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Kathryn Ladd and Catherine Oemcke,
Complainant(s)
against

Administrator, State of Connecticut, Teachers' Retirement Board; and State of Connecticut, Teachers' Retirement Board,
Respondent(s)

Notice of Meeting

Docket #FIC 2015-061

September 28, 2015

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, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, October 28, 2015.** 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 October 16, 2015.*** 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 October 16, 2015.*** **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 October 16, 2015,*** 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: Kathryn Ladd and Catherine Oemcke
Krista D. O'Brien, Esq.

2015-09-28/FIC# 2015-061/Trans/wrbp/KKR//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Kathryn Ladd and
Catherine Oemcke,

Complainants

against

Docket #FIC 2015-061

Administrator, State of Connecticut,
Teachers' Retirement Board; and
State of Connecticut, Teachers'
Retirement Board,

Respondents

September 28, 2015

The above-captioned matter was heard as a contested case on August 19, 2015, and September 15, 2015, at which times the complainants and the respondents appeared 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 email dated December 31, 2014, the complainants requested from the respondents records containing "the names of all individuals who receive or have received a [Teachers' Retirement Board] ("TRB") subsidy, both medical and dental, sent to the municipality of Waterford since January 1, 2006, to the present date. We would like the names to be correlated with dates the TRB subsidy was sent and the amount that was sent on their behalf."

3. It is found that, by email also dated December 31, 2014, the respondent administrator ("administrator"), denied the request, described in paragraph 2, above, on the ground that such information is exempt from disclosure under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

4. By letter dated January 20, 2015 and filed January 23, 2015, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide them with records responsive to the request, described in paragraph 2, above.

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

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

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

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

7. 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."

8. It is found that the respondents maintain records responsive to the request, described in paragraph 2, above, and that such records are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

9. It is found that the responsive records consist of reports sent quarterly by the TRB to local boards of education indicating the names of the retirees between the ages of 55 and 65, who received a payment, or subsidy, from the TRB for health/dental insurance, during a particular time frame, and the amount of such subsidy (the "responsive records").[1]

10. At the hearing in this matter, the respondents claimed that they are prohibited by HIPAA and §1-210(b)(2), G.S., from disclosing the responsive records.[2]

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[1] The amount of the subsidy for the cost of health and/or dental insurance is the same for each retiree and is not claimed to be confidential or exempt from disclosure when not linked to a particular retiree's name.

[2] Although not required to do so, the respondents created a list of the names of all individuals who retired from the Waterford school district from 2000 through 2013, which list includes the names of those individuals between the ages of 55 and 65, who received a subsidy from the TRB, as well the names of those individuals over age 65 who qualified for Medicare. In addition, the respondents created a separate list of the amounts of the subsidies paid by the TRB for retirees ages 55 to 65 during the time period from 2007 through 2014, which list does not include names or any other identifying information. The complainants were not satisfied with these lists because they could not determine from such lists which retirees received a subsidy.

11. With respect to the respondents' claim that the information described in paragraph 9, above, is exempt from disclosure under HIPAA, 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).

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

13. A "covered entity" under the regulations means a health plan, a health care clearinghouse or a health care provider. 45 CFR §160.103. It is found that the TRB is a health plan, and therefore a "covered entity" under the regulations.

14. "Health information" is any information that is created or received by...a health plan...and relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present or future payment for the provision of health care to an individual. (Emphasis added). Id. "Individually identifiable health information" is health information that identifies the individual or can be used to identify the individual. Id. It is found that the information withheld from the complainants and described in paragraph 9, above, is "individually identifiable health information," or PHI, because it identifies past payment for the provision of healthcare to a particular individual.

15. As noted in paragraph 12, above, however, the federal regulations contain a list of exceptions to the prohibition on disclosure of PHI. One such exception provides that "a covered entity may use or disclose [PHI] to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant portions of such law." 45 CFR §164.512(a). (Emphasis added).

16. 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. Required by law includes, but is not limited to...statutes or regulations that require the production of information. . . .

17. It is axiomatic that the FOI Act is a statute that requires disclosure of public records, unless such records are exempt from disclosure. This Commission has repeatedly concluded that the confidentiality requirements in HIPAA do not prohibit disclosure where disclosure is required by the FOI Act. See Alexander Wood et al. v. Chief Public Defender, State of

Connecticut, Office of the Chief Public Defender, Division of Public Defender Services, Docket #FIC 2012-276 (April 24, 2013), *aff'd* George Flores, Esq. et al. v. Freedom of Information Comm'n, Superior Court, Docket No. HHB-CV-13-6020905-S, Judicial District of New Britain (April 7, 2014, Cohn, J.); Ron Robillard v. Freedom of Information Officer, State of Connecticut, Department of Mental Health and Addiction Services, Docket #FIC 2011-297 (April 25, 2012), *rev'd on other grounds*, Freedom of Information Officer, Department of Mental Health and Addiction Services et al. v. Freedom of Information Comm'n et al, SC 19371 (September 22, 2015); Lamberto Lucarelli v. Chief, Police Department, Town of Old Saybrook et al., Docket #FIC 2010-068 (December 15, 2010); Priscilla Dickman v. Director, Health Affairs Policy Planning, Department of Community Medicine and Health Care, State of Connecticut, University of Connecticut Health Center, Docket #FIC 2009-541 (July 28, 2009); Robin Elliott v. Commissioner, State of Connecticut, Department of Correction, Docket #FIC 2008-507 (July 22, 2009). Such conclusion is consistent with the interpretation of the exception in 45 CFR §164.512(a) by courts in other jurisdictions. State of Nebraska ex re. Adams County Historical Society v. Kinyoun, 277 Neb. 749 (2009); Abbott v. Texas Dep't of Mental Health, *supra*; State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St. 3d 518 (2006).

18. It is found that the FOI Act requires disclosure of the information described in paragraph 9, above, unless it is exempt from disclosure.

19. The respondents claim that the information described in paragraph 9, above, is exempt from disclosure under §1-210(b)(2), G.S.

20. Section 1-210(b)(2), G.S., provides that disclosure is not required of "[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy[.]"

21. In Perkins v. Freedom of Information Commission, 228 Conn. 158, 175 (1993), the Supreme Court set forth the test for an invasion of personal privacy, necessary to establish the exemption at §1-210(b)(2), G.S. The claimant must first establish that the records in question are personnel, medical or similar files. Second, the claimant must show that disclosure of the records would constitute an invasion of personal privacy. In determining whether disclosure would constitute an invasion of personal privacy, the claimant must establish both of two elements: first, that the information sought does not pertain to legitimate matters of public concern, and second, that such information is highly offensive to a reasonable person.

22. The respondents claim that the responsive records are "similar files."

23. In Connecticut Alcohol and Drug Abuse Comm'n et al, v. Freedom of Information Comm'n et al., 233 Conn. 28, 41 (1995), the Supreme Court further expounded on the threshold test for the exemption contained in §1-210(b)(2), G.S:

> Just as a 'medical' file of an individual has as one of its principal purposes the furnishing of information for making medical decisions regarding that individual, a 'personnel' file has as one of its principal purposes the furnishing of information for making personnel decisions regarding the

> individual involved. If a document or file contains material, therefore, that under ordinary circumstances would be pertinent to traditional personnel decisions, it is 'similar' to a personnel file. Thus, a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should, for example, be promoted, demoted, given a raise, transferred, reassigned, dismissed or subject to other such traditional personnel actions, should be considered 'similar' to a personnel file for the purposes of §1-[210](b)(2).

24. In State of Connecticut, Department of Public Safety v. Freedom of Information Comm'n et al, Superior Court, Docket No. HHB-CV-08-4018164-S, Judicial District of New Britain (March 3, 2009, Schuman, J.), the court ruled that medical information contained in a police report investigating a suicide is not a "medical file" within the meaning of §1-210(b)(2), G.S:

> While these pages do contain some medical and prescription information about a third party, the obvious function of that information is not to contribute to making a medical decision regarding the third party, but rather to explain the decedent's source of a means to commit suicide. Stated differently, it is apparent from reading the entire six pages that the third party, rather than providing information to a health care professional to assist in medical treatment, rendered the medical information to the police in order to assist in their investigation. The department can establish only that the file contains medical "information" but not that the file is a "medical file" under the prevailing definition. Accordingly, the commission reasonably concluded that the six pages do not constitute a medical file and therefore are not exempt from disclosure under the act.

25. Based upon the foregoing, it is found that the respondents in this case failed to prove that the information, described in paragraph 9, above, has, as one of its principal purposes, the furnishing of information for making personnel or medical decisions regarding the individual involved.

26. Accordingly, it is found that the respondents failed to prove that the responsive records are personnel or medical or similar files within the meaning of §1-210(b)(2), G.S.

27. However, even assuming that the responsive records are "similar files," it is found that the respondents did not present any evidence that the information, described in paragraph 9, above, does not pertain to legitimate matters of public concern, and second, that disclosure of such information would be highly offensive to a reasonable person. Significantly, the requested records do not contain any information that is typically considered to be "medical information,"

such as medical diagnoses, recommended treatments, etc., but rather, contain only the names of retirees who have received a TRB subsidy, the date the subsidy was sent, and the amount of such subsidy. In fact, in the absence of any evidence to the contrary, it is found that disclosure of the names of retirees who are receiving public funds to pay for a portion of their health and/or dental insurance premiums, as well as the dates and amounts of such payments, are legitimate matters of public concern, and that disclosure of such information would not be highly offensive to a reasonable person.

28. Moreover, it is found that the respondents did not notify any of the retirees whose names are included in the responsive records to determine whether or not they objected to disclosure of the information described in paragraph 9, above, and no evidence of any objection to such disclosure was offered at the hearing in this matter.

29. Accordingly, it is found that the respondents failed to prove that the responsive records are exempt from disclosure, pursuant to §1-210(b)(2), G.S.

30. Based upon the foregoing, it is concluded that the respondents violated the disclosure requirements in §§1-210(a) and 1-212(a), G.S., by failing to provide a copy of the responsive records to the complainants.

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

1. Forthwith, the respondents shall provide, free of charge, an unredacted copy of the records, described in paragraph 9 of the findings, above.

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

Kathleen K. Ross
as Hearing Officer

FIC 2015-061/hor/kkr/09282015