FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by FINAL DECISION

Aviva Stahl and Seth Wessler,

Complainants

against Docket #FIC 2021-0697

Commissioner, State of Connecticut, Department of Correction; and State of Connecticut, Department of Correction,

Respondents November 16, 2022

The above-captioned matter was heard as a contested case on May 10, 2022, at which time the complainants and the respondents appeared and presented testimony, exhibits and argument on the complaint. The hearing was conducted remotely through the use of electronic equipment, pursuant to §149 of Public Act 21-2 (June Special Session), as amended by §1 of Public Act 22-3.

On August 17, 2022, the respondents filed a motion for permission to file an additional exhibit, consisting of an affidavit with two attachments. Absent objection from the complainants, the hearing officer granted such motion. The affidavit with attachments has been marked as Respondents' Exhibit B (after-filed).

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

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

2. It is found that, by letter dated April 6, 2021, the complainants requested from the respondents copies of certain records relating to deaths of inmates in facilities of the respondent Department of Correction ("DOC") between January 1, 2019 through the date of the request.

3. It is found that, by email dated April 8, 2021, the respondents received and acknowledged the request, and informed the complainants that they were "actively working" to comply with it and would update the complainants on the status.

4. It is found that, on various dates between mid-April and the filing of the complaint in this matter, the complainants and the respondents corresponded, and the respondents provided copies of some of the records responsive to the request described in paragraph 2, above.

5. By letter dated and filed December 13, 2021, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide a copy of all requested records.

6. Section 1-200(5), G.S., provides:

> "[p]ublic records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method.

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

> [e]xcept 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 . . . (3) receive a copy of such records in accordance with section 1-212.

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

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

10. It is found that, as of the date of the hearing in this matter, only the following requested records remained in dispute:

(a) incident reports documenting the death of each person in the custody of the Department of Correction between January 19, 2019 and the date the search for such records was conducted;

(b) complete "health record" as that term is defined in [Department of Correction] Administrative Directive 8.7, for each inmate who died; and

(c) inmate health records not contained in the "health record".

11. The respondents argued that the records, described in paragraph 10(a), above, are "preliminary drafts" and therefore are exempt from disclosure pursuant to §1-210(b)(1), G.S., and that the records, described in paragraphs 10(b) and 10(c), above, are exempt from disclosure pursuant to state and federal laws requiring confidentiality of medical records.

12. With regard to the request, described in paragraph 10(a), above, it is found that 281 deaths of individuals in the custody of the respondents occurred within the time frame identified by the complainants, and that the respondents maintain incident reports pertaining to such deaths. It is found that, generally, incident reports completed by DOC staff provide a narrative description of a particular event or incident, including but not limited to a death, by a witness or responder to such event or incident. It is found that incident reports must be created for any incident that meets the definition of a Class 1, Class 2, or Class 3 incident, as defined in DOC Administrative Directive 6.6. It is further found that such incidents do not always trigger an investigation, and that incident reports are created and maintained by the respondents even if an incident does not result in an investigation.

13. It is found that when an inmate death occurs, the DOC conducts an investigation for the purpose of determining whether certain protocols or systems within the DOC were violated or should be changed or improved. It is found that the investigation involves interviewing staff members, reviewing systems and gathering relevant documents from a number of different units/divisions within the DOC, including the medical unit, the mental health unit and the security division. It is found that an investigation report includes incident reports, supplemental reports, the medical examiner's report regarding the cause of death, medical records and reports, mental health records and reports, and video recordings, if any. It is also found that the investigation report requires several levels of approval before such reports are considered final and that, at any time during the course of an investigation, additional investigation may be ordered, and the report revised or changed accordingly. However, it is found that the requested incident reports themselves are not subject to revision once they are signed by the author. It is found that once the investigation reports are final, the DOC discloses such reports to the public.

14. At the hearing in this matter, Counselor Supervisor Anthony Campenelli ("Campanelli") testified on behalf of the respondents that, at the time of the denial and the hearing, all but one of the 281 deaths were still under investigation and that, therefore, the associated incident reports requested by the complainants were "preliminary drafts" not required to be disclosed. However, after the hearing was closed, the respondents notified the hearing officer that such testimony was not accurate. Based on the affidavit of Campanelli, marked as Respondents' Exhibit B (after-filed), it is found that, at the time the request was denied, and at the time of the hearing, 180 of the 281 investigations into inmate deaths were closed, and that 55 such investigations remained open. It is found that the respondents did not offer evidence as to the status of the investigations into the other 46 inmate deaths.

15. With regard to the 180 investigations that were closed, the respondents conceded in their post-hearing reply brief, that the incident reports associated with such investigations were not "preliminary drafts" and therefore not exempt from disclosure under §1-210(b)(1), G.S. It is found, therefore, that the respondents violated §§1-210(a) and 1-212(a), G.S., by denying the complainants' request for such incident reports.

16. With regard to the respondents' claim that the incident reports associated with the 55 investigations that were open as of the date of the denial and the hearing in this matter, §1-210(b)(1), G.S., provides that disclosure is not required of "preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure."

17. The Connecticut Supreme Court ruled in Wilson v. Freedom of Information Commission, 181 Conn. 324, 332 (1980) ("Wilson"), that:

> [w]e do not think the concept of preliminary, as opposed to final, should depend upon who generates the notes or drafts, or upon whether the actual documents are subject to further alteration....
>
> Instead the term 'preliminary drafts or notes' relates to advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated....
>
> ...[p]reliminary drafts or notes reflect that aspect of an agency's function that precedes formal and informal decision making. We believe that the legislature sought to protect the free and candid exchange of ideas, the uninhibited proposition and criticism of options that often precedes, and usually improves the quality of, governmental decisions. It is records of this preliminary, deliberative and predecisional process the exemption was meant to encompass.

18. The year following Wilson, the Connecticut General Assembly passed Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1), G.S. That provision, which narrowed the exemption for preliminary drafts or notes, provides in relevant part:

> [n]otwithstanding [§1-210(b)(1)], disclosure shall be required of:
>
> [i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.... (emphasis added).

19. In Van Norstrand v. Freedom of Information Commission, 211 Conn. 339, 343 (1989) ("Van Norstrand"), the Supreme Court provided further guidance regarding "preliminary drafts." Citing the dictionary definition, the court stated that the term "preliminary" means "something that precedes or is introductory or preparatory," and "something that is preceding the main discourse or business." Id. According to the Court, "[b]y using the nearly synonymous words 'preliminary' and 'draft', the legislation makes it very evident that preparatory materials are not required to be disclosed." Id.

20. Accordingly, §§1-210(b)(1) and 1-210(e)(1), G.S., together, permit nondisclosure of records of an agency's preliminary, predecisional, deliberative process, provided that the agency has determined that the public interest in withholding the records clearly outweighs the public interest in disclosing them and provided further that such records are not interagency or intra-agency memoranda or letters, advisory opinions, recommendations or reports comprising part of the process by which governmental decisions and policies are formulated. See Shew v. Freedom of Information Commission, 245 Conn. 149, 164-166 (1998) ("Shew").

21. With regard to the "balancing test" required by §1-210(b)(1), G.S., it is well established that the responsibility for making the determination as to what is in the public interest is on the agency that maintains the records. See Van Norstrand at 345. The agency must indicate the reasons for its determination to withhold disclosure, which reasons may not be frivolous or patently unfounded. Id., citing Wilson at 339. See also People for Ethical Treatment of Animals, Inc. v. Freedom of Information Commission, 321 Conn. 805, 816-817 (2016). Thus, the only determination for the FOIC to make is whether the reasons for nondisclosure given by the agency are frivolous or patently unfounded. See Lewin v. Freedom of Information Commission, 91 Conn. App. 521, 522-523 (2005); Coalition to Save Horsebarn Hill v. Freedom of Information Commission, 73 Conn. App. 89, 99 (2002).

22. It is found that the incident reports described in paragraph 16, above, are not preliminary drafts or notes, as such incident reports are not preparatory or predecisional. In Shew, the Supreme Court concluded that interview summaries and affidavits prepared by the town's attorney during an investigation of the town's police chief were preliminary drafts because they were "created solely to serve as supporting documentation for [the attorney's] unfinished [investigation] report." Shew at 164-65. Unlike the witness summaries and affidavits in Shew, the incident reports at issue in the instant case were not created solely to serve as supporting documentation for an investigation. Instead, the requested incident reports are stand-alone factual reports that were required to be created by the DOC pursuant to Administrative Directive 6.6 to document an incident, regardless of whether such reports were considered during a subsequent investigation.

23. However, even if the requested incident reports were preliminary drafts or notes, it is found that the respondents failed to prove that they conducted the "balancing test" required under §1-210(b)(1), G.S. Campanelli testified that the Commissioner of the DOC determined that, while an investigation is ongoing, the public interest in withholding the requested incident reports when they are part of a pending investigation clearly outweighs the public interest in disclosure, because disclosure could result in a safety and security risk within a facility.

Campanelli further explained that, in a volatile environment such as a correctional facility, disclosure of a report that states, for example, that staff violated a policy, which after further investigation is determined to be untrue, may result in an unnecessary disruption or disorder in a facility.

24. It is found that the respondents did not offer evidence that they reviewed each incident report responsive to the request, described in paragraphs 10(a) and 16, above, prior to denying the request for each such report. In Shew, the Supreme Court determined that the records at issue in that case were preliminary, deliberative and predecisional, but concluded that, because the town manager "never reviewed the documents … he could not have conducted the balancing test mandated by the statute." Shew at 165. The Court therefore concluded that the town failed to prove that the records were exempt from disclosure pursuant to §1-210(b)(1), G.S.

25. Similarly, in the instant case, because the respondents did not review each incident report, it is found that they did not conduct the required balancing test, and that therefore, they failed to prove that the public interest in withholding such reports clearly outweighed the public interest in disclosure under §1-210(b)(1), G.S.

26. Moreover, even if the respondents had offered sufficient evidence to establish the applicability of §1-210(b)(1), G.S., to the requested incident reports, it is found that such reports would be required to be disclosed pursuant to §1-210(e)(1), G.S. Under that analysis, such incident reports would be intra-agency "reports" that comprise part of the process by which governmental decisions and policies are formulated, and they are not preliminary drafts of memoranda, prepared by staff members of a public agency, which are subject to revision prior to submission to or discussion among the members of such agency. See Lindquist v. Freedom of Information Commission, 203 Conn. App. 512, 530-535 (2021).

27. It is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding all of the incident reports, described in paragraphs 10(a) and 16, above, from the complainants.

28. With regard to the incident reports associated with the 46 inmate deaths referenced in paragraph 14, above, it is found that the respondents provided no evidence regarding whether the investigations relating to such incident reports were ongoing or closed. However, in light of the findings and conclusion set forth in paragraph 22, above, it is found that regardless of the status of the investigations, such reports are not "preliminary drafts" exempt from disclosure pursuant to §1-210(b)(1), G.S.

29. Accordingly, it is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by withholding the 46 incident reports, referenced in paragraph 14, above, from the complainants.

30. With regard to the requests for "health records" described in paragraphs 10(b) and 10(c), above, the respondents argued that such records are exempt from disclosure pursuant to

the Health Insurance Portability and Accountability Act ("HIPAA"), Pub. Law No. 104-191, 110 Stat. 1936 (1996).

31. Federal regulations implementing HIPAA prohibit a "covered entity" from disclosing "protected health information," except as otherwise permitted by such regulations. 45 C.F.R. § 164.502. Pursuant to 45 C.F.R. § 160.103, a "covered entity" is a health plan, health care clearinghouse, or health care provider that transmits protected health information in connection with certain transactions specified by the regulations.

32. It is found that the respondents did not present any evidence that the DOC is a "covered entity" as defined by HIPAA, and in fact the respondents conceded at the hearing and in their post-hearing brief that the DOC is not a "covered entity." It is therefore found that the respondents failed to prove that the health records described in paragraphs 10(b) and 10(c), above, are exempt from disclosure pursuant to HIPAA.

33. However, relying on Byrne v. Avery Ctr. For Obstetrics and Gynecology, P.C., 327 Conn. 540 (2018) ("Byrne"), the respondents further claimed that they are not required to disclose the requested health records because they are "voluntarily compliant" with HIPAA in order to "protect[] ... the [DOC] from negligence claims" arising from the disclosure of confidential medical information.

34. In Byrne, the Connecticut Supreme Court held that a healthcare provider may be liable in tort for the unauthorized disclosure of confidential medical information, and that "HIPAA and its implementing regulations may be utilized to inform the standard of care applicable to such claims ...." Byrne at 556–57. The Court recognized, however, that a health care provider may not be held liable for disclosing medical information if "the disclosure is otherwise allowed by law." Id. at 567–68.

35. It is found that, because §1-210(a), G.S., requires the disclosure of public records "except as otherwise provided by federal law or state statute," (emphasis added), the holding in Byrne does not justify withholding public records that are subject to disclosure under the FOI Act.

36. It is therefore found that the requested records are not exempt from disclosure based on the respondents' stated voluntary compliance with HIPAA.

37. The respondents also claimed that the requested health records described in paragraph 10(b) and 10(c), above, are exempt from disclosure pursuant to federal regulations set forth in 42 C.F.R. Part 2 ("Part 2 Regulations") governing the disclosure of records relating to the treatment of substance use disorders.[1] However, in light of the findings and conclusions set forth in paragraphs 38 through 60, below, the Commission need not address whether the requested health records are exempt from disclosure pursuant to the Part 2 Regulations.

[1] Following the issuance of the proposed final decision, the respondents filed a "Motion to Reconsider" dated November 8, 2022, in which they sought to reopen the contested case hearing to admit additional evidence in support of this claimed exemption. That motion was denied by the hearing officer, and the proposed exhibit has not been considered hererin.

38. The respondents also contended that the requested health records described in paragraph 10(b) and 10(c), above, are exempt from disclosure pursuant to various statutory privileges set forth in §§52-146 through 52-146q, G.S., as well as §19a-583 G.S., which prohibits the disclosure of certain information related to testing, diagnosis, and treatment of HIV.

39. Section 1-210(b)(10), G.S., provides that "[n]othing in the Freedom of Information Act shall be construed to require disclosure of ... communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes ...." (emphasis added).

40. Section 52-146e(a), G.S., provides:

> [a]ll 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.

41. Section 52-146d, G.S., provides that, for purposes of the psychiatrist-patient privilege set forth in §52-146e:

> (2) "[c]ommunications 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 psychiatric mental health provider, or between a member of the patient's family and a psychiatric mental health provider, or between any of such persons and a person participating under the supervision of a psychiatric mental health provider 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; ...
>
> (4) "[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, or (B) codes or numbers which are

> in general use outside of the mental health facility which prepared the communications and records ....

42. Section 52-146o(a), G.S., provides in relevant part:

> [a] physician or surgeon, licensed pursuant to section 20-9, or other licensed health care provider, shall not disclose (1) any communication made to him or her by, or any information obtained by him or her from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder, or (2) any information obtained by personal examination of a patient, unless the patient or that patient's authorized representative explicitly consents to such disclosure.

43. Section 52-146q(b), G.S., provides in relevant part: "[a]ll communications and records shall be confidential and, except as provided in subsection (c) of this section, a social worker shall not disclose any such communications and records unless the person or his authorized representative consents to such disclosure."

44. Section 52-146q(a)(3), G.S., provides that, for purposes of the social worker-patient privilege set forth in §52-146(b):

> "[c]ommunications and records" means all oral and written communications and records thereof relating to the evaluation or treatment of a person between such person and a social worker, or between a member of such person's family and a social worker, or between such person or a member of such person's family and an individual participating under the supervision of a social worker in the accomplishment of the objectives of evaluation or treatment, wherever made ....

45. Section 52-146s(b), G.S., provides in relevant part: "a professional counselor shall not disclose any such communications unless the person or the authorized representative of such person consents to waive the privilege and allow such disclosure."

46. Section 52-146s(a)(3), G.S., provides that, for purposes of the professional counselor-patient privilege set forth in §52-146s(b):

> "[c]ommunications" means all oral and written communications and records thereof relating to the diagnosis and treatment of a person between such person and a professional counselor or between a member of such person's family and a professional counselor ....

47. Section 19a-583, G.S., provides that "[n]o person who obtains confidential HIV-related information may disclose or be compelled to disclose such information," subject to certain exceptions not applicable here.

48. Section 19a-581, G.S., provides in relevant part:

> (7) "[p]rotected individual" means a person who has been counseled regarding HIV infection, is the subject of an HIV-related test or who has been diagnosed as having HIV infection, AIDS or HIV-related illness;
>
> (8) "[c]onfidential HIV-related information" means any information pertaining to the protected individual or obtained pursuant to a release of confidential HIV-related information, concerning whether a person has been counseled regarding HIV infection, has been the subject of an HIV-related test, or has HIV infection, HIV-related illness or AIDS, or information which identifies or reasonably could identify a person as having one or more of such conditions, including information pertaining to such individual's partners ....

49. On September 2, 2022, the hearing officer ordered the respondents to submit for in camera inspection:

> an unredacted copy of the complete 'health record' for one inmate, which health record is responsive to the request at issue in this matter and is claimed to be exempt from disclosure. The 'health record' submitted should be representative of the health records they maintain and contain records sufficient to demonstrate the basis for each exemption claimed by the respondents. To the extent that no single health record is sufficient, the respondents shall submit an unredacted copy of additional responsive health records.

50. On September 16, 2022, the respondents submitted for in camera inspection two compact discs containing exemplar health records. The first disc contains a health record which consists of 6,582 pages, which records will be identified as IC-2021-0697-1-1 through IC-2021-0697-1-6582. The second disc contains a health record which consists of 322 pages, which records will be identified as IC-2021-0697-2-1 through IC-2021-0697-2-322. The respondents also submitted an in camera index indicating the exemptions being claimed for each record.

51. Based on a careful in camera inspection of IC-2021-0697-1-1 through IC-2021-0697-1-6582, it is found that the records listed below are administrative in nature, such as

records documenting that an inmate was transferred to a new location, or records documenting certain administrative actions:

IC-2021-0697-1-22, IC-2021-0697-1-48, IC-2021-0697-1-78 through 80, IC-2021-0697-1-85, IC-2021-0697-1-88, IC-2021-0697-1-99, 2021-0697-1-100, IC-2021-0697-1-189, IC-2021-0697-1-192, IC-2021-0697-1-221 through 22, IC-2021-0697-1-233, 2021-0697-1-254, IC-2021-0697-1-412, IC-2021-0697-1-428 through 29, IC-2021-0697-1-472, IC-2021-0697-1-517, IC-2021-0697-1-554, IC-2021-0697-1-641, IC-2021-0697-1-724, IC-2021-0697-1-1227, IC-2021-0697-1-1236, IC-2021-0697-1-1282, IC-2021-0697-1-1412 through 13, IC-2021-0697-1-1604, IC-2021-0697-1-1662, IC-2021-0697-1-1701, IC-2021-0697-1-1766, IC-2021-0697-1-1899, IC-2021-0697-1-1955, IC-2021-0697-1-2091, IC-2021-0697-1-2137, IC-2021-0697-1-2151, IC-2021-0697-1-2194, IC-2021-0697-1-2202, IC-2021-0697-1-2210, IC-2021-0697-1-2221, IC-2021-0697-1-2228, IC-2021-0697-1-2239, IC-2021-0697-1-2253, IC-2021-0697-1-2259, IC-2021-0697-1-2263, IC-2021-0697-1-2277, IC-2021-0697-1-2292, IC-2021-0697-1-2301, IC-2021-0697-1-2308, IC-2021-0697-1-2326, IC-2021-0697-1-2334, IC-2021-0697-1-2363, IC-2021-0697-1-2379, IC-2021-0697-1-2386 through 87, IC-2021-0697-1-2391, IC-2021-0697-1-2405, IC-2021-0697-1-2412, IC-2021-0697-1-2438, IC-2021-0697-1-2494 through 96, IC-2021-0697-1-2515 through 16, IC-2021-0697-1-2605, IC-2021-0697-1-2608, IC-2021-0697-1-2637 through 38, IC-2021-0697-1-2649, IC-2021-0697-1-2670, IC-2021-0697-1-2828, IC-2021-0697-1-2844 through 45, IC-2021-0697-1-2933, IC-2021-0697-1-2970, IC-2021-0697-1-3140, IC-2021-0697-1-3643, IC-2021-0697-1-3652, IC-2021-0697-1-3698, IC-2021-0697-1-3828 through 29, IC-2021-0697-1-4020, IC-2021-0697-1-4078, IC-2021-0697-1-4117, IC-2021-0697-1-4182, IC-2021-0697-1-4295, IC-2021-0697-1-4315, IC-2021-0697-1-4371, IC-2021-0697-1-4507, IC-2021-0697-1-4553, IC-2021-0697-1-4567, IC-2021-0697-1-4610, IC-2021-0697-1-4618, IC-2021-0697-1-4626, IC-2021-0697-1-4637, IC-2021-0697-1-4644, IC-2021-0697-1-4655, IC-2021-0697-1-4669, IC-2021-0697-1-4675, IC-2021-0697-1-4679, IC-2021-0697-1-4693, IC-2021-0697-1-4708, IC-2021-0697-1-4717, IC-2021-0697-1-4724, IC-2021-0697-1-4742, IC-2021-0697-1-4750, IC-2021-0697-1-4779, IC-2021-0697-1-4795, IC-2021-0697-1-4802 through 03, IC-2021-0697-1-4807, IC-2021-0697-1-4821, IC-2021-0697-1-4828 through 29.

52. It is also found that IC-2021-0697-1-5236, IC-2021-0697-1-5249, and IC-2021-0697-1-6444 are communications between an inmate and non-medical staff concerning issues unrelated to the diagnosis or treatment of a physical or mental health condition.

53. Accordingly, it is found that the records identified in paragraphs 51 and 52, above, are not exempt from disclosure under any of the exemptions claimed by the respondents on the in camera index. To the extent the remainder of the 281 health records requested by the complainants contain any records of the nature and type described in paragraphs 51 and 52, such records also are not exempt from disclosure. It is therefore concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to provide to the complainants a copy of the in camera records identified in paragraphs 51 and 52, above, and by failing to provide to the complainants a copy of any records of the nature and type described in paragraphs 51 and 52, above, that may be contained in the remainder of the 281 requested health records.

54. It is found that, other than the records identified in paragraphs 51 and 52, above, IC-2021-0697-1-1 through IC-2021-0697-1-6582 contain information obtained from a patient by a physician or other health care provider related to the diagnosis and treatment of an actual or supposed physical or mental disease or disorder, and/or information obtained by personal examination of a patient. For example, the in camera records include physician orders, physical assessment records, nursing notes, laboratory and radiology test results, medication records, and records documenting mental health assessments. Accordingly, it is found that, other than the records identified in paragraphs 51 and 52, above, IC-2021-0697-1-1 through IC-2021-0697-1-6582 are subject to the privilege set forth in §52-146o, G.S. To the extent the remainder of the 281 health records requested by the complainants contain any records of the nature and type described in this paragraph, such records also are subject to the privilege set forth in §52-146o, G.S.

55. In addition, it is found that IC-2021-0697-1-1 through IC-2021-0697-1-6582 also include communications and records thereof relating to diagnosis or treatment between a patient and a psychologist, social worker, professional counselor, and/or psychiatric mental health provider. Such records include, for example, psychotherapy notes, psychological evaluations, mental health treatment plans, and similar records relating to the diagnosis or treatment of a patient's mental health condition. It is found that such records are subject to the privileges set forth in §§52-146c, 52-146e, 52-146q, and/or 52-146s, G.S.[2] To the extent the remainder of the 281 health records requested by the complainants contain any records of the nature and type described in this paragraph, such records also are subject to the privileges set forth in §§52-146c, 52-146e, 52-146q, and/or 52-146s, G.S.

56. Based on the foregoing, it is found that IC-2021-0697-1-1 through IC-2021-0697-1-6582, other than those identified in paragraphs 51 and 52, above, are exempt from disclosure pursuant to §1-210(b)(10), G.S. Accordingly, it is concluded that the respondents did not violate

[2] The Commission notes that the respondents did not identify §52-146s as the basis for any exemption. However, it is clear on the face of the in camera records that many of the records are communications and records thereof between the subject of the records and a professional counselor, relating to the diagnosis and treatment of the subject of the records. Accordingly, it is found that such records are subject to the privilege set forth in §52-146s.

§§1-210(a) and 1-212(a), G.S., by withholding such records from the complainants. To the extent the remainder of the 281 health records requested by the complainants contain any records of the nature and type described in paragraphs 54 and 55, above, such records also are exempt from disclosure pursuant to §1-210(b)(10), G.S.

57. With regard to IC-2021-0697-2-1 through IC-2021-0697-2-322, after careful in camera inspection, it is found that such records contain "confidential HIV-related information," as defined in §19a-581(8), G.S., in that such records contain information pertaining to HIV and/or AIDS-related counseling, testing, diagnosis, and treatment, and information that reasonably could identify a person as having HIV or AIDS. Accordingly, it is found that such records are exempt from disclosure pursuant to §19a-583, G.S.[3] It is therefore concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., by withholding such records from the complainants. It is further found that, to the extent the remainder of the 281 health records requested by the complainants contain any records of the nature and type described in this paragraph, such records also are exempt from disclosure pursuant to §19a-583, G.S.

58. The complainants contended that even if the requested health records are determined to be privileged, the respondents nevertheless are required to redact all identifying information contained therein, and to disclose such redacted records.

59. Of the statutory privileges claimed by the respondents, only the psychiatrist-patient privilege set forth in §52-146e(a), G.S., on its face permits disclosure of de-identified records. Specifically, as set forth in paragraphs 40 and 41, above, §52-146e(a), G.S., prohibits disclosure of "communications and records or the substance or any part or resume thereof which identify a patient ...." (emphasis added). Pursuant to §52-146d, G.S., communications and records "identify a patient" if they "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 ...." (emphasis added). The other privileges claimed do not contain any language that may be construed to permit disclosure of de-identified records. Accordingly, it is concluded that §§ §§52-146c, 52-146q, 52-146o, and/or 52-146s, G.S., do not permit disclosure of de-identified health records.

60. However, even if disclosure of de-identified health records were permitted, based on a careful review of the in camera records, it is found that the requested health records cannot be redacted in accordance with the standard set forth in §52-146e(a), G.S. In particular, because of the nature and extent of the information contained in the requested health records, combined with the information previously disclosed to the complainants about the deceased inmates, it is found that the requested health records cannot be redacted to ensure that they do not contain information from which a person acquainted with the patient might reasonably be able to recognize the patient as the person referred to. Accordingly, it is found that the respondents are not required to disclose to the complainants redacted copies of the requested health records.

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

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[3] The Commission notes that the in camera records IC-2021-0697-2-1 through 322 also are subject to the physician-patient privilege set forth in §52-146o, G.S.

1. Within 30 days of the date of the Notice of Final Decision in this matter, the respondents shall provide to the complainants copies of the incident reports described in paragraph 10(a), of the findings, above, free of charge.

2. Within 30 days of the date of the Notice of Final Decision in this matter, the respondents shall provide to the complainants copies of the records identified in paragraphs 51 and 52, of the findings, above, free of charge.

3. Forthwith, the respondents shall commence a review of the remainder of the 281 health records responsive to the request set forth in paragraphs 10(b) and 10(c), above, to determine whether such health records contain records of the nature and type described in paragraphs 51 and 52 of the findings, above, and shall provide to the complainants copies of any such records free of charge, on a rolling basis, at least every 60 days. The respondents shall complete such review within 12 months of the date of the Notice of Final Decision in this matter.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of November 16, 2022.

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:

AVIVA STAHL AND SETH WESSLER, c/o Attorney David A. Schultz, Media Freedom and Information Access Clinic, PO Box 208215, New Haven, CT 06520

COMMISSIONER, STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION; AND STATE OF CONNECTICUT, DEPARTMENT OF CORRECTION, c/o Attorney Jennifer Lepore, State of Connecticut, Department of Correction, 24 Wolcott Hill Road, Wethersfield, CT 06109

Cynthia A. Cannata
Acting Clerk of the Commission

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