



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

David Slepian and the Connecticut Chapter of
the National Academy of Elder Law Attorneys,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0283

Commissioner, State of Connecticut, Department of
Social Services; and State of Connecticut,
Department of Social Services,
Respondent(s)

February 2, 2017

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, February 22, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE February 13, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE February 13, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE February 13, 2017**, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: Attorney Kristen A. Sweet
Assistant Attorney General Tanya DeMattia

FIC# 2016-0283/Trans/wrbp/VDH//PSP/2017-02-02

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

David Slepian and the Connecticut
Chapter of the National Academy
of Elder Law Attorneys,

Complainants

against

Docket #FIC 2016-0283

Commissioner, State of Connecticut,
Department of Social Services; and
State of Connecticut, Department of
Social Services,

Respondents

February 2, 2017

The above-captioned matter was heard as a contested case on October 4, 2016, at which time the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

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

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that, by letter dated February 22, 2016, the complainants requested that the respondents provide them with copies of records (the "first request"), as follows:
 - a. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the 2015 calendar year;
 - b. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the 2014 calendar year;
 - c. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the 2013 calendar year;
 - d. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the calendar month of January 2016;

- e. Going forward, all Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division issued during a calendar month beginning with the month of February 2016 and continuing on a monthly basis indefinitely; and
- f. The Department of Social Services policy with regard to fees and costs associated with providing documents in response to a Freedom of Information request.

3. It is found that, by email dated February 23, 2016, the respondents acknowledged the complainants' request, indicating that such request was being reviewed.

4. It is found that, by email dated March 7, 2016, the complainants requested that the respondents provide them with an update on the status of their February 22nd request.

5. It is found that, by email dated March 7, 2016, the respondents denied the complainants' request for records, stating that the requested Medicaid Fair Hearing decisions were part of individuals' Medicaid eligibility files and constituted client data and/or personal health information that is protected from disclosure under the Freedom of Information ("FOI") Act.

6. Thereafter, by letter dated March 23, 2016, the complainants sent the respondents an amended request for copies of records (the "second request"), as follows:

- a. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the 2015 calendar year **with names and/or data identifying the specific client redacted;**
- b. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the 2014 calendar year **with names and/or data identifying the specific client redacted;**
- c. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the 2013 calendar year **with names and/or data identifying the specific client redacted;**
- d. All Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division during the calendar **months of January, and February 2016 with names and/or data identifying the specific client redacted;**
- e. Going forward, all Medicaid Fair Hearing Decisions issued by the Office of Legal Counsel, Regulations and Administrative Hearings division issued during a calendar month beginning with the month of **March** 2016 and

continuing on a monthly basis indefinitely **with the names and/or identifying the specific client redacted**; and

- f. The Department of Social Services policy with regard to fees and costs associated with providing documents in response to a Freedom of Information request.
(Bold supplied to show modifications).

7. It is found that, by email dated March 31, 2016, the respondents denied the complainants' second request on the same grounds upon which it had denied the complainants' first request.

8. By letter dated April 4, 2016 and filed April 6, 2016, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with copies of the records described in paragraph 6, above.

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

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

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

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

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

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

13. At the start of the contested case hearing, the complainants stated that they were withdrawing the request for records in paragraph 6.f, above. In addition, because this Commission has jurisdiction over records that exist as of the date a request for records is made, and because the request in paragraph 6.e, above, is a request for records that are to be created sometime in the future, the Commission will not address such request.

14. Accordingly, the requests in paragraph 6.a through 6.d are at issue in the instant matter.

15. The respondents contend that the requested records are exempt pursuant to §1-210(b)(10), G.S., which provides that nothing in the FOI Act shall be construed to require the disclosure of:

Records, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes;

16. More specifically, the respondents contend that the requested records are exempt from disclosure pursuant to §17b-90, G.S., entitled "Disclosure of information concerning program applicants and participants. Limitations. Regulation," which provides, in relevant part, as follows:

(a) The commissioner shall adopt regulations, in accordance with chapter 54, necessary to enable him to carry out the programs the Department of Social Services is designated to administer pursuant to section 17b-2, including any regulations necessary for receiving grants from the federal government to this state if the absence of any such regulation would result in the loss of such grants and regulations governing the custody and use of the records, papers, files and communications concerning persons applying for or receiving assistance under said sections. When names and addresses of recipients of such assistance are required by law to be furnished to or held by any other government agency, such agency shall adopt regulations to prevent the publication of lists thereof or their use for purposes not directly connected with the administration of said programs.

(b) No person shall, except for purposes directly connected with the administration of programs of the Department of Social Services and in accordance with the regulations of the commissioner, solicit, disclose, receive or make use of, or authorize, knowingly permit, participate in or acquiesce in the use of, any list of the names of, or any information concerning, persons applying for or receiving assistance from the Department of Social Services or persons participating in a program administered by said department, directly or indirectly derived from the records, papers, files or communications of the state or its subdivisions or agencies, or acquired in the course of the performance of official duties. . .

17. Federal law directs that states participating in the Medicaid program safeguard, by way of a state statute, the use or disclosure of information pertaining to applicants and beneficiaries of Medicaid. See 42 C.F.R. §431.301 (“State plan requirements”). It is found that §17b-90, G.S., is Connecticut’s safeguarding statute for purposes of complying with federal Medicaid regulations.

18. However, federal law also expressly requires that all state agencies’ final decisions following a fair hearing concerning Medicaid entitlement be accessible to the public: “The public must have access to all agency hearing decisions, subject to the requirement of subpart F of this part for safeguarding information.” See 42 C.F.R. §431.244 (g).

19. Subpart F provides the scope of protection that a state must provide by way of safeguarding statute with regard to information about applicants and their beneficiaries. 42 C.F.R. §431.305, entitled “Types of Information to be safeguarded,” provides, in relevant part, as follows:

- (a) The agency must have criteria that governs the types of information about applicants and beneficiaries that are safeguarded.
- (b) This information must include at least—
 1. Names and addresses
 2. Medical services provided;
 3. Social and economic conditions or circumstances;
 4. Agency evaluation of personal information;
 5. Medical data, including diagnosis and past history of disease or disability; and
 6. Any information received for verifying income eligibility and amount of medical assistance payments. . . . Income information received from SSA or the Internal

Revenue Service must be safeguarded to the requirements of the agency that furnish the data;

7. Any information received in connection with the identification of legally liable third party resources under §433.138 of this chapter; and
8. Social Security Numbers.

20. The respondents contend that §17b-90, G.S., is a legislative determination that no records related to a Medicaid applicant or beneficiary, including an agency's final decision following a fair hearing on entitlement, can be disclosed. In effect, the respondents contend that Connecticut, in complying with the mandates of 42 C.F.R. §431.301, promulgated a statute—in this case, §17b-90, G.S.—that permissibly safeguarded all records that are in any way related to the Medicaid process.

21. However, adopting the respondents' construction of §17b-90, G.S., and the federal safeguarding mandate that such statute was enacted to effectuate, would render the safeguarding criteria so broad that they would swallow the general federal requirement that the public "must" have access to all agency final hearing decisions. See ¶ 18, above.

22. In fact, it is found that other states, such as New York and Vermont, have been able to meet their safeguarding requirements, while still complying with the federal regulation that their final agency hearing decisions be available to the public. See Ex. I and J.

23. The respondents also argue that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") precludes them from disclosing the final agency hearing decisions with regard to Medicaid eligibility.

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

25. It is found that HIPAA applies to any entity that is: a health care provider that conducts certain transactions in electronic form; a health care clearinghouse; or a health plan. See 45 C.F.R. §160.103. It is found that an entity that is one or more of these types of entities is referred to as "a covered entity" in the Administrative Simplification regulations that govern HIPAA and are required to comply with those regulations. See 45 C.F.R. §§160, 162, and 164.

26. It is further found that 45 C.F.R. §164.512(a)(1) provides in relevant part:

- (a) Standard: Uses and disclosures required by law.

- (1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and use or disclosure complies with and is limited to the relevant portions of such law.

27. It is further found that 45 C.F.R. §164.103 defines “required by law” as:

a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law [which includes]. . . but is not limited to. . . an administrative body authorized to require the production of information. . . and statutes or regulations that require the production of information. . . .

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

29. In addition, it is further concluded that 42 C.F.R. §431.244 (g) also requires by law the disclosure of “all final agency hearing decisions.”

30. Moreover, it is found that the respondent agency’s own policies and procedures with regard to HIPAA provides direction on how to “de-identify” records with confidential health information. The respondent agency’s HIPAA Policies and Procedures Manual, under the heading “De-identified Information,” provides, in relevant part, that:

De-identified information is health information that does not specifically identify an individual and there is no reasonable basis that the information alone *could* be used to identify an individual. De-identified information is not individually identifiable health information. In order to be considered de-identified, the following 18 elements must be removed: name; address; names of relatives; names of employers; birth date; telephone number; fax number; e-mail addresses; social security number; medical record number; health plan beneficiary number; account number; certificate/license number; any vehicle or device serial number; web URL; Internet Protocol Address; Finger or voice prints; Photographic images (e.g. full facial photographs); and any other unique identifying number, characteristic, or code. . . .


31. It is concluded that the final agency hearing decisions referred to in paragraphs 6.a through 6.d, above, after being redacted to comply with 42 C.F.R. §431.305 and/or HIPAA, must be disclosed to the complainants.

32. It is further concluded that the respondents violated the disclosure requirements of §§1-210(a) and 1-212(a), G.S., when they declined to disclose such redacted records to the complainants.

33. This Commission, having concluded that the respondents' final agency hearing decisions must be disclosed, is cognizant of the fact that the complainants in this case have requested over three years of final agency hearing decisions and that the respondents, up to this point, have not had to prepare these records for disclosure. It is found that there are approximately 1100 final agency hearing decisions responsive to the request in this case. Accordingly, it is found that the best way to accomplish the process of getting the requested records to the complainants is on a rolling basis.

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

1. The respondents shall provide the complainants with copies of the requested records, once redacted, free of charge. The respondents shall produce the redacted records to the complainants on a rolling basis, making a production to the complainants every other week, until all the requested records have been disclosed.



Valicia Dee Harmon
as Hearing Officer