FIcap # 2012-007
FIC# 2011-297

NO. CV 12 6015969S	:	SUPERIOR COURT
FREEDOM OF INFORMATION OFFICER, STATE OF CT, DMHAS	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	APRIL 29, 2013

MEMORANDUM OF DECISION

The plaintiffs, freedom of information officer, department of mental health and addiction services, and the department of mental health and addiction services itself (the department), appeal from an April 25, 2012 final decision of the defendant freedom of information commission (FOIC).[1] The FOIC issued its final decision on the complaint of the defendant Ron Robillard (Robillard). Robillard appeared in the appeal and filed a memorandum in support of the FOIC's final decision.

Robillard filed his complaint with the FOIC on June 8, 2011 and received a hearing before the FOIC on September 19, 2011. A proposed decision was issued by the hearing officer on March 22, 2012. After a meeting of the FOIC on April 25, 2012, the final decision was issued. The final decision made the following findings:

* * *

---

[1] The department is aggrieved by the orders of the FOIC for the purposes of General Statutes § 4-183 (a).

2. By letter of complaint filed on June 8, 2011, the complainant [Robillard] appealed to the Commission, alleging that the respondents [the department] violated the Freedom of Information ("FOI") Act by failing to provide psychiatric and medical records concerning the confinement of Amy Archer Gilligan from 1924 to 1962 at what is now Connecticut Valley Hospital, following her conviction for second degree murder for the arsenic poisoning of a resident of her nursing home. (Mrs. Gilligan was an accused serial murderer credited as the "inspiration," for lack of a better word, for the play "Arsenic and Old Lace.")

* * *

4. It is found that the respondents denied the complainant's request for medical and psychiatric records on May 12, 2011.

* * *

8. The requested records were submitted to the Commission for an in camera inspection. It is found that the withheld records consist primarily of psychiatric records and medical records.

* * *

12. It is found that [certain] records withheld by the respondents fall within the definition set forth in § 52-146d (2), G.S. . . . [2]

---

[2] "Communications and records" means all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any of such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever

13. It is concluded that the records . . . in paragraph 12, above, are exempt from disclosure pursuant to § 52-146e, G.S., and that the respondents did not violate the FOI Act by withholding them from the complainant.

14. The respondents contend that [certain other] records are also exempt from disclosure pursuant to the psychiatrist-patient privilege. . . .

15. It is found, however, that the documents . . . in paragraph 14, above, are not "communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, including communications and records which occur in or are prepared at a mental health facility" within the meaning of § 52-146d, G.S. Some of the records are communications with third parties, such as Gilligan's psychiatrist prior to her arrest, or the representative of an insurance company, and most do not relate to the diagnosis or treatment of Gilligan's mental condition.

16. It is therefore concluded that the respondents violated the FOI Act by failing to disclose the records . . . in paragraph 14, above. . . .

* * *

24. With respect to the remaining records withheld from the complainant (including those . . . in paragraph 14 and found not to be privileged psychiatric records in paragraph 15), most of which are on their face medical records, the

---

made, including communications and records which occur in or are prepared at a mental health facility.

respondents claim the records contain medical information protected from disclosure pursuant to § 1-210(b) (2), G.S., and the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104-191, 110 Stat. 1936 (1996).

25. It is found that HIPAA applies to any entity that is: a health care provider that conducts certain transactions in electronic form; a health care clearinghouse; or a health plan. It is found that an entity that is one or more of these types of entities is a "covered entity" required to comply with HIPAA. 45 C.F.R. 160.103, 45 C.F.R. 164.502.

26. The Commission takes administrative notice of the fact that CVH is a health care provider that conducts certain transactions in electronic form. It is found, therefore, that CVH is a covered entity required to comply with the HIPAA regulations.

* * *

29. It is concluded that the FOI Act requires by law the disclosure of non-exempt requested records, within the meaning of 45 C.F.R. § 164.103. *See* State of Nebraska ex re. Adams County Historical Society v. Kinyoun, 277 Neb. 749 (2009), Abbott v Texas Department of Mental Health, 212 S.W. 3rd 648 (Tex. 2006); State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St.3rd 518, 2006 (state public records laws which require disclosure of records are not in conflict with HIPAA privacy rules exceptions, even for covered entities).

30. It is found that HIPAA does not bar disclosure of the medical information contained in the in camera records.

31. It is concluded that HIPAA is not a "federal law" that exempts the requested medical records from disclosure pursuant to § 1-210(a), G.S. *See* Priscilla Dickman v

Director, Health Affairs Policy Planning, Department of Community Medicine and Health Care, State of Connecticut, University of Connecticut Health Center; Docket #FIC2009-541 (July 28, 2010) (¶¶ 38-45); Robin Elliott v. Commissioner, State of Connecticut, Department of Correction; Docket #FIC2008-507 (July 22, 2009) (¶¶ 76-85); Lucarelli v. Old Saybrook et al., Docket #FIC2010-068 (¶ 17).

32. The respondents also maintain that Gilligan's medical records are exempt from disclosure pursuant to § 1-210(b)(2), G.S., which provides that disclosure is not required of "[p]ersonnel or medical and similar files the disclosure of which would constitute an invasion of personal privacy."

* * *

36. It is concluded, therefore, that disclosure of the requested medical records would not be an invasion of personal privacy, because no such privacy right exists with respect to the deceased. See Crowley v. Commissioner, State of Connecticut, Department of Public Health, Docket #FIC2007-123 (August 8, 2007); and David K. Jaffe v. State of Connecticut, Connecticut Lottery Corporation Docket #FIC1999-019 (April 29, 1999). (Disclosure of deceased employee's personnel files would not be an invasion of privacy because privacy rights terminate at death.)

37. Even if Gilligan's privacy rights survived her death in 1962, her medical records are a legitimate matter of public concern, and disclosure of them would not be highly offensive to a reasonable person.

38. First, the Commission takes administrative notice of the fact Gilligan was a very public figure about whom legitimate public interest remains. The complainant asserts, without contradiction, in his September 19, 2011 written

statement:

> There is already an extensive official public record about Mrs. Gilligan. At the State Library, you will find a five-count indictment for murder, a hundred-page coroner's inquest report, a 1,000-page transcript of her first trial, a hundred-page judge's finding prepared for the Supreme Court, the state and defense appeal briefs, and a Supreme Court ruling– an equally if not more extensive record of secondary sources in the public domain. The fact that the Library has preserved these records and made them available to the public is testament to their historic significance and their value to future researchers, two criteria laid out in statute to guide acquisitions by the State Archives.
> Given the extent of the record in the public domain, there would seem to be very little we do not know about Mrs. Gilligan.
> But the records I have requested, and only these records can answer some very important questions.
> What was the true nature of her disease?
> Was her reported morphine addiction the result of becoming addicted to what was then a legal pain killer she used to treat the physical manifestations of an underlying disease?
> Were her large purchases of arsenic for therapeutic and not criminal use?
> What sort of treatments did she receive at the hospital, and are they considered effectual by today's standards?
> The functioning of our judicial system and how we care for the mentally ill are issues of

legitimate public concern, even in retrospect.

39. Second, the Commission finds that it would not be highly offensive to disclose the medical records of a notorious serial murderer who has been dead for 50 years.

40. It is therefore concluded that Gilligan's medical records are not exempt from disclosure pursuant to § 1-210(b) (2), G.S., and that the respondents violated the FOI Act by failing to provide such records to the complainant.

The FOIC entered the following order:

1. Forthwith, the respondents shall provide to the complainant all of the requested records not found to be exempt in this decision. (Return of Record, ROR, pp. 367-387).

This appeal followed. As before the FOIC, the department makes the following claims on appeal: (1) The FOIC erroneously applied Connecticut's psychiatric-patient privilege by allowing disclosure of certain of the documents requested by Robillard, (2) The FOIC erroneously applied the § 1-210 (b) (2) exemption from disclosure under the freedom of of information act (FOIA) and (3) the FOIC erroneously interpreted the department's claimed exemption under HIPAA.

The Appellate Court has recently stated the standard of review of an FOIC decision as follows: "We begin by setting forth our well established standard of review of agency decisions. Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . [A]n agency's factual and discretionary determinations are to be accorded

considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference.[3] . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law." (Citations omitted; internal quotation marks omitted). *Commissioner of Public Safety* v. *Freedom of Information Commission*, 137 Conn. App. 307, 311-12, 48 A.3d 694, cert. granted, 307 Conn. 918, 54 A.3d 562 (2012). See also *Tompkins* v. *Freedom of Information Commission*, 136 Conn. App. 496, 504, 46 A.3d 291 (2012).

Commissioner of Public Safety also has relevancy to the interpretation of a statute in the context of the Freedom of Information Act. "Because statutory interpretation is a question of law, our review is de novo. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the

---

[3] An exception to this rule is where the agency's interpretation has been "time tested." *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 603, 893 A.2d 431 (2006). The court does not apply this exception here.

language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to the existing legislation and common law principles governing the same general subject matter. . . .

"[P]ursuant to § 1-2z, [the court is] to go through the following initial steps: first, consider the language of the statute at issue, including its relationship to other statutes, as applied to the facts of the case; second, if after the completion of step one, [the court] conclude[s] that, as so applied, there is but one likely or plausible meaning of the statutory language, [the court] stops there; but third, if after the completion of step one, [the court] conclude[s] that, as applied to the facts of the case, there is more than likely or plausible meaning of the statute, [the court] may consult other sources, beyond the statutory language, to ascertain the meaning of the statute. . . .

"It is useful to remind ourselves of what, in this context, we mean when we say that a statutory text has a plain meaning, or, what is the same, a plain and unambiguous meaning. [Our Supreme Court] has already defined the phrase. By that phrase we mean the meaning that is so strongly indicated or suggested by the language as applied to the facts of the case, without consideration, however, of its purpose or the other, extratexual sources of meaning . . . that, when the language is read as so applied, it appears to be *the* meaning and appears to preclude any other likely meaning. . . . Put another way, if the text of the statute at issue, considering its relationship to other statutes, would permit more than one likely or plausible meaning, its meaning cannot be said to be plain and unambiguous." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission,* supra, 137 Conn. App. 312-13.

The department claims first that the psychiatrist-patient privilege of § 52-146e, under the definition of § 52-146d (2), applies to any record "generated" at a mental health facility. Thus the records relating to Gilligan that were from Connecticut Valley Hospital, a mental health facility, should fall under the privilege. Department's brief, page 4.

The department misreads the statutory provisions.[4] The definitional section, § 52-

---

[4] The statutory provisions are sufficiently clear so that extratexual references are not

146d (2), applies to oral or written *communications* relating to a patient's mental condition. The identity of the patient, protected under § 52-146e, means, under § 52-146d (4), records that arise from a "communication." Section 52-146d (2) specifically states that communications are "wherever made," and thus the key is not the facility, but the communication itself. As the Appellate Court stated in *Germain* v. *Town of Manchester*, 135 Conn. App. 202, 209, 41 A.3d 1100 (2012), a case involving a statutory exemption under FOIA, "In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended. . . . Under the plaintiff's interpretation of the plain language of [the statutory exemption], the word . . . is written out of the statute. It is well established that a statute must be interpreted to give effect to all its provisions. . . . No word within a statute is to be rendered mere surplusage." (Brackets omitted; citations omitted; internal quotation marks omitted.)

The court has in addition reviewed the sealed records[5] provided to this court to determine if any of the records, in contradiction to the findings of the FOIC, are subject to the psychiatrist-patient privilege.[6] If, after an in camera review, a court determines that

---

needed for interpretation.

5

The general topics of these sealed records have been listed in Findings ## 12 and 14. The sealed records also contain records relating to Gilligan's physical and dental examinations. See Finding # 24.

6

The defendant Robillard argues in his brief that the FOIC erred in applying and allowing

certain of the records are subject to the psychiatrist-patent privilege, the department's appeal must be sustained as to those documents. *Rocque* v. *Freedom of Information Commission*, 255 Conn. 651, 667, 774 A.2d 957 (2001).

The court, after review, agrees with the conclusions of the FOIC, except for two documents. The document of Finding # 12, labeled as (a), Admission Card, was redacted as to one page setting forth "provisional diagnosis." There are, however, four pages to the document and "provisional diagnosis" appears on three of these pages. Therefore, in addition to the deletion on the first page, there should be a similar deletion on the second and fourth pages as well. In addition, the document of Finding # 14, labeled as (g), Correspondence from Superintendent to A.P. Darling, also contains the diagnosis and the document should be redacted to strike the diagnosis.

The second claim of the department is that the records ordered produced are subject to FOIA exemption § 1-210 (b) (2) ("medical files . . . the disclosure of which would constitute an invasion of personal privacy"). "When a claim for exemption is based upon [this FOIA provision], the person must meet a twofold burden of proof. First, the person claiming the exemption must establish that the files are . . . medical . . . .

---

the psychiatrist-patient privilege to the documents set forth in Finding 12. He also argues that the exemption for attorney-client privilege was improperly allowed by the FOIC in a portion of the final decision not part of the department's appeal. Robillard did not appeal from the final decision of the FOIC, but has appeared only as a defendant, after service by the department. Therefore, the court does not reach Robillard's arguments challenging the scope of the FOIC's disclosure order.

Second, the person claiming the exemption . . . must also prove that disclosure of the files would constitute an invasion of personal privacy. The . . . disclosure constitutes an invasion of personal privacy . . . [as determined in *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 175 (1993) when] "the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person." (Citations omitted.) *Rocque* v. *Freedom of Information Commission*, supra, 661-62; *Tompkins* v. *Freedom of Information Commission*, supra, 136 Conn. App. 496 (2012). The court agrees in general with the standards employed by the FOIC in the final decision, Findings ## 36-39, in its determination that the department did not meet its burden under § 1-210 (b) (2) and *Perkins*.

The court has again conducted a review of the sealed records in this appeal and concludes that regarding the documents of Finding # 14, the FOIC has correctly disallowed the b (2) exemption, subject to the court's findings on the psychiatric-patient privilege above. Also in the sealed record are documents generated by Gilligan's physical and dental examinations from 1924 to a time just prior to her death.[7] The court concludes that the department has met its burden that these records are not a legitimate matter of public concern and would be highly offensive if disclosed. Therefore the court sustains the department's appeal as to these documents.

---

[7] See footnote 5, supra.

The final claim raised by the department is that the FOIC erred in finding an exception to the applicability of the federally-enacted Health Insurance Portability and Accountability Act (HIPAA). See Findings ## 29-31; § 45 C.F.R. § 164.512 (a) ("A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of the law.") The department in its brief contested the interpretation that the FOIC gave to the federal regulation.

The court asked the parties during oral argument to re-brief this issue in light of *Director of Health Affairs Policy Planning, University of Connecticut Health Center* v. *Freedom of Information Commission*, 293 Conn. 164, 977 A.2d 148 (2009) that also involved an issue of "required by law." Further, a subsequent event occurred with the issuance by the Department of Health and Human Services of an addition to its HIPAA regulations that provides: "A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual for a period of 50 years following the death of the individual." 45 C.F.R. § 164.502 (f), printed in the Federal Register on January 25, 2013. Since Ms. Gilligan died on April 23, 1962, under this provision, the department is exempt from HIPAA compliance. The court need only resolve the HIPAA issue in light of the additional regulation.

The department argues that the court must review the FOIC's decision at the time

that Robillard filed his complaint and must therefore disregard the amended regulation. However, our Appellate Court has held that a subsequent change to FOIA while an appeal was pending has rendered an appeal moot. The court stated: "An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . It is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Brackets omitted; citation omitted.) *Commissioner of Correction* v. *Freedom of Information Commission*, 129 Conn. App. 425, 428-29, 22 A.3d 630 (2011).

In the *Correction* appeal, subsequent to the FOIC final decision, the legislature created an exemption to FOIA so that the complainant was not allowed access to an agency record. Here, a federal regulation has been adopted so that the complainant may have access to the requested records without HIPAA consideration. Even if the court were to analyze the appeal at the time the original request was made, and find that HIPAA did not allow access, the federal regulation has now been amended to allow access. If Robillard renewed his request today, the department would not have the

protection of HIPAA. Therefore this portion of the appeal is moot.

The court dismisses the appeal, except as noted above.

Henry S. Cohn, Judge