified person—to the New Haven Independent. (*Id.*). Notably, representatives at the New Haven Independent, confirmed to Respondents that the video they received was not redacted. (*Id.*). In other words, the video did not obscure the face of the student and was only redacted prior to publication at the express request of Respondents. (Testimony A. Pinto). Not surprisingly, the incident resulted in a significant amount of media attention—both within the local community and on a national level. (Testimony A. Pinto). In fact, Complainant authored three articles in the New Haven Independent in less than two weeks relating to the incident, which together generated more than 100 public comments. (See Respondents Ex. A, B and D). In each article, Complainant embedded a redacted version of the video depicting the interaction. (*Id.*). Moreover, Complainant posted a redacted version of the video on his personal YouTube page, which has been viewed more than 24,000 times. (See Respondents Ex. C). Significantly, almost all adult members and most students within the school community know the identity of the student involved in the interaction. (Testimony A. Pinto). Given that the interaction was highly publicized and involved a single student, it cannot be credibly argued that the records at issue, if disclosed, would not allow a school community member to identify the student with reasonable certainty.

As set forth above, it is violative of FERPA to release de-identified education records without “tak[ing] into account information that is linked or linkable to a specific student as well as other reasonably available information about a student, so that the cumulative effect of multiple disclosures of student data does not allow a reasonable person in the school community to identify the student with reasonable certainty.” (See Dear Colleague Letter about FERPA Final Regulations). Consequently, it is evident that any attempts by Respondents to de-identify records concerning the October 2018 would be a futile endeavor and insufficient to protect the identity of the specific student at the center of this matter. Taken together, the above demonstrates that Respondents acted in accordance with FERPA when they withheld records linkable to a single student. (See 34 C.F.R. § 99.3(f)).

4. Portions of Records Relaying Privileged Communications Between Respondents and Their Attorneys Were Redacted, As Permitted by FOIA.

As observed by our Supreme Court, “Connecticut has a long-standing, strong public policy of protecting attorney-client communications.” (See *Harrington v. Freedom of Information Commission*, 323 Conn. 1, 11 (2016) (quoting *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.*, 249 Conn. 36, 48 (1999)). Indeed, our Appellate Court aptly explained that “where legal advice of any kind is sought from a professional legal advisor in his or her capacity as such, the communications relating to that purpose, made in confidence by the client, are at the client’s instance permanently protected from disclosure by the client or by the legal adviser, except the protections may be waived.” (See *Shew v. Freedom of Information Commission.*, 245 Conn. 149, 157 (1998) (internal quotations omitted)). Nevertheless, courts have recognized that not all

communications between a client and his or her attorney is privileged. (See *Harrington* at 14). Accordingly, our Supreme Court adopted the following four-prong test to determine whether communication between an attorney and his or her client is in fact 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 communication must be made in confidence.” (*Shew*, at 159)).

As evidenced by the records submitted by Respondents for *in camera* inspection,<sup>11</sup> the portion of records claimed to be privileged communications were addressed to or authored by in-house or external counsel for Respondents. Additionally, the communications were either made to current employees or agents of Respondents for the purpose of obtaining or receiving legal counsel in a fairly complicated situation impacting various stakeholders. Further, there is no evidence on the record that Respondents, the owners of the privilege, waived their privilege with respect to the communications at issue by releasing to a third-party on any of the communications. To the contrary, Respondents withheld the communications at issue precisely in order to maintain the attorney-client privilege that applies to such communications. Accordingly, Respondents maintain that they properly withheld communications between them and their attorney.

To the extent that Complainant contends, that there has been a waiver of attorney-client privilege because the “gist” of certain communication is known to him or

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<sup>11</sup> For ease of reference, and corresponding to the records submitted for *in camera* inspection, Respondents claimed the attorney-client communication exemption for all records or a portion thereof.

other third-parties, Respondents respectfully submit that the argument is not consistent with case law. Specifically, in a recent case brought by a public agency against this Commission, a Connecticut Superior Court expressly rejected the knowledge of the “gist” of privileged communication waives privilege and remanded the case to the Commission with the instruction to apply the “actually disclosed” standard articulated by the Second Circuit in *In re von Bulow*, 828 F.2d 94 (2d Cir.1987). (See *Berlin Public Schs. v. Freedom of Information Commission et al.*, No. HHBCV156029080S, 2016 WL 785578 (Conn. Super. Ct. July 2, 2016)). In reaching its conclusion, the *Berlin* Court noted that the case articulating the “gist” rationale was abrogated by the U.S. Supreme Court, albeit on other grounds, but made clear that the rationale was nonetheless not widely applied by courts. (*Id.* at \*5). The court reasoned that that the “fairness doctrine” instead required that where disclosure of communications protected by attorney-client privilege occurs in an extrajudicial setting, waiver is applicable only to the particular matters actually disclosed. (*Id.* at \*5 - 6). Further, the Court clarified that “under Von Bulow, disclosure of the substance of a privileged communication in an extrajudicial context is as effective a waiver as a direct quotation since it reveals the ‘substance’ of the statement.” (*Id.* at \*5 (quoting *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D. NY 1996)(internal quotations omitted)). However, the *In re Kidder* Court noted that its holding was limited and permitted the piercing of the [attorney-client] privilege only “to purely factual summaries of witness statements, and thus avoid any danger that the waiver might encompass core attorney mental processes....” 168 F.R.D. at 473.

In the present matter, the communications encompass core attorney mental processes. Additionally, unlike in *Berlin*, which involved a direct verbatim quotation from a privileged communication, Complainant did not submit any documentary or testimonial evidence at the contested hearing to support that Respondents “actually disclosed” the contents of their attorney-client communications—whether by direct quotation or in “substance.” Instead, Complainant merely reiterated speculations regarding the substance of communications protected by attorney-client privilege. Accordingly, Respondents respectfully submit that any argument concerning the waiver of privilege due to knowledge of the “gist” of the privileged communication be squarely rejected as inapplicable to the present matter.

5. Preliminary Records Were Properly Withheld, As Permitted by FOIA.

As recognized by FOIA, a public agency may withhold records that are preliminary drafts and notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure. In fact, the Connecticut Supreme Court ruled that “the concept of preliminary [drafts or notes], as opposed to final [drafts or notes] should not depend upon...whether the actual documents are subject to further alteration...” but rather “[p]reliminary drafts or notes reflect that aspect of the agency's function that precedes formal and informed decisionmaking.... It is records of this preliminary, deliberative and predecisional process that we conclude the exemption was meant to encompass.” (*Shew v. FOI Commission*, 245 Conn. 149, 164-5 (1998)). Moreover, courts have made clear that a public agency must “indicate the reasons for its determination to withhold disclosure and

those reasons must not be frivolous or patently unfounded.” (*State of Connecticut, Office of the Attorney General v. Freedom of Information Commission*, 2011 WL 522872, \*8 (Conn. Super. Ct. Jan. 20, 2011)).

Here, Respondents believe that four (4) records<sup>12</sup> submitted *in camera* are exempt from disclosure as preliminary drafts. With respect to Record 7, Respondents rely on this exemption, in the alternative, as it relates the October 2018 incident. Respondents are concerned that disclosure would have a chilling effect on future investigations concerning students matters. With respect to Record 9 and 11, Respondents rely on this exemption, in the alternative, because the record was not finalized nor was it received by the intended recipient. Accordingly, Respondents believe that disclosure of the record would necessarily be a misrepresentation of facts and subject Respondents to potential legal action (e.g., defamation). Lastly, Respondents rely on this exemption in the alternative, with respect to Record 24 as they believe that the author of the record—a state agency—produced a final version of the document that may differ in substance from the information presented in the record. Given the nature of the record, Respondents believe that it would be fundamentally unfair to produce a draft record under the circumstances which may not be an accurate and full representation of the facts and thus, subject Respondents to potential legal action (e.g., defamation). To that end, Respondents made a public records request to the agency and notified Complainant that they would forward the finalized record upon receipt (Complainant Ex. 2). Accordingly, to the extent that the Hearing Officer finds

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<sup>12</sup> For ease of reference, and corresponding to the records submitted for *in camera* inspection, Respondents claimed the preliminary draft exemption for the following records: Records 7, 9, 11 and 24.

that other exemptions claimed are not applicable to the above-referenced records, Respondents contend that, in the alternative, the records are exempt from disclosure as a preliminary draft and were properly withheld for the reasons set forth above.

#### **IV. Conclusion**

Respondents maintain that the evidence in the record firmly establish that their actions in response to Complainant's request for information at issue in this case comported with FOIA. Specifically, Respondents contend that the facts demonstrate that they acted promptly, diligently and in good-faith to provide Complainant with all non-exempt public records responsive to his request. Further, Respondents assert that their redactions and withholdings were made for permitted reasons under FOIA and, in many instances, were mandated by FERPA. For the foregoing reasons, Respondents respectfully requests that the Commission find that Respondents complied with the requirements of FOIA and dismiss this Complaint.

RESPONDENTS

AMISTAD ACADEMY, AND ITS  
PRINCIPAL

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**CERTIFICATE OF SERVICE**

This is to certify that on this 16<sup>th</sup> day of December, 2019, a copy of the foregoing Post-Hearing Brief was electronically mailed to:

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*\_\_\_\_/s/ Melika S. Forbes \_\_\_\_*

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