FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Josh Kovner and The Hartford Courant,

Complainants

against Docket #FIC 2018-0035

Commissioner, State of Connecticut, Department of Mental Health and Addiction Services; and State of Connecticut, Department of Mental Health and Addiction Services,

Respondents December 19, 2018

The above-captioned matter was heard as a contested case on May 31, 2018, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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

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

2. By letter of complaint filed on January 22, 2018, the complainants appealed to the Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying them copies of certain incident reports created by the respondents' Police Department.

3. It is found that the complainants made a November 9, 2017 request (repeating May 15 and July 5, 2017 requests) to the respondents for:

> DMHAS [Department of Mental Health and Addiction Services] Police Department incident reports on any and all deaths in 2016 of Whiting Forensic Division patients that were deemed "accidental" by the medical examiner's office, including, but not limited to, a death of a patient on December 1, 2016. At the time, in reference to the December 1, 2016 death, DMHAS said in a statement that the patient "died due to a medical event."

4. The November 9, 2017 request added that "[a]ll references to the identity of a patient can be redacted."

5. It is found that the respondents denied the complainant's request on January 22, 2018.

6. Section 1-200(5), G.S., defines "public records" as follows:

> 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, ...whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

7. 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.

8. 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."

9. A responsive record concerning a death on December 1, 2016, which consists of a single DMHAS police case/incident report, was submitted to the Commission for an in camera inspection in two forms: one unredacted, and one redacted. The pages have been numbered by the Commission as 2018-0034-01U through 2018-0034-41U (unredacted) and 2018-0034-01R through 2018-0034-41R (redacted).

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

11. The respondents maintain that the requested police incident reports, to the extent they identify or confirm the identity of a psychiatric patient, are exempt from disclosure pursuant to §52-146e, G.S., which provides in relevant part:

> (a) All communications and records as defined in section 52-146d shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Except as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.

12. Section 52-146d(4), G.S., provides in relevant part:

> ... as used in sections 52-146d to 52-146i, inclusive ... '[i]dentifiable' and 'identify a patient" refer to communications and records which contain (A) names or other descriptive data from which a person acquainted with the patient might reasonably recognize the patient as the person referred to ....

13. The respondents contended that disclosing the requested records will identify a patient, because the request seeks information about a specific individual.

14. It is found that the complainants know the identity of the patient who died on December 1, 2016, and reported on the incident.

15. The respondents nonetheless contended that, although the complainants, and the public by way of the complainants' reporting, already know the identity of the patient, that the records will "confirm" that identity, and that such confirmation is not permitted under §52-146e, G.S.

16. It is found that the records are not necessary to confirm the identity of the patient. It is found that the patient's identity, to the extent that "confirmation" falls within the strictures of §52-146e, G.S., has already been confirmed by the patient's family, by public reporting, and by the Chief State Medical Examiner's Office public report of the autopsy.

17. Additionally, it is found that the complainants' request expressly indicated that all references to the identity of a patient could be redacted. Unless the records identify a patient, there can be no violation of §52-146e, G.S.

18. Nonetheless, the express terms of §52-146d(4), G.S., define "identify" to include records that contain the name or other identifying information of a patient, and do not create an exception for a patient who has been already identified.

19. It is found that the police reports contain the name or other identifying information of a patient.

20. However, the name and other identifying information of a patient are only confidential if contained in communications and records as defined in §52-146d(2), G.S.

21. Section 52-146d(2), G.S., defines such protected communications and records as follows:

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

22. In addition to the express language of the statutes, the respondents contended that the Connecticut Supreme Court has repeatedly held "that the psychiatric patient privilege extends to communications and records that identify a patient," citing *Falco v. Institute of Living*, 254 Conn. 321, 329 (2000); *Freedom of Info. Officer v. Freedom of Info. Comm'n*, 318 Conn. 769, 785 (2015); *State v. Fay*, 326 Conn. 742, 751 (2017).

23. The Commission notes that *Falco*, above, adjudicated a discovery dispute, not an appeal from a FOI Commission case; and that the records at issue there were not police reports or records which otherwise fell outside the definition set forth in §52-146d, G.S. The party seeking disclosure in *Falco,* unlike the instant case, conceded that §52-146e G.S., expressly prohibited disclosure, but argued that the trial court could balance competing interests and override the privilege in its discretion. No such issue is presented in the instant case. The Commission further notes that, unlike the instant case, the identity of the patient was not already known to the party seeking discovery, who was using discovery as a way to find the identity of an apparently otherwise unknown patient.

24. The Commission notes that *Freedom of Info. Officer*, above, did not concern anything resembling police reports, but only whether certain medical records were also psychiatric records. [1]

25. The Commission observes that *State v. Fay*, above, concerned a psychiatrist's treatment records and testimony, not police records.

26. It is concluded that the cases cited by the respondents do not expressly or implicitly expand the scope of §§52-146d or 146e, G.S., to include police records, or any other records beyond those relating to diagnosis or treatment that identify a patient.

27. It is found that the requested records were prepared by the respondents' police department.

28. The respondents contended that the police officers serve in a recovery-oriented healthcare service agency; that they "provide safety and security management activities which are critical to maintaining compliance required for the Joint Commission on Accreditation of Healthcare Organizations; that DMHAS Police receive extra training on serving the population at Whiting; and that psychiatrists and other mental health professionals cannot treat patients if they cannot ensure patient safety and security and treatment.

29. It is found, however, the police officers do not participate in the diagnosis or treatment of a patient's mental condition, and that the incident reports prepared by them do not reflect diagnosis or treatment made by others.

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[1] The Commission had ordered disclosure of many records in the underlying administrative decision in that case, Docket #FIC 2011-297, *Robillard v. Department of Mental Health and Addiction Services et al.*, that in fact identified and confirmed the identity of the patient as Amy Archer Gillian. But those records were neither psychiatric nor medical records, and that order of disclosure was not disturbed. Those records included accident reports and correspondence. See *Robillard*, above, at paragraph 14.

30. It is found that none of the requested records relate to the diagnosis or treatment of a patient's mental condition, within the definition set forth in §52-146d(2), G.S.

31. It is also found that none of the requested records are 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.

32. It is therefore concluded that none of the requested records fall within the definition at §52-146d(2), G.S., and therefore are not exempted from disclosure by §52-146e, G.S.

33. The respondents also claim the records are exempt from disclosure pursuant to the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104-191, 110 Stat. 1936 (1996).

34. The Commission takes administrative notice of the fact that HIPAA was enacted to safeguard medical information and "to improve the efficiency and effectiveness of the health care system by facilitating the electronic exchange of information with respect to financial and administrative transactions carried out by health plans, health care clearinghouses, and health care providers." See Standards of Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14776 (Mar. 27, 2002).

35. Federal regulations implementing HIPAA prohibit a "covered entity" from disclosing "individually identifiable health information," also known as "protected health information ("PHI"), without consent of the individual, except as permitted by such regulations. See 45 CFR §164.512; *Abbott v. Texas Department of Mental Health and Mental Retardation*, 212 S.W. 3d 648 (Tex. 2006).

36. A "covered entity" under the regulations means a health plan, a health care clearinghouse or a health care provider. 45 C.F.R. 160.103, 45 C.F.R. 164.502.

37. While Whiting Forensic Institution may be a covered entity, it is found that the respondent DMHAS's police department is not.

38. Even if the records are in the custody of a covered entity, the question remains whether those records are protected health information.

39. "Health information" is defined as any information that is created or received by a health care provider, and relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual. "Individually identifiable health information" is health information that identifies the individual or can be used to identify the individual. 45 CFR §160.103.

40. It is found that the requested records were created by DMHAS's police department, were not shown to be received by a health care provider, and, most importantly, do not relate to the physical or mental health or condition of an individual, or the provision of health care to an individual.

41. Even if the requested police report fell within the ambit of HIPAA, the federal regulations contain a list of exceptions to the prohibition on disclosure of PHI. One such exception provides that "a covered entity may use or disclose [PHI] 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 portions of such law." 45 CFR §164.512(a).

42. 45 C.F.R. §164.103 defines "required by law" as:

> a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law. Required by law includes, but is not limited to…statutes or regulations that require the production of information. . . .

43. It is axiomatic that the FOI Act is a statute that requires disclosure of public records, unless such records are exempt from disclosure. This Commission has repeatedly concluded that the confidentiality requirements in HIPAA do not prohibit disclosure where disclosure is required by the FOI Act. See *Alexander Wood et al. v. Chief Public Defender, State of Connecticut, Office of the Chief Public Defender, Division of Public Defender Services*, Docket #FIC 2012-276 (April 24, 2013), *aff'd George Flores, Esq. et al. v. Freedom of Information Comm'n,* Superior Court, Docket No. HHB-CV-13-6020905-S, Judicial District of New Britain (April 7, 2014, Cohn, J.); *Ron Robillard v. Freedom of Information Officer, State of Connecticut, Department of Mental Health and Addiction Services*, Docket #FIC 2011-297 (April 25, 2012), *rev'd on other grounds, Freedom of Information Officer, Department of Mental Health and Addiction Services et al. v. Freedom of Information Comm'n et al,* 318 Conn. 769 (2015); *Lamberto Lucarelli v. Chief, Police Department, Town of Old Saybrook et al.*, Docket #FIC 2010-068 (December 15, 2010); *Priscilla Dickman v. Director, Health Affairs Policy Planning, Department of Community Medicine and Health Care, State of Connecticut, University of Connecticut Health Center*, Docket #FIC 2009-541 (July 28, 2009); *Robin Elliott v. Commissioner, State of Connecticut, Department of Correction*, Docket #FIC 2008-507 (July 22, 2009). Such conclusion is consistent with the interpretation of the exception in 45 CFR §164.512(a) by courts in other jurisdictions. See *State of Nebraska ex re. Adams County Historical Society v. Kinyoun*, 277 Neb. 749 (2009); *Abbott v. Texas Dep't of Mental Health, supra; State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518 (2006).

44. The respondents nonetheless contend that the records may not be disclosed under HIPAA in accordance with the "required by law" exception because §1-210(b)(2), G.S., exempts medical and similar records from disclosure if disclosure would create an invasion of personal privacy.

45. The Supreme Court set forth the test for the exemption contained in §1-210(b)(2), G.S., in *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 175 (1993). The claimant must first establish that the files in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does

not pertain to legitimate matters of public concern, and second, that the disclosure of such information is highly offensive to a reasonable person.

46. The determination of whether a file is a medical or similar file requies a functional review of the documents at issue. *Connecticut Alcohol & Drug Abuse Commission v. FOIC*, 203 Conn. 28, 40-41 (1995). "[A] 'medical' file of an individual has as one of its principal purposes the furnishing of information for making medical decisions regarding that individual." *Id.* at 41.

47. It is found that the requested incident reports are a police report of a death, and did not contribute to making a medical decision.

48. It is therefore concluded that the requested records are not medical or similar records within the meaning of §1-210(b)(2), G.S.

49. Further, the general rule under the FOI Act is disclosure, exceptions to this rule must be narrowly construed, and the burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. *New Haven v. FOIC*, 205 Conn. 767, 775 (1988); *Superintendent of Police v. FOIC*, 222 Conn. 621 (1992); *Ottochian v. FOIC*, 221 Conn. 393 (1992).

50. The Supreme Court, in *Perkins*, supra, construed the term "invasion of personal privacy" according to its common-law meaning and adopted the definition for invasion of privacy set forth in 3 Restatement (Second) Torts Section §652I of the Restatement provides, in relevant part, that a claim " . . . for invasion of privacy can be maintained only by a living individual whose privacy is invaded." The commentary accompanying §652I provides that in the absence of statute, an action for invasion of privacy cannot be maintained after the death of the individual.

51. It is concluded, therefore, that disclosure of the requested police incident reports 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 #FIC 2007-123 (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.)

52. Even if the decedent's privacy rights survived his death, the police incident report is a legitimate matter of public concern, and disclosure of it would not be highly offensive to a reasonable person.

53. It is therefore concluded that the requested police incident reports are not medical or similar records exempt from disclosure pursuant to §1-210(b)(2), G.S.

54. It is concluded that the FOI Act requires disclosure of the requested police incident reports, and that HIPAA therefore does not prohibit disclosure. *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.3d 518, 2006 (state public records laws which require disclosure of records are not in conflict with HIPAA privacy rule exceptions, even for covered entities).

55. It is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the requested police incident reports.

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

1. Forthwith, the respondents shall provide to the complainant unredacted copies of all the requested records.

Approved by Order of the Freedom of Information Commission at its special meeting of December 19, 2018.

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:

JOSH KOVNER AND THE HARTFORD COURANT

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES; AND STATE OF CONNECTICUT, DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES, c/o Assistant Attorney General Walter Menjivar, Office of the Attorney General, 55 Elm Street, PO Box 120, Hartford, CT 06141-0120

Cynthia A. Cannata
Acting Clerk of the Commission

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