FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Laura Terry,

Complainant

against Docket #FIC 2015-544

David Freedman, as Member,
Newtown Board of Education; and
Kathy Hamilton, as Member,
Newtown Board of Education,

Respondents September 28, 2016

The above-captioned matter was heard as a contested case on January 25, 2016, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. This matter was consolidated for hearing with Docket #FIC 2015-771, Laura Roche v. David Freedman et al.

At the hearing, the Newtown Board of Education, which had been named as a respondent by the Commission, moved for a dismissal on the grounds that the complaint was against individual Board of Education members only, and not against the Board as a whole. Without objection, the motion was granted, and the caption of the case has been amended to remove the Board as a respondent.

An April 7, 2016 Report of Hearing Officer was then considered by the Commission at its May 11, 2016 regular meeting. That report, which recommended dismissal on the grounds that the requested documents were not public records, was not approved, the Commissioners voting 3-1 to remand the matter to the hearing officer for the purpose of taking additional evidence regarding the content and deletion of the communications at issue in this matter. The matter was then heard on July 29, 2016, at which time the complainant and the respondents again appeared, stipulated to additional facts, and presented additional testimony, exhibits and argument on the complaint. The respondents, who had appeared only through counsel at the January 25, 2016 hearing, testified for the first time at the July 29, 2016 hearing. At the conclusion of the hearing, the hearing officer ordered the respondents to submit after-filed exhibits regarding the method by which the communications at issue were automatically deleted; those exhibits were filed on August 5, 2016.

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. By letter of complaint, filed November 23, 2015, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to comply with her requests for certain public records.

3. It is found that the respondents, using their personal email accounts and their personal computers, transmitted two Board of Education records to an individual, or individual, outside of the Board of Education. Those transmitted records were an email chain originating with the Board's attorney (transmitted by the respondent Freedman), and text messages among Board members (transmitted by the respondent Hamilton). The transmitted records were electronic conversations among Board members about then ongoing business of the Board. The purpose of the transmittals was to bring to light a continuing practice of the Board conducting private conversations that the respondents believed should have been public.

4. It is found that the transmitted records ultimately appeared on the Facebook account of Carey Schierloh, although the records may or may not have been directly transmitted by the respondents to Ms. Schierloh.

5. It is found that Ms. Schierloh is the Secretary of the Republican Town Committee, and Deputy Republican Registrar of Voters for the Town of Newtown.

6. It is found that the transmitted records were discussed on Schierloh's Facebook account among varying individuals, including members of the Newtown Legislative Council, a former member of the Newtown Board of Education, and interested members of the public. Individuals posted opinions that, for example: the disclosure was improper or not; that the disclosure properly or improperly revealed email and text meetings out of public view by the Board of Education; that one of the disclosed records was or was not privileged by the attorney-client relationship; that one of the records did or did not contain information concerning negotiation of the superintendent's compensation that should have been confidential; and that the disclosure was or was not the action of an unknown "whistleblower."

7. It is found that the complainant, a Newtown resident, did not approve of the transmittals by the respondents, as she considered that the email and text messages were sensitive and confidential, and that the disclosure was a political act directed at members of the opposing party. She wanted to know to whom the records were transmitted.

8. It is found that the Newtown Board of Education discussed the posting of the Board records on Schierloh's Facebook page at its meetings of October 20, October 26 and November 4, 2015. Those discussions included the subject of a referral to the Town Ethics Commission by the Newtown Board of Selectman, and the hiring of an

investigator by the Newtown Board of Education to determine who disclosed the records. The Board also voted to discuss the behavior of the two respondents in open session.

9. It is found that the respondent Freedman, on October 27, 2015, admitted that he had released the email chain in question. His October 27 statement read in part:

> I've become more and more discouraged this election season watching members of the [Board of Education] in both parties accuse other elected officials of back room politics when it is an ongoing problem on the board I serve on.
>
> In an effort to shed some light on this very serious issue I released the email in question from our former board attorney, Floyd Dugas. His solicitation of the replies from board members contributes, in this case, to the culture of circumventing proper process. Even this information should only have been discussed during a properly noticed executive session of the [Board of Education].
>
> At no time did I believe I was violating attorney-client privilege, as this information is now all part of [the] public record. Should the [FOI Commission] rule otherwise, I would of course accept their judgment. Rather than accept responsibility to go on a witch-hunt spending taxpayer dollars to uncover who sent the email, which is unacceptable.

Mr. Freedman did not disclose to whom he had sent the email, or the contents of his transmittal email.

10. It is found that both respondents disapproved of the Board members' long-standing practice of communicating among themselves about Board business by email and text messages.

11. It is found that the disclosed email chain dated from more than a year before its disclosure by Mr. Freedman; and the disclosed text messages dated from a few months before their disclosure by Ms. Hamilton.

12. It is found that the respondent Hamilton had previously brought her concerns to the Board chair, without satisfaction.

13. It is found that the complainant made an October 29, 2015 request to the respondents for any communications related to the transmittal by them of the Board of Education email chain and text messages.

14. It is found that the complainant requested copies of the respondents' communications in order to ascertain the content of the emails transmitting the Board records (as opposed to the contents of the records transmitted, which is known), and the individuals to whom the emails were sent.

15. It is found that the respondents did not provide the requested records.

16. 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.

17. Section 1-210(a), G.S., provides in relevant part:

> 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.

18. Section 1-212(a), G.S., provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

19. Both respondents, in answers to questions under cross examination from the complainants and the hearing officer, were evasive and non-responsive, claiming not to remember or be able to explain their own actions, giving inconsistent answers to questions, and refusing to answer some questions at all. The specifics of this testimony, and findings of the respondents' credibility, are described below.

20. Both respondents refused, despite specific direction by the hearing officer after the respondents' objections were overruled, to answer, under cross-examination, the question to whom they had sent the emails. [1] Both testified that the reason for their refusal

[1] The respondents objected on the grounds that the witness had already testified that the disclosure was to someone unnamed who was not a member of the Board of Education; that "we've already had this discussion;" and that the witness was a "whistleblower."

was to protect the recipients. Although this testimony initially seemed believable to the hearing officer, upon reflection it is found not credible, as the recipient of the information was necessarily a deliberate participant in the design to expose the communications, by virtue of then forwarding the information to the Facebook page of a town official. Moreover, it is difficult to reconcile the respondents' testimony about their motivation for protecting the recipients with their claims that, aside from the records forwarded, the respondents' emails contained no other content. This inconsistency raises the question: why was it necessary to protect the recipients if nothing but records were transmitted to them, without comment or direction?

21. The Commission infers from the respondents' refusal to answer that the answers would have been adverse to the respondents' defense of this matter—for example, that the disclosures were to other public officials outside the Board of Education, or that disclosure of the identities of the recipients would enable the complainant to approach the recipients and request the recipients' copies of the emails that the respondents sent, which inquiry could result in disclosure of the contents of the transmittal emails. The respondents' testimony about their reasons for refusing to answer simply to protect the recipients is not credible.

22. Also, it is found that the transmittals that originated with the respondents ended up on the Facebook page of a town official who, by virtue of her position as secretary of the Republican Town Committee, is presumed to have significant contacts with town officials, particularly those of her party.

23. It is therefore found by inference from the facts on the record, and based upon the credibility of the respondents' testimony, that the transmittals by the respondents were made to other town officials, albeit not other members of the Board of Education, for the purpose of generating discussion among both town officials and others about a matter within the purview of the board's business—that is, how the board conducts its business by email.

24. Both respondents testified that there was no content to their transmittals of the Board records, other than the actual records transmitted. This testimony is not credible. It is found, based on a reasonable inference from the facts on the record, including the respondents' testimony that they were frustrated by the ongoing practices of the Board and intended to reveal these practices by disclosure of the email chain and text messages, that the records would not have been transmitted without any comment or explanation of the reason for their transmittal. Moreover, it is found that the respondents either deleted, or declined to produce, or obtain from the recipients, the emails themselves, thereby withholding direct evidence of the content of the transmittals. It is inferred from this deletion of evidence, or refusal to produce it, that the contents of the transmittals do not support the respondents' testimony.

25. It is therefore found by inference from the facts in the record that the contents of the transmittals by the respondents related to the respondents' purposes for disclosing

the records of the Board to other public officials, and therefore relate to the conduct of the public's business within the meaning of §1-200(5), G.S.

26. The respondent Hamilton testified that she could not recall whether she had transmitted the Board's records to more than one individual. This testimony is not credible. It is found, based on a reasonable inference from the facts on the record, including the fact that Ms. Hamilton considered it important that the records be disclosed, and initially did not admit that she had disclosed the records, that she would have given some considerable thought to whom the disclosures were to be made, and that she would have not have completely forgotten the recipients of the disclosures. Moreover, it is found that the respondents either deleted, or declined to produce, the emails themselves, thereby withholding direct evidence regarding the identity of the recipients. It is inferred from this deletion of or refusal to produce this evidence that the contents of the email do not support the respondents' testimony.

27. It is found that neither respondent could provide a credible explanation under cross-examination as to why he or she had selected the particular records they did for disclosure, or why they had made the disclosures when they did, long after the underlying events had transpired. When asked about the timing or motivation of the disclosures, both respondents' repeatedly testified merely that they were "frustrated." When asked why he had had selected the particular email chain for disclosure, Mr. Freedman answered simply, "Why not?" and "Because that's the one at the time that I felt I wanted to submit."

28. Both respondents testified that they could not recall whether they themselves had participated in email or text messages similar to the ones they revealed and claimed to be improper. This testimony not credible. Contrary to the respondents' testimony, it is found from the documentary evidence on the record that both respondents participated in at least one email discussion among Board members concerning the Board's attorney's disclosed email concerning the superintendent's compensation. It is additionally found that, considering that the respondents considered the practice of conducting Board business by email or text unacceptable, it is reasonable to infer that they would remember whether or not they themselves had participated in the very practice of which they disapproved.

29. Both respondents testified under direct examination that they conducted a diligent search of their personal computers, and did not retain the emails transmitting the two Board records (the email chain originating with the attorney, and the text messages), which they testified that they had deleted long ago.

30. When asked under cross examination why they had deleted the requested emails, both respondents testified, for the first time, to having configured their email systems to *automatically* delete all sent emails. It is found to be an unusual and convenient coincidence that both respondents would have so configured their email systems in such a way.

31. It is found that the respondents' testimony under cross examination that they had configured their email systems to automatically delete sent emails is not consistent with their original statements under direct examination, in which they averred that when they received the complainant's request, they "remembered that [they] had previously deleted the record at issue long before it was requested," and they had a "recollection that [they] had deleted the message/e-mail at issue." Their original testimony makes no mention of automatic deletion, or remembering automatic deletion, but implies a memory of a specific act of deletion.

32. It is additionally found that the claim of automatic deletion of all sent emails, including emails relating to the conduct of the Board's business, and especially including the very email claimed to have been sent to expose the conduct of the Board's business, creates an inference that the respondents have something to hide, and thus further supports an inference that the respondents' testimony about the deletion of the records and reason for the deletion was not credible. Further, it is found that the belated and inconsistent explanation that the sent emails were "automatically" deleted "long ago" is more likely intended to shield the respondents' from the accusation that the specific emails requested were deliberately deleted in order to prevent their disclosure. Further, the respondents' lack of credibility generally casts substantial doubt upon their testimony about the automatic deletion of the emails, or their reasons for doing so.

33. It is therefore found that the respondents' testimony about the automatic deletion of the emails, including their purported reasons for doing so, is not credible.

34. Based upon the findings above, it is found by reasonable inference from the facts on the record that the transmittals of the email chain and the text messages were made to governmental officials, and related to the conduct of the public's business. Specifically, it is found that the respondents' evasions, memory lapses, and refusals to answer all support an inference that the emails were in fact subject to disclosure under the FOI Act as public records.

35. Both respondents testified, on direct examination, that their transmittals were not authorized by the Board of Education, not done as part of other Board of Education business, were not known at the time to the Board of Education, were not the result of any Board of Education action at any Board of subcommittee meeting, were not released during a meeting, and were done on the respondents' personal time, and that the Board of Education had no role in the transmittals.

36. It is also found that both the respondents' transmittals of the Board's records, and the complainant's FOI complaint in reaction to those transmittals, are at least partly partisan in nature.

37. It is found, however, that none of this rebuts the conclusion that the transmittals were made to other governmental officials outside the Board of Education, and that the transmittals related to the conduct of the public's business. While the transmittals may not been part of the process by which the Board conducted business, it is

nonetheless clear that the transmittals *related* to the conduct of the public's business. Indeed, it is apparent from the Facebook interchanges that followed the postings on Ms. Schierloh's account, the admission by Mr. Freedman regarding his disclosure, and the subsequent discussions and votes by members of the Board of Education at subsequent public meetings, that virtually everyone involved clearly believed that the unauthorized transmittals related to the conduct of the public's business. *See* paragraphs 6 through 9, above.

38. The respondents contend that the requested records are not public records within the meaning of §1-200(5), G.S., based on this Commission's decisions in Docket #FIC 2015-280, PTO Council of Norwalk v. Mosby et al.; Docket #FIC 2015-261, Torrano v. Mosby et al.; and Docket #FIC 2015-281, Chapman v. Mosby et al.

39. In the three Mosby cases, the respondent Mosby, a member of the Norwalk Board of Education, had obtained copies of public records for the purpose of pursuing a complaint with the NAACP alleging discrimination and disparate treatment by Board against African-American and Hispanic female Board members. The complainants sought to obtain copies of the copies of the public records that Mosby had collected, during her personal time, in order to see her evidence of discrimination.

40. The three Mosby cases raised no issues concerning to whom the public records were sent, or what additional communications accompanied the transmittal of the records, which are the only two issues raised in this case.

41. It is therefore concluded that the three Mosby cases, which were decided on the facts and circumstances of those particular matters, do not control the outcome in this case, in which the only information sought is the identity of the recipients of the records, and the unknown content that accompanied the transmittal of those records.

42. In the first Report of Hearing Officer that proposed a decision in this matter, it was concluded in paragraphs 13 and 14 that the requested records were not public records, but only records of a political act taken to expose actions or communications by the respondents, citing Bromer v. Herrman et al., Docket #FIC 2013-376 (letter to newspaper signed by selectmen was political action seeking to refute statements made by adversaries, and was not a matter over which the agency had supervision, control, jurisdiction or advisory power).

43. Based upon the additional evidence produced at the second hearing on this matter, most specifically the findings concerning the credibility of the two respondent-witnesses who did not testify at the first hearing, and the additional findings that followed from those credibility determinations; and further based upon a reconsideration of the legal analysis in the first Report of Hearing Officer; it is concluded that paragraphs 13 and 14 of the first Report of Hearing Officer were incorrect.

44. It is therefore concluded that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

45. The respondents raised no issue concerning any purported exemption to the disclosure of the requested records.

46. It is therefore concluded that the respondents violated §1-210(a), G.S., by failing to produce the requested records.

47. In reaching this conclusion, the Commission notes that it cannot countenance the destruction of public records, and then a refusal to testify credibly about the contents of those records.

48. Further, while the Commission is cognizant of the respondent's testimony that the requested records were automatically deleted, the respondents offered no evidence that the deleted records could not be recovered from the respondents' personal computers, or from the email services to which the respondents subscribe, or from the recipients of the requested 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 provide the complainant with copies of the requested records.

Approved by Order of the Freedom of Information Commission at its regular meeting of September 28, 2016.

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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:

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Cynthia A. Cannata
Acting Clerk of the Commission

FIC/2015-544/FD/cac/9/28/2016