Mehdi M. Saeedi	: Office of Public Hearings
	:
v.	: OPH/WBR No. 2008-090
	:
Department of Mental Health &	:
Addiction Services, et al.	: July 28, 2009

Articulation re: the order granting the complainant's motion to compel the production of redacted documents

I

Summary

The parties agreed that the purpose of the hearing on the record on July 7, 2009 was for oral argument on the complainant's motion to compel and the respondents' objections thereto, to be followed by this articulation as to "the reasons for granting [the complaint's] motion to compel insofar as it pertained to the disclosure of medical records . . . ." Transcript of July 7, 2009, at 4: 2 – 3; 4:16. See also *State of Connecticut v. Commission on Human Rights & Opportunities, Office of Public Hearings*, CV-09-4020280, Complaint for Administrative Appeal, at 6.

General Statutes § 4-177c (a)[1] and §§ 4-61dd-16 (a) and (b)[2] and 4-61dd-17[3] of the Regulations of Connecticut State Agencies authorize the parties in a contested case to inspect and copy relevant and material documents. The regulations also authorize the presiding referee to impose sanctions for failing to comply with an order to produce

such documents. The documents requested by the complainant in his motion to compel are relevant and material as they are probative of issues and facts germane to the complainant's burdens of production and persuasion, and to the ultimate determination of whether the respondents retaliated against the complainant in violation of General Statutes § 4-61dd.

Section 4-177c (a) and § 4-61dd-16 (a) also provide that relevant and material documents may, nevertheless, not be produced if there are federal or state laws that provide for their nondisclosure. There are federal and state laws regarding privileges that restrict the production of medical documents containing patient identifying information; that is, medical information that identifies a specific patient or reasonably could identify a specific patient. These privilege statutes, however, do not apply in this case.

Under federal and state statutes and case law, medical documents that do not disclose individual patient-identifying information are exempt from the privilege statutes. Paragraph 1 of the February 20, 2009 order granting the complainant's motion to compel specifically directed that "the respondents shall, complying with the redaction provisions of 45 C.F.R. § 164.514, produce documents responsive to the requests for the complainant to inspect and copy." As a result of the redaction of the identifying information, federal and state privilege laws do prohibit the production of the redacted documents. Further, because federal and state privilege laws are inapplicable to the the production of the redacted documents, there is no requirement to notify patients or to

obtain their consent prior to the production of the redacted documents, the sanctions imposed on the respondents for their failure to produce redacted documents were appropriate, and the protective order is actually superfluous.

II

Procedural history

On October 16, 2008, the complainant filed a complaint with the chief human rights referee alleging that the respondents had violated General Statute § 4-61dd. According to the complainant, the respondents had illegally retaliated against him when he reported his concerns regarding Dr. Sonido's care of patients. The respondents filed their answer on November 19, 2008.

Thereafter, the complainant served on the respondents a request for production of documents and, on January 21, 2009, the respondents filed their objections to the request. On February 13, 2009, the complainant filed a motion to compel the respondents to produce documents. On February 20, 2009, the respondents filed an objection to the complainant's motion to compel. Also on February 20, 2009, the undersigned granted the complainant's motion to compel and ordered the respondents to produce redacted documents. On March 12, the complainant filed a proposed revised HIPAA-compliant protective order re: disclosure of medical records. On March 13, 2009,

the undersigned issued the revised HIPAA-compliant protective order re: disclosure of medical records.

On March 19, 2009, the complainant filed a motion for sanctions against the respondents for their failure to comply with the order to produce redacted documents. On April 6, 2009, the complainant's motion for sanctions was granted.

On April 2, 2009, the respondents filed in the superior court an appeal and a petition to stay further administrative procedures. On June 16, 2009, the stay was granted and the court ordered that an oral argument be held before the presiding human rights referee to be followed by an articulation of the presiding referee's ruling. Pursuant to the court order, oral argument was held on July 7, 2009. The transcript of the oral argument was filed on July 16, 2009. The transcript of the June 16, 2009 superior court hearing was filed on July 27, 2009.

Section III of this articulation provides the relevant provisions of the complainant's motion to compel and of the presiding referee's order to produce redacted documents. Section IV articulates why the redacted documents are relevant and material to this case. Section V articulates why the production of the redacted documents is permissible under federal law. Section VI articulates why production of the redacted documents is permissible under state law. Finally, Section VII articulates responses to non-statutory arguments raised by the respondents, including their objection to the HIPAA-compliant protective order.

III

The complainant's motion to compel and the order to produce redacted documents

Determination of the relevance and materiality of the requested documents and the impact, if any, of federal and state privilege laws begins with a review of the documents requested by the complainant in his motion and of the provisions of the order to produce redacted documents.

A

The complainant's motion to compel

In his motion to compel, the complaint sought an order compelling the respondents to produce documents responsive to his requests numbered 3a, 3b, 3c, 3d, 4, 10a, 10b, 10c, 10d, 11, 17, 19, 20 and 21 as follows:

> 3. All documents provided to any Respondent concerning Complainant's allegations about Dr. Romeo Sonido's medical errors, mismanagement, carelessness and/or negligence, including but not limited to the following:
>
> a. EKG and medical records of a patient with heart attack who received no cardiac management under his care for 9 days, which Complainant provided to Respondent Buss in August 2007 (See Complaint, Attachment 2.);
>
> b. Documents concerning a patient addressed in Complainant's 9/26/07e-mail to Respondent Buss (a high risk patient with symptoms suggestive of heart events)

provided by Complainant to Respondent Buss in September 2007. (See Complaint, Attachment 2, Exhibit A.);

c. Documents concerning an incident report filed by Complainant on November 29, 2007 alleging a 'high risk error' on the part of Dr. Sonido in managing a patient admitted to his care at the detox unit on November 16, 2007, including but not limited to a copy of the incident report and any documents concerning the investigation, conclusions(s) and responsive action(s) taken; and

d. Documents concerning other patients who were mismanaged and neglected under Dr. Sonido's care in the ensuing months, which Complainant provided to Respondents Lev and Buss during a meeting with them, Respondent Forman and a human resources officer at Respondent Forman's office in December 2007.

4. All documents transmitted to or from any of the Respondents concerning Dr. Sonido's actions or omissions, including but not limited to any corrective actions taken or recommended in response to Dr. Sonido's conduct and/or concerning decisions made by Respondents about Dr. Sonido's continued employment.

10. Any documents concerning a complaint allegedly made against Dr. Saeedi by one or more employees at Dutcher 2 North, in which Dr. Saeedi was accused of telling a patient with hepatic encephalopathy that Dr. Peterson, the unit psychiatrist, had given him medication that 'poisoned his liver.' This request includes, but is not limited to the following:

a. Any documents concerning any investigation of the complaint;

b. Any documents concerning the decision to remove Dr. Saeedi from caring for the above patient;

c. The medical records (medical, psychiatrist, and nursing progress notes, order sheets, and Middlesex Hospital Emergency Room record) of the abovementioned patient;

d. Any documents concerning communications to or from Respondents concerning the above complaint, its investigation, the decision to remove Complainant from the patient's care or the patient's medical condition or treatment.

11. The medical records (medical, psychiatrist, and nursing progress notes, order sheets) of another patient treated by Dr. Saeedi at Dutcher 2 North, as to whom

Dianne McKeon, RN (the unit head nurse) and Dr. Peterson demanded that Dr. Saeedi reduce the dose of insulin.

17. All documents supporting Respondent Forgit's rating of Dr. Saeedi's communication with psychiatrists and staff in 2004 and 2007 annual performance evaluations.

19. All documents concerning a 'Critical Incident Report' on a patient treated by Dr. Saeedi made after this Complaint was filed, including but not limited to any documents concerning a meeting held on November 10, 2008 concerning this matter, any statement made by Rosanna Urcel, 2 North unit nurse and any investigation, conclusion and/or recommendations.

20. Any documents concerning the subject matter of a Team Meeting – Battell 3 North, held Wednesday, November 12, 2008. This request includes any documents concerning this subject matter prepared on, before or after November 12, 2008.

21. Any documents concerning the subject matter of a meeting of an Ambulatory Care doctors' meeting held during February or March 2008, at which Dr. Saeedi discussed his transfer and/or work assignment, including but not limited to any e-mail messages sent by Respondent Forgit to attendees of that meeting, any complaint(s) made by Respondent Forgit concerning Dr. Saeedi's conduct at that meeting and any responses to those documents.

Complainant's motion to compel, at 2 – 4.

B

Order to produce redacted documents

Issued on February 20, 2009, the order compelling the respondents to produce redacted documents provided in relevant part:

1. The complainant's motion is granted. On or before March 5, 2009, the respondents shall, complying with the redaction provisions of 45 C.F.R. §

164.514, produce documents responsive to the requests for the complainant to inspect and copy.

2. The complainant shall file and serve a proposed protective order for approval by the presiding human rights referee.

3. As set forth in section 4-61dd-16 (b) of the Regulations of Connecticut State Agencies, the respondents' failure to comply with this order for production may result in non-monetary sanctions. The sanctions may include but are "not limited to: (1) An order finding that the matters that are the subject of the request for production or disclosure are established in accordance with the claim of the party requesting such order; (2) An order prohibiting the party who has failed to comply from introducing designated matters into evidence; and (3) An order limiting the participation of such party with regard to issues or facts relating to the disclosure sought."

4. In the event that the respondents fail to comply with this order, the complainant may, on or before March 19, 2009, file a motion for sanctions. The motion shall include an order page. The motion shall explain the relevance and materiality of the documents requested to the allegations and to the proposed sanction. Both the motion and the proposed order shall state with specificity the sanctions sought, consistent with section of 4-61dd-16 (b) the Regulations of Connecticut State Agencies.

IV

The redacted documents requested by the complainant are relevant and material to this case

Section 4-177c provides in relevant part: "(a) In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other

provision of the general statutes . . . .” Thus, the articulation continues with a determination of whether the documents requested by the complainant are relevant and material by reviewing the definitions of “relevant” and “material”, the applicable provisions of the “whistleblower retaliation” statute and the complainant’s burden of proof.

A

“We are mindful that evidence is relevant if it has a tendency to establish the existence of a material fact. . . . Relevant evidence is evidence that has a logical tendency to aid the trier [of fact] in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable.” (Internal quotation marks omitted.) *United Technologies Corp. v. Commission on Human Rights & Opportunities*, 72 Conn. App. 212, 229, cert. denied, 262 Conn. 920 (2002). “Evidence is material where it is offered to prove a fact directly in issue or a fact probative of a matter in issue.” (Internal quotation marks omitted.) *State v. Fernandez*, 76 Conn. App. 183, 188, cert. denied, 264 Conn. 901 (2003).

B

Section 4-61dd, often referred to as the “whistleblower retaliation” statute, provides in relevant part:

> (a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report, the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths to witnesses, where necessary, for the purpose of an investigation pursuant to this section. Upon the conclusion of the investigation, the Attorney General shall where necessary, report any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation.

(b) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute; or (D) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract.

(2) If a state or quasi-public agency employee or an employee of a large state contractor alleges that a personnel action has been threatened or taken in violation of subdivision (1) of this subsection, the employee may notify the Attorney General, who shall investigate pursuant to subsection (a) of this section.

(3) (A) Not later than thirty days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section. If the human rights referee finds such a violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of any employee benefits for which the employee would otherwise have been eligible if such violation had not occurred, reasonable attorneys' fees, and any other damages. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person who was a party at such hearing, in accordance with the provisions of section 4-183.

(B) The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and noticing and conducting hearings under subparagraph (A) of this subdivision.

C

The complainant's evidentiary burden to prove a violation of § 4-61dd is set forth in *O'Sullivan v. Vartelas*:

> Whistleblower retaliation cases brought under § 4-61dd are typically analyzed under the three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) and also under federal and state case law interpreting other anti-retaliatory and anti-discrimination statutes. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990); *Irwin v. Lantz*, OPH/WBR 2007-40 et seq., Final Decision, 11 (May 9, 2008) (2008 WL 2311544). The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of her prima facie case; (2) the respondents' burden in the presentation of their non-retaliatory explanation for the adverse personnel action; and (3) the complainant's ultimate burden of proving the respondents retaliated against her because of her whistleblowing. *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 11-12. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. Id., 11.
>
> The complainant's prima facie case of whistleblower retaliation has three elements: (1) the complainant must have engaged in a protected activity as defined by the applicable statute; (2) the complainant must have incurred or been threatened with an adverse personnel action; and (3) there must be a causal connection between the actual or threatened personnel action and the protected activity. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995; *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 12-14.
>
> The four statutory components of a protected activity as defined by § 4-61dd are, first, the respondent must be a state department or agency, a quasi-public agency, a large state contractor or an employee thereof (regulated entity). §§ 4-61dd (b) (1), 4-61dd (h) (2), 1-120. Second, the complainant must be an employee of the regulated entity. § 4-61dd (b). Third, the complainant must have knowledge either of "corruption, unethical practices, violations of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in a state department or agency or a quasi-public agency" or of (2) "corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring

in a large state contract" (protected information). § 4-61dd (a). Fourth, the complainant must have disclosed the protected information to an employee of (1) the auditors of public accounts; (2) the attorney general; (3) the state agency or quasi-public agency where she is employed; (4) a state agency pursuant to a mandatory reporter statute; or (5) the contracting state agency concerning a large state contractor (whistleblowing). § 4-61dd (b) (1). *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 12.

With respect to the third and fourth statutory components of a protected activity, the complainant "need only establish general corporate knowledge that the [she] has engaged in a protected activity." (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, United States District Court, No. 3:04-CV-304 (EBB) (D. Conn. March 20, 2008) (2008 WL 793597, 7). Further, the complainant need not show that the conduct she reported actually violated § 4-61dd (a), but only that she had a reasonable, good faith belief that the reported conduct was a violation. § 4-61dd (c) and (g); *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 176; *Pappas v Watson Wyatt & Co.*, supra, 2008 WL 793597, 4-6; *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 13.

To satisfy the second element of her prima facie case of whistleblower retaliation, the complainant must show that she suffered or was threatened with an adverse personnel action by a regulated entity subsequent to her whistleblowing. §4-61dd (b) (1). "[T]he means by which an employer can retaliate against an employee are not limited to discriminatory actions that affect the terms and conditions of employment. . . . . Instead, retaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct . . . such as hiring, firing, change in benefits, or reassignment. . . . . Again, the plaintiff must show that [her] employer's actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, 537 F. Sup.2d 332, 355-56 (D. Conn. 2008); *Tosado v. State of Connecticut, Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6); *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 13-14.

The third element of a prima facie case of whistleblower retaliation requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and her whistleblowing. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. The complainant can establish the inference of causation by three methods: (1) indirectly, for example, by showing that the whistleblowing was followed closely in

time by discriminatory treatment or through other circumstantial evidence such as disparate treatment of similarly situated co-workers; *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000); *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondents; *Gordon v. New York City Bd. of Educ.*, supra, 232 F.3d 117; *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; or (3) by operation of statute as a rebuttable presumption; § 4-61dd (b) (5). *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 14.

The complainant's "burden of proof at the prima facie stage is *de minimis*." *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173. Section 4-61dd "is remedial in nature and as such should be read broadly in favor of those whom the law is intended to protect." *Colson v. Petrovision, Inc.*, 2000 WL 1475850, 3 (Conn. Super.) (28 Conn. L. Rptr. 334) (construing General Statutes § 31-51m).

O'Sullivan v. Vartelas, 2008 WL 5122194 (OPH/WBR 2008-086, Ruling re: the respondents' motion to dismiss and Order re: amending the complaint, at 2 – 6, November 20, 2008).

D

In his production requests numbered 3 and 4, the complainant seeks documents related to his complaints to the respondents about the medical care Dr. Sonido provided to patients and documents related to the respondents' knowledge of and response to those complaints. Documents that provide the specifics of the information that the complainant knew and reported as well as documents that provide the specifics of the respondents' response to such information are relevant and material for several reasons. First, these documents are probative of facts and issues germane to the complainant's burden of showing that he had knowledge of any matter involving, or that

he reasonably believed involved, “corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency”.

Second, these documents are probative of facts and issues germane to the complainant’s burden of showing that he did in fact disclose information to employees of the state agency where he is employed and the type of information that he actually disclosed.

Third, these documents are probative of facts and issues germane to the complainant’s burden of establishing an inference of a causal connection between the information that he reported and the adverse action that he incurred.

In his production requests numbered 10, 11, 17, 19, 20 and 21, the complainant seeks documents related to adverse actions taken against him. These documents are probative of facts and issues germane to the complainant’s burden of establishing that he did in fact incur, or was threatened with, adverse personnel actions and that these adverse actions were motivated by a retaliatory animus.

Documentation of adverse personnel actions that were not referenced in the complaint or that may be untimely filed may, nevertheless, serve as supportive background evidence. *United Technologies Corp. v. Commission on Human Rights & Opportunities*, supra, 72 Conn. App. 230.

V

The order to produce redacted documents is permissible under federal law

Notwithstanding that the requested redacted documents are relevant and material to this case, the respondents argued that there are federal laws exempting the documents from disclosure under § 4-177c. A review of applicable federal case law and of the federal statutes cited by the respondents themselves, however, reveals that the order to produce redacted documents is permitted by federal law because documents that do not disclose identifying information are exempted from federal privilege statutes.

A

The interplay between the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), federal and state privilege statutes, and the redaction of patient identifying information was comprehensively analyzed in *In re Zyprexa Products Liability Litigation*, 254 F.R.D. 50 (E.D.N.Y.), aff'd, 2008 WL 4682311 (E.D.N.Y. 2008):

> II. Privilege
>
> In addition to challenging disclosure on relevance grounds, the States argue that their respective physician-patient privilege laws prohibit discovery of the patient medical records. *Cf.* Fed.R.Civ.P. 26(b) (1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense ....") (emphasis added). For the reasons that follow, this Court concludes that the States' privilege laws pose no obstacle to the discovery of the medical records, provided the records are de-identified.

A. Applicable Privilege Law

It is axiomatic that state privilege laws do not govern in federal question cases. *See* *Nw. Mem'l Hosp. v. Ashcroft,* 362 F.3d 923, 925-26 (7th Cir.2004); *von Bulow v. von Bulow,* 811 F.2d 136, 141 (2d Cir.1987); *Nat'l Abortion Fed'n v. Ashcroft,* No. 03-CV-8695 (RCC), 2004 WL 555701, at *6 (S.D.N.Y. Mar. 19, 2004) (citations omitted); *EEOC v. Boston Market Corp.,* No. 03-CV-4227 (LDW)(WDW), 2004 WL 3327264, at *3-4 (E.D.N.Y. Dec. 16, 2004). And even where a federal question case contains pendent state law claims, the federal law of privileges still obtains. *See* *von Bulow,* 811 F.2d at 141; *see also* S. Rep. 93-1277, *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 n. 16 ("It is ... intended that the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case."). No physician-patient privilege exists under federal common law. *See* *Nw. Mem'l Hosp.,* 362 F.3d at 926; *Kunstler v. City of New York,* No. 04-CV-1145 (RWS)(MHD), 2006 WL 2516625, at *6 & n. 7 (S.D.N.Y. Aug. 29, 2006) (citing *Jaffee v. Redmond,* 518 U.S. 1, 10, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996)) (noting federal courts' rejection of the physician-patient privilege); *see generally* Fed.R.Evid. 501.

In contrast to federal question cases, state privilege laws apply in suits in federal court-such as diversity cases-in "which State law supplies the rule of decision." Fed.R.Evid. 501; *see also* *Application of Am. Tobacco Co.,* 880 F.2d 1520, 1527 (2d Cir.1989) (citing *Dixon v. 80 Pine St. Corp.,* 516 F.2d 1278, 1280 (2d Cir.1975)); *R.R. Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.) Inc.,* 97 F.R.D. 37, 39 (E.D.N.Y.1983) (citations omitted). In federal cases in which state privileges apply, those privileges "should be interpreted no more broadly than necessary." *Am. Tobacco Co.,* 880 F.2d at 1527.

On this issue, Connecticut stands in a different position than the other States. Because Connecticut's complaint against Lilly involves a federal question-arising under the federal civil RICO statute-that case is not governed by Connecticut's statutory or common law privileges, including its physician-patient privilege. And because there is no physician-patient privilege under federal law, the non-party records Lilly seeks in Connecticut's case are discoverable pursuant to an order of this Court, with or without redaction. *Cf.* *Nw. Mem'l Hosp.,* 362 F.3d at 924-26 (holding that state privileges do not apply to non-party hospital, because underlying litigation involved a federal question).

As to the remaining States, the identification of the applicable body of privilege law is less clear. Although none of the other States allege violations of federal law in their complaints, and each has vigorously challenged the basis for

federal jurisdiction, Judge Weinstein has held that jurisdiction lies under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,* 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). *See, e.g., State of Montana v. Eli Lilly & Co.,* No. 07-CV-1933, 2008 WL 398378, at *4-7 (E.D.N.Y. Feb. 12, 2008); *Hood v. Eli Lilly & Co.,* No. 07-CV-645, 2007 WL 1601482, at *1 (E.D.N.Y. June 5, 2007); *State of West Virginia v. Eli Lilly & Co.,* 476 F.Supp.2d 230, 233-34 (E.D.N.Y.2007); *Foti v. Eli Lilly & Co.,* 375 F.Supp.2d 170, 172-73 (E.D.N.Y.2005).[FN4]

FN4. New Mexico's motion to remand to state court is still pending. See 8/25/08 Motion to Remand, *Madrid v. Eli Lilly & Co.,* No. 07-CV-1749, D.E. # 42.

In *Grable,* the Supreme Court recognized that "in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues[,]" even in the absence of claims arising directly under federal law. *Grable,* 545 U.S. at 312, 125 S.Ct. 2363. The Supreme Court explained: "[A] federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues[.]" *Id.* In denying several States' motions to remand, Judge Weinstein ruled that "the substantial federal funding provisions involved and the allegations about the violation of federal law through improper off-label use [of Zyprexa] present a core of substantial [federally oriented] issues...." *Foti,* 375 F.Supp.2d at 172-73; *see also McGraw,* 476 F.Supp.2d at 234 ("At issue here is not simply a federal standard, but also the added factor of an intricate federal regulatory scheme including detailed federal funding provisions, requiring some degree of national uniformity in interpretation."). Thus, whether state privilege law applies is informed by the fact that these cases involve federal question jurisdiction, as opposed to diversity jurisdiction.

Unfortunately, there is a paucity of case law on the issue of which body of privilege law applies in a *Grable*-type federal question case. Where, as here, federal interests are strong enough for *Grable*-type federal question jurisdiction to attach, the underlying rationale of Rule 501 of the Federal Rules of Evidence suggests that the federal law of privileges should apply. *See* S. Rep. 93-1277, *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7058-59 & n. 17. However, except as to Connecticut, state law will determine if and to what extent Lilly is liable for the harm claimed by the States-a countervailing factor on the privilege issue. *See id.*

Although it may well be that none of the States' respective privilege laws should apply in these cases, that issue need not be definitively resolved;

regardless of the resolution of that issue, federal statutes and regulations make clear that de-identified health information is discoverable in litigation in federal court, with or without patient consent.

B. HIPAA

Pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104-191, 110 Stat. 1936 (1996), there are many circumstances in which "[a] covered entity may use or disclose protected health information without the written authorization of the individual ... or the opportunity for the individual to agree or object[.]" 45 C.F.R. § 164.512.[FN5] These include disclosures "[i]n response to an order of a court[,] ... provided that the covered entity discloses only the protected health information expressly authorized by such order[.]" *Id.* § 164.512(e)(1)(i). Under section 164.512, "it is evidently denudate that a purpose of HIPAA was that health information, that may eventually be used in litigation or court proceedings, should be made available during the discovery phase." *Bayne v. Provost,* 359 F.Supp.2d 234, 237 (N.D.N.Y.2005) (citing 45 C.F.R. § 164.512(e)(1)(ii)).

FN5. The term "covered entity" includes Medicaid plans and other government-sponsored health plans. *See* 45 C.F.R. §§ 160.102, 160.103; *see also* U.S. Dep't of Health and Human Servs., Summary of the HIPAA Privacy Rule, at 2 (May 2005) [hereinafter "HIPAA Privacy Rule Summary"], *available at* www. hhs. gov/ ocr/ privacy summary. pdf. "Protected health information means any individually identifiable health information [.]" 45 C.F.R. § 160.103; *see also* HIPAA Privacy Rule Summary, at 3-4.

As previously discussed, Connecticut's physician-patient privilege does not apply in its case against Lilly because that case is grounded in a federal question. Accordingly, the protected health information (i.e., the medical records) of patients in Connecticut can be discovered pursuant to an order of this Court, so long as the covered entity (i.e., the State of Connecticut Department of Social Services) discloses only that information authorized in such an order. *Cf.* 45 C.F.R. § 164.512(e)(1)(i).

The other States contend that their respective privilege laws are more stringent than HIPAA, and argue that a HIPAA-compliant court order will not suffice to protect the privacy interests of the patients whose medical records Lilly seeks. This argument has some appeal, but ultimately misses the mark. Even assuming that state privilege laws afford greater protection to the records Lilly seeks-and it is not entirely clear that they do-HIPAA contains a supersession

clause which makes clear that to the extent state privilege laws are more protective of de-identified health information than is HIPAA, those laws are preempted by HIPAA's regulatory scheme.

Under HIPAA, a provision of state law that is contrary to HIPAA's standards or requirements is preempted, unless "[t]he provision of State law relates to the privacy of individually identifiable health information and is more stringent than a [HIPAA] standard, requirement, or implementation specification...." 45 C.F.R. § 160.203(b); *see also* 42 U.S.C. § 1320d-7. "A standard is 'more stringent' if it 'provides greater privacy protection for the individual who is the subject of the individually identifiable health information' than the standard in the regulation." FN6 *Nw. Mem'l Hosp.,* 362 F.3d at 924 (quoting 45 C.F.R. § 160.202(6)). Federal regulations further provide that "[h]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information." 45 C.F.R. § 164.514(a). To achieve de-identification, numerous identifiers must be redacted from the relevant medical records. *See id.* § 164.514(b)(2).

FN6. Although state patient privacy laws that are "more stringent" than HIPAA may survive HIPAA preemption, they do not apply in federal question cases such as that brought by Connecticut. *See Nw. Mem'l Hosp.,* 362 F.3d at 925; *Nat'l Abortion Fed'n,* 2004 WL 555701, at *5.

The Seventh Circuit's decision in *Northwestern Memorial Hospital* is instructive on the interplay between HIPAA and state privilege law. In that case, a non-party hospital challenged a Department of Justice subpoena seeking records of patients who underwent late-term abortions, in order to use those records in litigation surrounding the constitutionality of the Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531. *See Nw. Mem'l Hosp.,* 362 F.3d at 924. In the course of its decision, the Seventh Circuit held that HIPAA does not create a federal physician-patient privilege, but rather provides a procedure for the disclosure and use of medical records in litigation. *See id.* at 926. The court noted that any applicable privilege would be found outside of HIPAA regulations, and pointed to the supersession clause as supporting its conclusion. *See id.* The court declared: "Provided that medical records are redacted in accordance with the redaction requirements ... of § 164.514(a), they would not contain 'individually identifiable health information' and the 'more stringent' clause would fall away." *Id.* A concurring judge put the point succinctly: "In passing HIPAA, Congress recognized a privacy interest only in 'individually identifiable medical records' and

not redacted medical records, and HIPAA preempts state law in this regard." *Id.* at 933 (Manion, J., concurring in part and dissenting in part).

In tandem, these statutory provisions and regulations compel the conclusion that de-identified health information is not protected under HIPAA, and that, to the extent state privilege laws offer protection to de-identified medical records, HIPAA preempts those laws. Accordingly, the States' physician-patient privilege laws do not prevent Lilly from discovering the de-identified records it seeks.

C. State Physician-Patient Privilege Laws

In any event, even in the absence of HIPAA preemption, it appears that the States' respective privilege laws would not apply to de-identified information. While all of the States provide privilege protection to communications (including those reflected in medical records) by a patient to a physician for the purposes of treatment, *see, e.g.,* Conn. Gen.Stat. § 52-146o; La.Rev.Stat. Ann. § 13:3734(A)(1); Miss.Code Ann. § 13-1-21; Mont.Code Ann. §§ 50-16-525, 50-16-535; La.Code Evid. Ann. art. 510(B); Miss. R. Evid. 503(b); N.M. R. Evid. 11-504(B), each State has also recognized that de-identified or redacted medical records simply do not fall within the ambit of their respective privilege laws. *See, e.g.,* Mont.Code Ann. § 50-16-504(6) ("Health care information" under Montana's Uniform Health Care Information Act is limited to "information ... that identifies or can readily be associated with the identity of a patient and relates to the patient's health care."); N.M. Stat. Ann. § 14-6-1 (providing that health information in the custody of government agencies is confidential, but only insofar as it "relates to *and identifies* specific individuals as patients") (emphasis added), *together with* N.M. R. Evid. 11-504(D)(4) ("There is no privilege ... for communications relevant to any information that the physician ... or patient is required by statute to report to a public employee or state agency."); *Fischer v. Hartford Hosp.,* No. CV-0569702, 2002 WL 237409, at *3 (Conn.Super. Jan. 23, 2002) ("The defendant [hospital] ... is ordered to disclose the information requested by plaintiff provided that all identifiable [non-party] patient information shall be deleted."); *Jackson v. Baptist Ret. Ctr. of Arcadia,* 933 So.2d 131, 131 (La.2006) (permitting discovery of non-party medical records subject to redaction of identifying information); *Speer v. Whitecloud,* 744 So.2d 1283, 1284 (La.1999) ("Once any personal information which would identify the patients is redacted from the records, the requested discovery does not invade the physician patient privilege, and the need for [notice to the patient and a contradictory hearing] is eliminated."); [FN7] *Baptist Mem'l Hosp. v. Johnson,* 754 So.2d 1165, 1169-70 (Miss.2000) (requiring disclosure of non-party patient medical records without redaction).

FN7. The State of Louisiana argues that a recent decision by a Louisiana intermediate appellate court prevents the Louisiana Department of Health and Hospitals ("DHH") from producing medical records of Medicaid patients without the patients' consent. *See Foti v. Janssen Pharmaceutica, Inc.,* No. 08-CW-365 (La.Ct.App. Apr. 30, 2008), attached to 5/9/08 Deft.'s Position Statement Regarding Discovery Schedule, Ex. 7. In that decision, which is currently pending before Louisiana's Supreme Court, the intermediate court, citing Louisiana's evidentiary and statutory physician-patient privileges, requires DHH to obtain waivers from patients whose records it intends to produce, and to include in those waivers an assurance that various mechanisms, including de-identification, will be utilized to protect the patients' privacy. The court places the burden of obtaining the waivers upon the State.

Assuming *arguendo* that this issue were governed by Louisiana law, this Court would be obligated to follow a controlling decision of the State's *highest court,* or, in the absence of such a decision, to predict how the highest court would resolve this issue. *See In re Rezulin Prods. Liab. Litig.,* 178 F.Supp.2d 412, 414 & nn. 8-9 (S.D.N.Y.2001) (collecting cases). In contrast to the intermediate appellate decision cited by the State, the Supreme Court of Louisiana has made clear that de-identified medical records are not privileged under Louisiana law. *See Jackson,* 933 So.2d at 131; *Speer,* 744 So.2d at 1284. Moreover, to the extent that the appellate court's decision would afford protection to de-identified records under Louisiana law, HIPAA preempts that state law. Accordingly, this Court is not persuaded that Louisiana law requires both waivers *and* de-identification of patient medical records.

This is precisely the point made in *In re Rezulin Products Liability Litigation,* 178 F.Supp.2d 412 (S.D.N.Y.2001), which provided a starting point for this Court's colloquy with the parties on the issue of redaction. *See* 8/14/08 Order to Show Cause. In *Rezulin,* a diversity case involving alleged deceptive marketing by a pharmaceutical company, the defendant company subpoenaed physicians to compel them to produce medical records pertaining to patients who had participated in clinical trials of the drug at issue. *See Rezulin,* 178 F.Supp.2d at 413. As in these Zyprexa cases, the defendant in *Rezulin* was amenable to production of redacted records. *See id.* Construing Texas law, Judge Kaplan concurred with the "heavy weight of authority" from across the country and held that "the discovery of [medical] records redacted to eliminate identifying information may be compelled consistent with the [physician-patient] privilege...." *Id.* at 416 & n. 16 (collecting cases). Here, as in *Rezulin,* the fact that the States afford protection to medical records containing identifying information is of no

> moment; production of de-identified records would offend none of the States' respective privilege laws.
>
> Having taken into account the above considerations and arguments, this Court concludes that, provided the disputed medical records are de-identified in accordance with the requirements of 45 C.F.R. § 164.514(b)(2), they are not privileged and are thus discoverable pursuant to Rule 26(b) of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 26(b). For the same reason, the production of the records in de-identified form obviates the need for a mechanism to address the individual privacy objections of patients and health care providers. *Cf. ACLU v. Dep't of Def.*, 543 F.3d 59, 63-64, 86-88 (2d Cir.2008) (referring, in the FOIA context, to the privacy interest in de-identified sexually graphic photographs as *"de minimis."*).

In re Zyprexa Products Liability Litigation, supra, 254 F.R.D. 52 – 56.

Thus, as to this pending case, the court effectively resolved in favor of the complainant numerous issues that have been raised by the respondents:

1. "[T]he States' privilege laws pose no obstacle to the discovery of the medical records, provided the records are de-identified." Id., 52;
2. "Federal regulations further provide that '[h]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information.' 45 C.F.R. § 164.514(a). To achieve de-identification, numerous identifiers must be redacted from the relevant medical records. *See id.* § 164.514(b)(2)." Id., 54.
3. "In tandem, these statutory provisions and regulations compel the conclusion that de-identified health information is not protected under HIPAA". Id.

4. “In any event, even in the absence of HIPAA preemption, it appears that the States' respective privilege laws would not apply to de-identified information. While all of the States provide privilege protection to communications (including those reflected in medical records) by a patient to a physician for the purposes of treatment, *see, e.g.,* Conn. Gen.Stat. § 52-146o; . . . each State has also recognized that de-identified or redacted medical records simply do not fall within the ambit of their respective privilege laws. *See, e.g.,* . . . *Fischer v. Hartford Hosp.,* No. CV-0569702, 2002 WL 237409, at *3 (Conn.Super. Jan. 23, 2002) (‘The defendant [hospital] ... is ordered to disclose the information requested by plaintiff provided that all identifiable [non-party] patient information shall be deleted.’). Id., 55
5. “Having taken into account the above considerations and arguments, this Court concludes that, provided the disputed medical records are de-identified in accordance with the requirements of 45 C.F.R. § 164.514(b)(2), they are not privileged . . . .” Id., 56
6. “For the same reason, the production of the records in de-identified form obviates the need for a mechanism to address the individual privacy objections of patients and health care providers.” Id.

B

Notwithstanding the federal court decision in *In re Zyprexa Products Liability Litigation* holding that redacted medical documents are discoverable, the respondents cite to Rule 501 of the Federal Rules of Evidence and *Jaffe v. Raymond*, 518 US 1 (1996); 42 U.S.C. § 290dd-2 and various sections of 42 C.F.R. Part 2; 42 U.S.C. § 1320d-6; 42 U.S.C. § 1396a (a) (7); 42 C.F.R. § 431.300; 45 C.F.R. Part 160 and to 45 C.F.R. Part 164 in support of their failing to disclose the redacted documents. Respondents' objection to complainant's motion to compel, at 7 – 9. These statutes, however, do not justify the respondents' failure to comply with the order to produce redacted documents.

Rule 501 of the Federal Rules of Evidence and *Jaffe v. Raymond*

The respondents cite to Rule 501 of the Federal Rules of Evidence and the Supreme Court's decision in *Jaffe v. Raymond*, supra, as federal laws that prohibit the production of the redacted documents. In *Jaffe*, the Court found that Rule 501 included a federally recognized psychotherapist privilege protecting the conversations between an identifiable patient and his psychotherapist. The federal rules of evidence, however, "govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101." Rule 101, Federal Rules of Evidence. Rule 1101 (a)

then provides that: “These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to the United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms ‘judge’ and ‘court’ in these rules include United States bankruptcy judges and United States magistrate judges.”

The respondents offer no explanation, nor is any explanation apparent, as to how the federal rules of evidence, which by their own terms apply only to proceedings in federal courts, are applicable to a state administrative proceeding.

42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2

Although the respondents cite to 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 as bases for their failing to comply with the order to produce redacted documents, these federal statutes also do not apply to this case. These provisions regulate the disclosure of patient identifying information, and the order to produce redacted documents directed the respondents to redact identifying information.

The provisions of 42 U.S.C. § 290dd-2 must be read in conjunction with their implementing regulatory provisions, 42 C.F.R. Part 2. 42 U.S.C. § 290dd-2 (a) provides in relevant part that “[r]ecords of the identity, diagnosis, prognosis, or treatment of any

patient . . . relating to substance abuse education . . . shall . . . be confidential . . . .” The section then further directs that “the Secretary shall prescribe regulations to carry out the purposes of this section.” 42 U.S.C. § 290dd-2 (g). The regulations are then set forth in 42 C.F.R. Part 2. These regulations make clear, however, that the restriction on the release of substance abuse documents pertains only to the release of patient identifying information.

In its definition section, the regulations state that: “Disclose or disclosure means a communication of ***patient indentifying information***, the affirmative verification of another person's communication of ***patient identifying information***, or the communication of any information from the record of a patient who has been ***identified***.” (Emphasis added.) 42 C.F.R. § 2.11 Further, according to the regulations: “Patient identifying information means the name, address, social security number, fingerprints, photograph, or similar information by which the ***identity of a patient*** can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a program, if that number does not consist of, or contain numbers (such as a social security, or driver's license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the program.” (Emphasis added.) Id.

The regulations also provide that: “The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which: (i) Would ***identify a***

patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person . . . ." (Emphasis added.) 42 C.F.R. § 2.12 (a) (1) (i). The regulations additionally state that the confidentiality restrictions in these statutes apply only to patient records to which these regulations apply. 42 C.F.R. § 2.13 (a).

Thus, the confidentiality, patient consent and court-ordered authorization provisions of 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 do not apply to this case because, by the express provisions of the regulations themselves and the court decision in *In re Zyprexa Products Liability Litigation*, the provisions only restrict the dissemination of patient identifying information and, here, the order to produce redacted documents directed the respondents to redact patient identifying information from the documents they produce.

42 U.S.C. § 1320d-6

The respondents identify 42 U.S.C. § 1320d-6 as a basis for their failure to comply with the order to produce redacted documents. This section, though, imposes penalties on someone who "knowingly and in violation of this part – (1) uses or causes to be used *a unique health identifier*; (2) obtains *individually identifiable health information* relating to an individual; or (3**)** discloses *individually identifiable health information* to another person." (Emphasis added.) 42 U.S.C. § 1320d-6. "The term

'individually identifiable health information' means any information, including demographic information collected from an individual, that— (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) 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, *and*— (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual." (Emphasis added.) 42 U.S.C. § 1320d (6).

As the statutory language and the decision in *In re Zyprexa Products Liability Litigation* make clear, this provision only applies to the disclosure of identifiable information. The order to produce redacted documents expressly directed the respondents to redact such information from the documents they produced.

42 U.S.C. § 1396a (a) (7)

The respondents reference 42 U.S.C. § 1396a (a) (7) as a basis for their failure to comply with the order to produce redacted documents. This section, however, only requires that a state plan for medical assistance "provide safeguards which *restrict* the use or disclosure of information concerning applicants and recipients . . . ." (Emphasis added.) Restricting the disclosure of information, though, is not the equivalent of prohibiting its disclosure.

42 C.F.R. § 431.300

The respondents further cite to 42 C.F.R. § 431.300 as a justification for their failure to comply with the order to produce redacted documents. This regulation, though, also does not prohibit the disclosure of documents; it merely "requires that a State plan must provide safeguards that restrict the use or disclosure of information . . . ." (Emphasis added.) Again, restricting the disclosure of information is not the equivalent of prohibiting its disclosure.

45 C.F.R. Part 160 and 45 C.F.R. Part 164

HIPAA's privacy regulations, issued by the U.S. Department of Health and Human Services and codified in 45 C.F.R. Part 160 and Part 164, are cited by the respondents in support of their failing to produce the redacted documents. As with the other federal statutes cited by the respondents, these provisions are also inapplicable to this case because they regulate the disclosure of patient identifiable information and, as directed in the order to produce redacted documents, identifying information was to be redacted from the documents produced by the respondents.

The privacy rules contained in parts 160 and 164 only protect "individually identified health information," defined as "information that is a subset of health information, including demographic information collected from an individual, and: (1) Is created or received by a health care provider, health plan, employer, or health care

clearinghouse; and (2) 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; ***and*** (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual." (Emphasis added.) 45 C.F.R. § 160.103.

However, "[h]ealth information that meets the standard and implementation specifications for de-identification under §164.514 (a) and (b) is considered ***not*** to be individually identifiable health information, *i.e.,* de-identified. ***The requirements of this subpart do not apply to information that has been de-identified in accordance with the applicable requirements of §164.514*** . . . ." (Emphasis added.) 45 C.F.R. § 164.502 (d) (2). "Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is ***not*** individually identifiable health information." (Emphasis added.) 45 C.F.R. § 164.514 (a).

Pursuant to 45 C.F.R. § 164.514 (b) (2), health information is de-identified, and hence not subject to the restrictions of HIPAA, if the following information has been redacted:

(A) Names;

(B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census:

(*1*) The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people; and

(*2*) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000.

(C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;

(D) Telephone numbers;

(E) Fax numbers;

(F) Electronic mail addresses;

(G) Social security numbers;

(H) Medical record numbers;

(I) Health plan beneficiary numbers;

(J) Account numbers;

(K) Certificate/license numbers;

(L) Vehicle identifiers and serial numbers, including license plate numbers;

(M) Device identifiers and serial numbers;

(N) Web Universal Resource Locators (URLs);

(O) Internet Protocol (IP) address numbers;

(P) Biometric identifiers, including finger and voice prints;

(Q) Full face photographic images and any comparable images; and

(R) Any other unique identifying number, characteristic, or code, except as permitted by paragraph (c) of this section; and

(ii) The covered entity does not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information.

In this case, the order to produce redacted documents specifically directed the respondents to "comply[ ] with the redaction provisions of 45 C.F.R. § 164.514 . . . ." As the respondents have made no credible persuasive offer of proof that the redacted documents could identify specific individuals, the redacted, or de-identified, documents are no longer subject to HIPAA's confidentiality restrictions.

It is also worth noting that the respondents may even be ordered to "disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in situations covered by this section, subject to the applicable requirements of this section." 45 C.F.R. § 164.512. The disclosure of protected health information without the individual's notice or written authorization is permitted when the disclosures are made "in the course of any judicial *or administrative proceeding*: (i) in response *to an order of* a court or *administrative tribunal*, provided that the covered entity discloses only the protected health information expressly authorized by such

order". (Emphasis added.) 45 C.F.R. § 164.512 (e) (i). This is an administrative proceeding in which the respondents were ordered to produce documents.

C

In summary, federal law does not prevent the respondents from complying with the order to produce redacted documents. Because the order directed the respondents to redact the documents to comply with 45 C.F.R. § 164.514, the redacted documents have been de-identified and are not subject to federal privilege laws. Therefore, the redacted documents must be produced pursuant to § 4-177c.

VI

The order to produce redacted documents is permissible state law

Notwithstanding that the requested redacted documents are relevant and material to this case and are exempted from federal confidentiality statutes, the respondents further argued that there are state laws exempting the documents from disclosure under § 4-177c. A review of applicable state case law and of the state statutes cited by the respondents themselves, though, reveals that the order to produce redacted documents is permitted by state law because documents that do not disclose identifying information are exempted from the confidentiality requirements of state privilege statutes.

It should also be noted that federal law provides that if there is a provision of 45 C.F.R. Part 160 or Part 164 that is "contrary" to a provision of state law, the state law is preempted unless the state law falls within one of the enumerated exceptions. 45 C.F.R. § 160.203. The respondents cite to several state laws as bases for their failing to comply with the order to produce redacted documents without identifying which, if any, of the federal exceptions apply. The state laws raised by the respondents will be addressed, although no determination is being made that the state laws meet any of the exceptions to federal preemption.

A

The relationship between the disclosure of non-party redacted medical records and state physician-patient privileges was addressed in *Fischer v. Hartford Hospital*, 31 Conn. L. Rptr. 291, 2002 WL 237409 (Superior Court, Docket No. HHD-97-0569702-s, January 23, 2002). In *Fischer*, the court held that requiring the hospital to disclose the medical records of non-party patients would not violate state privilege statutes, provided that all identifiable patient information was redacted. In so holding, the court observed:

> While there is no case law in Connecticut addressing this issue, other states with similar statutes as Connecticut have resolved this problem by excluding identifiable patient information.
>
> In *Community Hospital Ass'n v. Dist. Ct., Etc.*, 194 Colo. 98, 570 P.2d 243 (Colo.1977), a patient sued the surgeon who performed unneeded surgery on him and the hospital for negligence. Colorado had a statute which provided that "[a] physician or surgeon ... shall not be examined without the consent of his patient as to any information acquired in attending the patient ..." C.R.S. § 13-90-107(d) (1973). The trial court ordered the hospital to produce certain medical records of nonparty patients. The Supreme court held that the order requiring the

hospital to produce copies of 140 patient records upon whom the surgeon performed surgery between 1964-1968, which stated that all identifying information was to be removed and that the records would be filed with the court and sealed by the court and not opened except upon order of the court, did not violate the physician-patient privilege statute. *Id.,* at 244. Further, it stated that "many instances of injustice can be caused by application of the privilege." *Id.* It found that if the names and addresses of the patients are not disclosed the privilege is not violated. *Id.,* at 245.

In *State ex rel. Lester E. Cox Med. Ctr. v. Keet,* 678 S.W.2d 813 (Mo.1984), the plaintiff, whose husband died as a result of a postoperative infection, sought discovery of documents and materials used by peer review committees concerning the incident, including medical records of any patient at the clinic who developed a bacteriological infection subsequent to surgery and identification of any patient and the reason for hospitalization in the same room or ward with the decedent. The defendant argued that these records were protected by the physician-patient privilege codified under Missouri Revised Statutes § 491.060(5) (1978). The Supreme Court of Missouri quashed the trial court's writs in prohibition and allowed the respondent to conduct in camera examinations of the records it was seeking. The court stated that "information contained in the redacted records of other patients may be relevant or lead to the discovery of evidence relevant to plaintiff's malpractice claims and the search for truth demands that such records be examined by the trial court ..." *Id.,* at 815.

In *Amente v. Newman,* 653 So.2d 1030 (Fla.1995), the patient sued the doctor for malpractice alleging that her child's injury resulted from the doctor's negligent obstetrical care and treatment. At the time of suit, Florida had a statute which prohibited disclosure of other patient medical records unless a party to the case obtained a subpoena from a court and provided notice to the nonparty patient or his legal representative. The Circuit Court allowed the patient to discover medical records for all of the doctor's obese obstetric patients during a two-year period without a subpoena or notice to the nonparty. The District Court quashed the discovery order. The patient petitioned for review. The Florida Supreme Court held the records were properly discoverable if redacted. The doctor stated that he relied upon his past experience in delivering morbidly obese women without complications in his selection of the delivery method for the plaintiff. The doctor also expressed a belief that his delivery method did not cause the infant's injuries and that he cannot explain what did cause the injuries. The court found that information in other patient's records may be relevant to causation. *Id.,* at 1033. In this case the court found that the patients' right of

privacy and confidentiality of their records were protected by the trial judge's requirement that all identifying information be redacted.

In *Tanzi v. St. Joseph Hosp.,* 651 A.2d 1244 (R.I.1995), the plaintiff sought the names and addresses of patients who visited the emergency room for cardiac-related problems on June 5, 1989 and the two-week period preceding that date. The plaintiff's husband had gone to the emergency room on June 5th with complaints of chest pain. The doctor diagnosed the plaintiff's husband as having indigestion. Two days later the man died of a heart attack. The Rhode Island Supreme Court held that the trial court's decision to allow disclosure of the names and addresses of other patients was incorrect. However, the court held that the plaintiff could have the records as long as all names and information that may identify the patients (such as addresses, social security numbers, etc.) were redacted from the records.

In *Cochran v. St. Paul Fire and Marine Ins. Co.,* 909 F.Supp. 641 (W.D.Ark.1995), the parents of a minor who was hospitalized brought a medical malpractice action against the hospital's insurer based on alleged negligent medical treatment of the minor following his car accident. The insurer requested an order limiting discovery of certain records including incident reports concerning nonparty patients. The District Court held that incident reports concerning nonparty patients were discoverable because the plaintiff requested only redacted copies which omitted the patients' names. The defendant asked the court to black out the name and title of the person discovering the incident, the name of the physician, the signature and title of the person involved in the incident, the section entitled analysis of the medication incident, the comment section and the name of the department manager. The court denied the defendant's request stating that it failed to show how this information is privileged or somehow exempt from disclosure.

In *Terre Haute Regional Hosp. v. Trueblood,* 600 N.E.2d 1353 (Ind.1992), the patient brought suit against a hospital to recover for negligence in reappointing and supervising the surgeon who allegedly performed two unnecessary surgeries. The trial court compelled discovery of nonparty medical records. The court of appeals vacated and remanded. Granting transfer, the Supreme Court held that production of these records does not violate physician-patient privilege when all information regarding identities of nonparty patients has been redacted from the records. It stated that “if the disclosure reveals the ailments but not the patient's identity, then such disclosure would appear not to violate the privilege.” (Internal quotation marks omitted.) *Id.,* at 1361. Further, it stated that “[w]here adequate measures have been taken to protect the identity of

the nonparty patient, their consent is not required before allowing the records to be discovered." (Internal quotation marks omitted.) *Id.* The court balanced the patient's individual interest in quality medical care against the public's interest in being protected from incompetent physicians. *Id.*

In *Ventimiglia v. Moffitt,* 502 So.2d 14 (Fla.Dist.Ct.App. 4th Dist.1986), the Circuit Court ordered a physician to produce copies of records of other patients he had treated for conditions similar to that suffered by the claimant. The physician petitioned for writ of certiorari seeking to set aside the order. The District Court of Appeal held that it was not an abuse of discretion to compel the doctor to produce copies of the record. It stated that "[t]he trial court provided that any possible reference to the identity of the patients be deleted from the records and protected from discovery." *Id.* The trial court "relied on the fact that the physician predicated his diagnosis and opinion in claimant's case, at least in part, upon his experience with other patients." *Id.* Further, the trial court found that discovery of those records was relevant to the issues involved in the case.

Finally, in *Ziegler v.Super. Ct. In and for Cty.of Pima,* 134 Ariz. 390, 656 P.2d 1251 (Ariz.1982), a patient was seeking medical records of other patients who went through the similar surgical procedure performed on the patient. The trial court allowed discovery of these records. The Court of Appeals held that disclosure of the records, with all clues as to the identity of the patients deleted, would not violate the physician-patient privilege. The court ordered that all references to the name, address, marital status and occupation or employment of the patient must be removed from the records.

The court finds these well-reasoned cases persuasive. The defendant Hartford Hospital is ordered to disclose the information requested by the plaintiff provided that all identifiable patient information shall be deleted. The plaintiff is to keep all such records confidential and shall disclose them only to medical experts consulted regarding this case.

Fischer v. Hartford Hospital, supra, 2002 WL 237409, 1 – 3.

Thus, as to this pending case, the court effectively resolved in favor of the complainant that state medical privilege laws do not apply to the production of redacted, non-identifiable medical documents of non-parties.

In responding to *Fischer*, the respondents argue that the "case is not applicable. That goes to discrimination law, not whistleblower retaliation, which is sui generis." Transcript of July 7, 2009, at 20:14-17. The respondents offer no authority, nor is any authority readily apparent, for their proposition that transcendent relevant legal principles suddenly become irrelevant when they become inconvenient. (Also, *Fischer* was actually a medical malpractice case, arguably not exactly 'sui generis' from the concerns raised by the complainant in his initial "whistleblowing".)

B

The respondents argued that even if the requested documents were relevant and material, other provisions of the general statutes exempted them from disclosure under § 4-177c. The respondents specifically identified General Statutes §§ 4-190 through 4-197, 17b-90, 31-128f, and 52-146c through 52-1461. Respondents' objection to complainant's motion to compel, at 7-8, 11; Respondents' objection to complainant's request to produce documents, at F. These statutes, however, do not prevent the disclosure of documents that redact individually identifiable information.

Sections 4-190 through 4-197

The disclosure restrictions of §§ 4-190 et seq. are limited to the release of "personal data". "Personal data" is defined in § 4-190 (9) as "any information about a person's education, finances, medical or emotional condition or history, employment or

business history, family or personal relationships, reputation or character which because of name, identifying number, mark or description can be readily associated with a particular person." Although the order to produce redacted documents did not refer to § 4-190, the order did direct the respondents to produce documents that were redacting in compliance with 42 C.F.R. § 164.514. The redaction of such information would also result in the elimination of "personal data" from the documents. With the elimination of personal data, the disclosure prohibitions of §§ 4-190 et seq. do not apply to the disclosure of the redacted documents.

Section 17b-90

"The Respondents object to the extent Complainant seeks the production of individually identifiable information that is not disclosable pursuant to . . . § 17b-90 . . . ." Respondents' objection to complainant's motion to compel, at 8. As the complainant stated in his motion to compel, he has no objection to the respondents removing identifying information. Motion to compel, at 9. Further, the order to produce redacted documents specifically directed the respondent to remove identifying information in accordance with 45 C.F.R. § 164.514.

Section 31-128f

The respondents contend that the "Complainant seeks non-disclosable information from employees' personnel files, in violation of Connecticut General

Statutes § 31-128f . . . .” Respondents’ objection to complainant’s motion to compel, at 7. Section 31-128f provides, however, that disclosure of individually identifiable information contained in an employee’s personnel file or medical file is permissible without the employee’s written authorization when the disclosure is made “(2) pursuant to a lawfully issued administrative summons . . . .” In this case, the order to produce redacted documents constituted a lawfully issued administrative summons directing the respondents to produce relevant and material documents.

Sections 52-146d through 52-146i, *Falco v. Institute of Living and Noll v. Hartford Roman Catholic Diocesan Corp.*

The respondents cite to the confidentiality and medical privilege statutes in §§ 52-146f through 52-146j; to *Falco v. Institute of Living*, 254 Conn. 321 (2000); and to *Noll v. Hartford Roman Catholic Diocesan Corp.*, Superior Court, judicial district of Hartford at Hartford, Docket No. HHDX04-CV02-4034702s (September 5, 2008) (46 Conn. L. Rptr. 276) (2008 WL 4307983) in support of their failure to comply with the order to produce redacted documents. These statutes and cases do not apply to this case.

The confidentiality privileges recited in §§ 52-146f through 52-146j are subject to, and must be read in context with, §§ 52-146d and 52-146e. Section 52-146e provides that: “(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." (Emphasis added.)

The phrase "identify a patient" is defined in § 52-146d (4) as "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". In other words, only patient-identifying documents require either patient consent or, in the absence of patient consent, compliance with the disclosure provisions of §§ 52-146f to 52-146j. As § 52-146e (a) and *Fischer v. Hartford Hospital* make clear, however, documents that do not identify a patient do not need patient consent and do not need to comply with the non-consensual disclosure requirements of §§ 52-146f to 52-146j.

In this case, the order to produce redacted documents directed the respondents to redact patient-identifying information. Therefore, pursuant to § 52-146e (a) and *Fischer v. Hartford Hospital*, the medical privilege statutes cited by the respondents do not apply to prevent the production of the redacted documents.

Similarly, the courts' decisions in *Falco* and *Noll* are of no support to the respondents. In *Falco*, the plaintiff sought "to compel the disclosure of the name, last

known address and social security number of one of the defendant's patients referred to as John Doe." *Falco v Institute of Living*, supra, 254 Conn. 322. Citing to the "identify of patient" language in §§ 52-146d, 52-146e (a) and 52-146f; Id., 326 – 29; the court concluded that that the "protection of communications *that identify a patient* are central to the purpose of the statutes . . . ." (Emphasis added.) Id., 328 - 29. In other words, the court held that identifying information is protected under the psychiatrist-patient privilege. Similarly, in *Noll*, the issue was the disclosure of the medical records of a specifically named person, one of the defendants.

Unlike the situation in *Falco* and *Noll*, in this case, the names of the persons whose records are being sought are not referenced in the pleadings and the order to produce redacted documents specifically directed the respondents to redact identifying information.

VII

Non-statutory arguments advanced by the respondents do not preclude production of the redacted documents

The respondents raise several non-statutory reasons for failing to comply with the order to produce redacted documents. None of these reasons, however, justify the respondents' failure to comply with the order.

A

The respondents argued that to "the extent that this Request seeks names and other personal information regarding individuals not connected with this litigation as

such information is irrelevant, immaterial, unduly burdensome, and constitutes an unwarranted and improper invasion of privacy." Respondents' objection to complainant's motion to compel, at 7 – 8. As previously discussed, the complainant does not seek and the respondents were not ordered to produce the names or the identifying information of non-parties. In compliance with federal and state law, the respondents were directed to redact patient identifying information. The production requests and the order to produce redacted documents are narrowly tailored to produce relevant, material and non-identifying documents.

B

According to the respondents, this tribunal "cannot order disclosure of records from non-party patients." Respondents' objection to complainant's motion to compel, at 11. However, as previously discussed, *Fischer v. Hartford Hospital* and federal and state law are clear: this tribunal has the authority to order the respondents to produce relevant, material and non-identifying documents of non-parties.

C

The respondents contend "there is absolutely no statutory language within the enumerated statutes that authorizes state entities such as the OPH to administratively adjudicate federal claims through a public hearing process that is binding upon the employer." Respondents' objection to complainant's motion to compel, at 11. The only

claim being adjudicated here, however, is a state claim: whether the respondents illegally retaliated against the complainant in violation of § 4-61dd. This tribunal has the authority under § 4-177c and § 4-61dd-16 to determine whether there are federal and/or state laws affecting the obligation of the parties to produce relevant and material documents.

D

Finally, the respondents raise as an issue the protective order.[4] "An important concern is the lack of enforceability by this administrative body of any protective order. The Office of Public Hearings would not have continuing jurisdiction over this matter, or the authority to sanction an entity who was not a party to the proceedings." Respondents' objection to complainant's motion to compel, at 11 – 12. The "referee in this instance does not have the authority to issue a HIPAA qualified protective order". Transcript of July 7, 2009, at 17: 8 – 9. See also *State of Connecticut v. Commission on Human Rights & Opportunities, Office of Public Hearings*, CV-09-4020280, Complaint for Administrative Appeal, at 6 and the transcript of the June 16, 2009 Superior Court hearing.

The respondents' obligation to produce the redacted documents is independent of and distinct from the protective order. Even if the protective order were not referenced in the order to produce redacted documents, even if the protective order had not been issued, even if the referee lacks the authority to issue the protective order and even if the protective order is unenforceable, the respondents would, nevertheless, still

have the obligation to produce the documents pursuant to § 4-177c and § 4-61dd-16. As has been discussed at length, the requested documents are relevant and material and, as redacted, are not subject to any federal or state privilege laws that would preclude their production. In the absence of any applicable federal or state privilege laws, a protective order is actually unnecessary for the production of redacted documents, and the existence and enforcement of the protective order are irrelevant to the substantive and procedural aspects of this case.

Because the respondents have the statutory obligation under § 4-177c to produce relevant, material, redacted documents, sanctions were imposed upon them pursuant to paragraph 3 of the order to produce redacted documents for their failure to comply with the production order..

_____
Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Kathleen Eldergill, Esq.
Nancy A. Brouillet, Esq.

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[1] General Statutes § 4-177c: "(a) In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.

(b) Persons not named as parties or intervenors may, in the discretion of the

presiding officer, be given an opportunity to present oral or written statements. The presiding officer may require any such statement to be given under oath or affirmation."

[2] Section 4-61dd-16 of the Regulations of Connecticut State Agencies:

"(a) Each party shall be afforded the opportunity to inspect and copy relevant and material records, papers and documents not in the possession of the party, except as otherwise provided by applicable state or federal law.

"(b) If a party fails to comply with an order of the presiding officer regarding a request for disclosure or production, the presiding officer may issue a non-monetary order, including but not limited to:
(1) An order finding that the matters that are the subject of the request for production or disclosure are established in accordance with the claim of the party requesting such order;
(2) An order prohibiting the party who has failed to comply from introducing designated matters into evidence; and
(3) An order limiting the participation of such party with regard to issues or facts relating to the disclosure sought."

[3] Section 4-61dd-17 of the Regulations of Connection State Agencies:

"In addition to those sanctions allowed under sections 4-61dd-15 and 4-61dd-16 of the Regulations of Connecticut State Agencies, if a party or the attorney or other representative of a party fails to comply with sections 4-61dd-1 to 4-61dd-21 of the Regulations of Connecticut State Agencies or with a ruling of the presiding officer, the presiding officer may impose such non-monetary sanctions as he or she deems just and appropriate under the circumstances, including but not limited to continuance of the proceeding, exclusion of testimony or other evidence, and the drawing of an adverse inference against the noncomplying party or attorney or representative of a party."

[4] The revised HIPAA-compliant protective order provided in relevant part:

> 1. . . . All items listed shall be redacted:
> a. Names of patients shall be redacted and replaced with neutral identifiers such as 'patient number 1' or some other identifier which will not contain individually identifiable information;
> b. all address information, including but not limited to zip codes;

c. All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and for all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
d. Telephone numbers'
e. Fax numbers;
f. Electronic mail addresses;
g. Social security numbers;
h. Medical record numbers;
i. Health plan beneficiary numbers;
j. Account numbers;
k. Certificate/license numbers;
l. Vehicle identifiers and serial numbers, including license plate numbers;
m. Device identifiers and serial numbers;
n. Web Universal Resource Locators (URLs);
o. Internet Protocol (IP) address numbers;
p. Biometric identifiers, including finger and voice prints;
q. Full face photographic images and any comparable images; and
r. Any other unique identifying number, characteristic, or code, except as permitted by paragraph (c) of this section.

2. Medical documents designated as confidential will be labeled "Confidential".

3. Documents designated "Confidential", and any other information contained in those documents ('Information') will be held and used by the party receiving such documents and information solely for use in connection with the above-captioned action.

4. Nothing in this protective order constitutes an admission by any party that Confidential documents or Information disclosed in this case are relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of any or all Confidential documents or Information disclosed.

5. Documents or Information designated as 'Confidential' shall not be disclosed to any person, except:
a. The parties and their counsel;
b. Employees of such counsel assigned to and necessary to assist in this proceeding;
c. Consultants or experts to the extent deemed necessary by counsel;

d. Any person from whom testimony is taken or is to be taken in this action, except that such a person may only be shown the Confidential documents in preparation for his/her testimony and may not retain the Confidential documents or Information; and
e. The hearing officer at the hearing.

6. Prior to disclosing or displaying and Confidential documents to any person, counsel shall: (1) apprise that person of the confidential nature of the documents or Information; and (2) apprise that person that this tribunal has restricted the use of those documents or information by her/him for any purpose other than this litigation and has enjoined the disclosure of those documents or Information to any person.

7. Any “Confidential” documents or Information produced by the parties shall be used by the parties and their attorneys only for the purpose of the preparation for trial, or trial, of this matter, and shall not be used for any other purpose, including, but not limited to, disclosure to any third party.

8. Each person given access to the Confidential documents or Information shall segregate such material, keep it strictly secure, and refrain from disclosing it in any manner, and shall keep the information or documents strictly confidential, except as specifically provided for by the terms of this order.

9. At the conclusion of litigation, the Confidential documents and Information and any and all copies shall be promptly (and in no event later than thirty (30) days after entry of a final judgment not subject to further appeal) returned to opposing counsel or, with written consent, be destroyed. The return or destruction shall be certified in writing by the holder of the Confidential documents or Information.

The protective order recites the provisions of 45 C.F.R. § 164.514 (which was referenced in the order to produce redacted documents), acknowledges that nothing in the protective order constitutes an admission by the parties that the documents are admissible at the administrative hearing and reserves the parties’ rights to object to their admission. Paragraphs 1 and 4. These provisions impose no obligations or rights on the parties than any party would have with any document produced. The protective order

also imposes, effectively only on the complainant, limitations on the use, disclosure and disposition of the produced, redacted documents. Paragraphs 2, 3, 5 – 9. Because the respondent has the statutory obligation under § 4-177c to produce the redacted documents even without a protective order, these provisions, proposed by the complainant, reflect a willingness on his part to accommodate the respondents' concerns regarding access to the documents.