

<b>DOCKET NO. HHB-CV-19-6050491</b>	:	<b>SUPERIOR COURT</b>
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<b>DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES, ET AL.</b>	:	<b>JUDICIAL DISTRICT NEW BRITAIN</b>
	:	<b>ADMINISTRATIVE APPEALS SESSION</b>
<b>VS.</b>	:	
	:	
<b>FREEDOM OF INFORMATION COMMISSION, ET AL.</b>	:	<b>JULY 1, 2020</b>

**MEMORANDUM OF DECISION**

**INTRODUCTION:**

The Department of Mental Health and Addiction Services (DMHAS) has appealed a final decision of the Freedom of Information Commission (FOIC) ordering DMHAS to provide un-redacted copies of certain DMHAS police incident reports to the Hartford Courant and its reporter, Mr. Josh Kovner.

**FACTS AND PROCEDURAL HISTORY:**

On November 9, 2017, the Hartford Courant and its reporter, Josh Kovner, submitted a freedom of information request to DMHAS asking for production of the following documents:

“DMHAS Police Department incident reports on any and all deaths in 2016 of Whiting Forensic Division patients that were deemed “accidental” by the medical examiner’s office, including, but not limited to, a death of a patient on December 1, 2016. At the time, in reference to the Dec. 1, 2016 death, DMHAS said in a statement that the patient “died due to a medical event.”

NEW BRITAIN  
 JUDICIAL DISTRICT OF  
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The request further stated that: "All references to the identity of the patient can be redacted."

DMHAS responded denying the request because DMHAS determined that the requested documents were exempt from disclosure under Connecticut's Freedom of Information Act (FOIA).<sup>1</sup>

On January 22, 2019, Mr. Kovner filed a complaint with the FOIC alleging that DMHAS had improperly denied his request. On May 31, 2018, the FOIC conducted a contested case hearing in this matter. On December 19, 2019, the FOIC issued its final decision which rejected DMHAS' grounds for non-disclosure concluding that DMHAS had violated the FOIA and ordering DMHAS to produce un-redacted copies of the documents requested.

DMHAS has timely appealed the final decision of the FOIC to this court. This court has granted DMHAS' motion for a stay pending the court's substantive decision in this matter.

DMHAS is aggrieved because it has exhausted its administrative remedies and is appealing an adverse final decision of the FOIC, which orders DMHAS to produce the requested documents and finds that DMHAS violated FOIA.

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<sup>1</sup> DMHAS asserted three reasons for its non-disclosure. First, DMHAS asserted that the requested documents were exempt from disclosure, pursuant to General Statutes § 52-146e. Alternatively, DMHAS asserted that the requested documents were exempted from disclosure pursuant to the interaction of the FOIA and the federal Health Insurance Portability and Accountability Act (HIPAA). Lastly, DMHAS asserted that the requested documents were exempt from disclosure, pursuant to General Statutes § 1-210 (b) (2).

**STANDARD OF REVIEW:**

This appeal is brought pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-183.<sup>2</sup> Judicial review of an administrative decision in an appeal under the UAPA is limited. *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). “[R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency’s findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither [the Supreme Court] nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.” (Internal quotation marks omitted.) *Id.*

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<sup>2</sup> Section 4-183 (j) provides in relevant part: “The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the court finds such prejudice, it shall sustain the appeal and, if appropriate, may render a judgment under subsection (k) of this section or remand the case for further proceedings.”

Although the courts ordinarily afford deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes, "[c]ases that present pure questions of law . . . invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Internal quotation marks omitted.) *Dept. of Public Safety v. Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

**ANALYSIS:**

The document request at issue requests DMHAS police reports for any patient deaths at Whiting Forensic during 2016 that were deemed by the medical examiner to be accidental. In particular, it requests a DMHAS police report for the death of a patient that died on December 1, 2016. Thus, although the description in the request appears to be broad, in reality the request is for a specific DMHAS police report concerning the death of a specific Whiting patient.

General Statutes § 1-210 (a), the FOIA, provides in relevant part:

"Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency . . . shall be public records and every person shall have the right to . . . (3) receive a copy of such records in accordance with section 1-212 . . ."

Thus, requested records should be produced unless exempt by federal law or state law. DMHAS' brief on appeal asserts two exceptions. First, DMHAS asserts that the requested record is exempt under the psychiatrist-patient privilege as provided for in General Statutes § 52-146e and § 52-

146d. Second, DMHAS asserts that the federal Health Insurance Portability and Accountability Act (HIPAA) exempts the requested records from disclosure.

A. Applicability of the Psychiatrist-Patient Privilege to the Requested Records

In Connecticut, the psychiatrist-patient privilege is codified in General Statutes § 52-146e, which provides in relevant part:

“(a) All communications and records as defined in section 52-146d shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Except as provided in sections 52-146f to 52-146i<sup>3</sup>, 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.”<sup>4</sup> (Emphasis and references added.)

Thus, if the requested records fit within the definition of “communications and records” as provided for in General Statutes 52-146d (2), they may not be disclosed if the records identify the patient.

Section 52-146d (2) provides in relevant part:

“Communications and records means **all oral and written communications and records** thereof **relating to diagnosis or treatment of a patient’s mental condition** between the patient and a psychiatrist, or between a member of the patient’s family and a psychiatrist, or between any of such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, **including communications**

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<sup>3</sup> No party has asserted that the exceptions provided for in General Statutes § 52-146f to § 52-146i apply in this matter.

<sup>4</sup> No consent of the patient or his representative has been provided.

**and records which occur in or are prepared at a mental health facility . . .”**  
(Emphasis added.)

Thus, records that occur in, or are prepared at, a mental health facility relating to the treatment of a patient’s mental condition are included in the statutory definition of “communications and records.”

Whiting Forensic is a mental health facility, and DMHAS, which operates Whiting Forensic, provides psychiatric services there.<sup>5</sup> The DMHAS has its own police force, and a portion of that force is stationed and employed at Whiting Forensic. The police report in question was prepared by the DMHAS police at Whiting Forensic. Thus, the police report was prepared at a mental health facility and the issues reported occurred in a mental health facility<sup>6</sup>.

The next question to be answered is whether the police report is a document that relates to the treatment of a patient’s mental condition. This court finds that the police report is a record that relates to the treatment of a patient’s mental

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<sup>5</sup> Whiting Forensic, a division of DMHAS, is the state’s maximum security psychiatric facility. See R. at 43-44. DMHAS has its own police force. See R. at 45-46.

<sup>6</sup> The phrase “including communications and records which occur in or are prepared at a mental health facility” in §52-146d(2) expands the definition of communications and records. Preceding the foregoing phrase in the definition is a description of three types of communications followed by the words “wherever made”. Following the words, “wherever made” the phrase “including communications and records which occur in or are prepared at a mental health facility” would be superfluous, since “at a mental health facility” would be made a mere subset of “wherever made”, unless the phrase separately, apart from the previously described communications, expanded the definition.

condition<sup>7</sup>. The subject of the police report was a patient in Whiting Forensic, a mental health facility. The DMHAS police are a specialized police force that is stationed and employed at Whiting Forensic<sup>8</sup>. The DMHAS police work integrally with the mental health care providers at Whiting Forensic to deliver overall mental health care. The dedicated police force maintains order and promotes the safety of staff and patients as psychiatric services are delivered. Given the type of patients and psychiatric services delivered at Whiting Forensic, it would not be reasonably possible to deliver the treatment provided without the services of the dedicated police. Further, the DMHAS police are employees at the facility. Lastly, the police report details the patient's mental and physical conditions and treatment. In view of the foregoing, the court determines that the police report in question is a record prepared at a mental health facility that relates to the treatment of the mental condition of a patient at the facility, and is therefore a record within the definition of §52-146d(2). The FOIC's determination otherwise is not supported by substantial evidence in the record and is a clear error of law.

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<sup>7</sup> The words "relating to" in §52-146d(2) are clearly broad.

<sup>8</sup> The DMHAS police are not a generalized police force. They are employees of DMHAS that assist in the delivery of medical services by DMHAS.

Given the foregoing, the police report may not be disclosed if it would identify<sup>9</sup> a patient in Whiting Forensic. In its un-redacted state, which was ordered produced by the FOIC, there is no doubt the police report identifies a patient at Whiting Forensic. The record indicates that the police report contains the patient's name, psychiatric condition, the date of the incident, a description of the incident and the location of the incident. The police report also discusses treatment that the patient received. Accordingly, in accordance with General Statutes § 52-146e, the police report may not be produced in its un-redacted form.

The FOIC found that because (i) "the complainant's know the identity of the patient who died on December 1, 2016, and reported on the incident," and (ii) the identity of the patient had already been confirmed by the family, public reporting and the medical examiner, the un-redacted record should be produced. However, the applicable statute has no public knowledge exception. Further, how are we to determine the actual extent of the public knowledge in each individual case, keeping in mind that FOIA requests need to be administered by the various

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<sup>9</sup> General Statutes § 52-146d (4) defines what it means to identify a patient: "'Identifiable' and 'identify a patient' refer to **communications and records which contain (A) names or other descriptive data from which a person acquainted with the patient might reasonably recognize the patient as the person referred to, or (B) codes or numbers which are in general use outside of the mental health facility which prepared the communications and records.**"



employees within the state and municipal governments? How are these employees to assess the extent of existing public knowledge in each individual case in connection with each FOIA request that they receive? Such a standard would be unworkable in this context, and is not provided for in the statute. Instead, the statute simply requires that if the record itself identifies the patient, it cannot be disclosed without consent. Here, there is no doubt that the un-redacted record identifies the patient, and thus, it cannot be disclosed.

The last consideration to be made is to determine whether a redacted form of the record can be provided. General Statutes § 52-146e (a) provides in relevant part: "no person may disclose . . . records . . . which identify a patient . . ." Thus, the statute focuses on the record itself, and whether or not the record identifies a patient. Accordingly, the police report may be redacted such that the record itself will not identify the patient involved. This analysis does not take into consideration what the public may or may not know, but instead focuses on whether the record in question identifies the patient. The definition of "identify a patient" confirms the foregoing by focusing on "communications and records" "which contain" "names or other descriptive data" "from which" a person may reasonably recognize a patient. Thus the focus is on records containing data from which a patient may reasonably be recognized. It is the data in the record that is used to judge whether or not it would reasonably lead to the identity of a patient. The court has reviewed

the DMHAS police report in camera and has determined that a redacted form of the record may be provided without identifying the patient.

**B. The Applicability of HIPAA to the Requested Records**

As is clear from a plain reading of § 1-210 (a), applicable federal law is an exception to the FOIA's disclosure requirement. HIPAA is a federal law that establishes privacy standards for the protection of health records, including psychiatric and medical records. See 45 C.F.R § 164.500 and § 164.502. Whiting Forensic and DMHAS are clearly covered entities under HIPAA since they are each clearly a health care provider. The DMHAS police department is stationed and employed at Whiting Forensic. The DMHAS police department at Whiting Forensic is an integral part of Whiting Forensic and is essential to the provision of medical services. As such, Whiting Forensic and the DMHAS police are indistinguishable for this purpose and are each a covered entity in the provision of medical services.

Federal regulations implementing HIPAA prohibit a covered entity from disclosing individually identifiable health information, also known as protected health information, without the consent of the patient. See 45 C.F.R. § 164.512. As provided for in 45 C.F.R § 160.103, "Health Information" is defined as "any information . . . that . . . (1) Is created or received by a health care provider . . . 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." Further, "Individually

identifiable health information” is defined as health information that identifies the individual or can be used to identify the individual.

The DMHAS police report is a record that was created and received by a health care provider, namely Whiting Forensic through its employees, the DMHAS police. Further, the DMHAS police report relates to a patient’s mental health condition. The subject of the police report was a patient at Whiting Forensic, a mental health facility. The report clearly contains information concerning the patient’s physical and mental health. The DMHAS police report in fact contains detailed descriptions of the patient’s psychiatric condition, the patient’s treatment therefor, and the emergency medical treatment administered to the patient because of the incident. The DMHAS police are a specialized police force that is stationed and employed at Whiting Forensic. The DMHAS police work integrally with the mental health care providers at Whiting Forensic to deliver overall mental health care. The dedicated police force maintains order and promotes the safety of staff and patients as psychiatric services are delivered. Given the type of patients and psychiatric care delivered at Whiting Forensic, it would not be reasonably possible to deliver the treatment provided without the services of the dedicated police. Further, the DMHAS police are employees at the facility. In view of the foregoing, the court determines that the police report in question is a record created and received by a health care provider that relates to the mental and physical health condition of a patient at the facility. The report contains protected health information. The FOIC’s determination otherwise is not supported by substantial evidence in the record and is a clear error of law.

However, the police report may be redacted such that the record itself will not contain individually identifiable health information and not identify the patient involved. The court has reviewed the DMHAS police report in camera and has determined that a redacted form of the record may be provided without identifying the patient or revealing any individually identifiable health information.

The FOIC has determined, through a circular argument, that despite the fact that the FOIA has an explicit exception from its disclosure requirements for federal law, and despite the fact that HIPAA clearly prevents disclosure of protected health information, the FOIA's mandated disclosure of HIPAA protected health information is authorized because HIPAA itself has a "required by law" exception to its protections. The FOIC thus determined that the FOIA itself fits within the "required by law" exception to HIPAA protections. This circular argument is clearly erroneous.

Taken at face value, the FOIC's view would mean that HIPAA provides absolutely no protection for protected health information arising at any state operated health care facility such as Whiting Forensic. If the FOIA requires the disclosure of medical records that are otherwise protected by HIPAA, then patients treated at medical care facilities operated by the state have no HIPAA protection. Such is clearly not the case.

The HIPAA “required by law” exception is provided for in 45 C.F.R. § 164.512 (a) as follows:

“A covered entity may use or disclose protected health information without the written authorization of the individual . . . in situations covered by this section, subject to the applicable requirements of this section . . .

- (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 the use or disclosure complies with and is limited to the relevant requirements of such law. ”

The foregoing regulations provide that a covered entity “may use or disclose.” Thus, it is permissive, not mandatory. Further, the record contains evidence of the interpretation of this regulation applied by the Department of Health and Human Services (DHHS), the agency that promulgated and enforces the foregoing regulations.<sup>10</sup> The DHHS guidance clearly indicates that where a state law on disclosure, such as FOIA, specifically exempts or otherwise imposes other qualifications on the disclosure of medical records, such disclosures are not considered “required by law” and therefore, do not fall within the HIPAA “required by law” exception. Such is the case here. As noted above, the disclosure of patient identifying information is prohibited by General Statutes § 52-146d in combination with § 52-146e. Thus, the “required by law”

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<sup>10</sup> Deference should be given to the interpretation of regulations by the agency that promulgates and enforces them. Further, DHHS’ interpretation is reasonable in harmonizing the federal health care information protection regulations with our similar statutes and policies and with our FOIA statute.

exceptions of HIPAA do not apply and the FOIA does not mandate disclosure of this HIPAA protected health information.

### C. Conclusion

The DMHAS police report in question may not be disclosed or provided under the FOIA in un-redacted form. In its un-redacted form, the DMHAS police report contains information that identifies a psychiatric patient and would therefore violate the patient-psychiatrist privilege. Further, the DMHAS police report contains protected health information that is prohibited to be released by HIPAA without consent. As such, the un-redacted DMHAS police report may not be disclosed or provided in response to the defendant's FOIA request<sup>11</sup>. However, the DMHAS police report that has been redacted to delete any information that identifies the patient and to delete any HIPAA protected health information may be provided in response to the defendant's FOIA request<sup>12</sup>.

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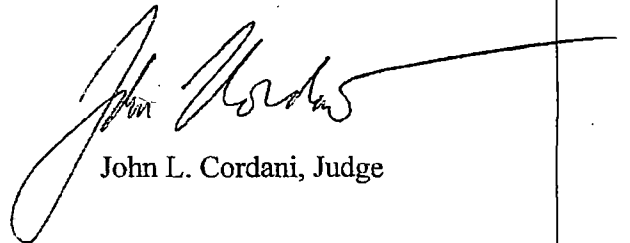
<sup>11</sup> In fact, the underlying FOIA request itself specified that "All references to the identity of the patient can be redacted".

<sup>12</sup> A redacted version of the requested documents has already been prepared.

**ORDER:**

The appeal is partially sustained and the judgment of the FOIC is modified as follows:

The plaintiff is directed to delete any information that identifies the patient and any information that qualifies as protected health information under HIPAA from the DMHAS police report requested, and to provide the redacted DMHAS police report to the defendant.

A handwritten signature in black ink, appearing to read "John Cordani", with a long horizontal line extending to the right from the end of the signature.

John L. Cordani, Judge