

NO. CV 09 4020983S : SUPERIOR COURT

COMMISSIONER, STATE OF
CONNECTICUT, DEPARTMENT OF
PUBLIC SAFETY : JUDICIAL DISTRICT OF
NEW BRITAIN

V. :

FREEDOM OF INFORMATION
COMMISSION, ET AL. : JUNE 4, 2010

NO. CV 09 4021543S : SUPERIOR COURT

COMMISSIONER, STATE OF
CONNECTICUT, DEPARTMENT OF
PUBLIC SAFETY : JUDICIAL DISTRICT OF
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V. :

FREEDOM OF INFORMATION
COMMISSION, ET AL. : JUNE 4, 2010

MEMORANDUM OF DECISION

The plaintiff, commissioner of the department of public safety (DPS), appeals from two final decisions of the defendant freedom of information commission (FOIC) contesting FOIC orders (1) to release DPS records to the defendant-complainant David Collins¹ and (2) to release the identical DPS records to the defendant-complainant

¹ Mr. Collins is a reporter for the New London Day, also named a defendant. This is Docket No. CV 09 4020983 and the FOIC final decision was issued on April 30, 2009.

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*Fileap 2009-022 (FIC 2008-607)
Fileap 2009-028 (FIC 2008-480)*

Alexander Wood.²

Collins and Wood were seeking DPS records concerning a person who fell to his death at the MGM Grand Hotel located at Foxwoods in Ledyard, Connecticut on June 4, 2008. In the course of the hearing of these appeals, the DPS withdrew its opposition to releasing the deceased's gambling records, and the court on January 19, 2010 denied DPS's stay motion regarding a witness statement. These items have been released to Collins and Wood.

The documents remaining at issue, now under a stay and sealed after an appropriate motion, relate to alleged medical records, motor vehicle records, and an NCIC print-out. Regarding these records, the FOIC made the following findings of fact:³

2. It is found that on August 20, 2008, the complainants made a written request for copies of records concerning a suicide at the MGM Grand Hotel/Casino on June 4, 2008.
3. By letter dated September 16, 2008, 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 records they requested, described in paragraph 2, above.

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Mr. Wood is a reporter for the Manchester Journal Inquirer, also named a defendant, although non-appearing in this matter. This is Docket No. CV 09 4021583 and the FOIC final decision was issued on July 15, 2009.

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These findings are taken from the Wood appeal; identical findings are made in the Collins appeal, although the finding numbers are slightly different.

* * *

16. The respondents claim that § 1-210(b)(2), G.S., exempts from mandatory disclosure all or part of the records identified as: IC-2008-607-9 through IC-2008-607-13.

* * *

20. Upon careful review of the in camera records, it is found that, with the exception of IC-2008-607-106, IC-2008-607-108 and IC-2008-607-109, the respondents failed to prove that any of the redactions of the records described in paragraph 16, above, constitute personnel files or medical files or similar files, within the meaning of § 1-210(b)(2), G.S. Rather, it is found that such records are “fundamentally the report of . . . [a] police officer [] charged with investigating the death.” See Town of Putnam v. Commissioner, State of Connecticut, Department of Public Safety, and State of Connecticut, Department of Public Safety, Docket #FIC 2007-580 (May 28, 2008); Ralph W. Williams and Journal Inquirer v. Chief, Police Department, Town of Vernon, Docket #FIC 2002-164 (March 26, 2003).
21. It is found that IC-2008-607-106, IC-2008-607-108, and IC-2008-607-109 are entitled without redaction as “Medications I am taking regularly or as needed.” It is found that the respondents claims that, aside from the title, the contents of such records are exempt, and the respondents redacted the contents when they provided such records to the complainants. It is found that such records have as one of their “principal purposes the furnishing of information for making medical decisions regarding that individual.” CATIC, supra. It is found, therefore, that the redacted information is a record similar to a medical file, within the meaning of § 1-210(b)(2), G.S.
22. It is found, however, that the individual to whom such

personal medication card applies is deceased.

23. The Supreme Court, in Perkins, supra, construed the term “invasion of personal privacy” according to its common-law meaning and adopted the definition for invasion of privacy set forth in 3 Restatement (Second) Torts Section §652I of the Restatement provides, in relevant part, that a claim “. . . for invasion of privacy can be maintained only by a living individual whose privacy is invaded.” The commentary accompanying §652I provides that in the absence of statute, an action for invasion of privacy cannot be maintained after the death of the individual.
24. It is concluded, therefore, that disclosure of the requested records described in paragraph 16, above, would not be an invasion of personal privacy, because no such privacy right exists with respect to the deceased. See Crowley v. Commissioner, State of Connecticut, Department of Public Health, Docket #FIC 2007-123 (August 8, 2007); and David K. Jaffe v. State of Connecticut, Connecticut Lottery Corporation, Docket #FIC1999-019 (April 29, 1999). (Disclosure of deceased employee’s personnel files would not be an invasion of privacy because privacy rights terminate at death.)

* * *

26. It is concluded that the respondents violated the FOI Act by failing to provide copies of records described in paragraph 16, above, except for the records described in paragraph 25, above.

38. It is found that line 4 of IC-2008-607-118 through IC-2008-

607-120 is the deceased's operator number.⁴ It is found that the MGM Grand gave the records that contain the deceased's operator number to the respondents in order to assist the investigation.

41. It is concluded that § 14-10, G.S., does not exempt [the operator number] from disclosure. . . .
42. The respondents claim that § 29-164f, G.S., 42 U.S.C. § 14616 prohibit disclosure of IC-2008-607-11 and IC-2008-607-112, which the respondents identify as national Criminal History Information. It is found that § 29-164f, G.S., and 42 U.S.C. § 14616 set forth the National Crime Prevention and Privacy Compact, to which Connecticut and the U.S. Federal Bureau of Investigation are contracting parties.
43. It is found that IC-2008-607-111 and 112 are print-outs from the respondents' electronic inquiry about the deceased to the National Crime Information Center, which is the computerized database of criminal history information accessible to the respondents through the National Crime Prevention and Privacy Compact, described in paragraph 42, above.
44. It is concluded, however, that a public agency may not contract away its statutory obligations under the FOI Act. . .
45. It is concluded, therefore, that neither § 29-164f, G.S., nor 42 U.S.C. § 14616 prohibit the disclosure of the NCIC printouts

The following order by the Commission is hereby recommended on the basis of

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IC-2008-607-125-126, also submitted under seal, contain similar records.

the record concerning the above-captioned complaint:

1. Henceforth, the respondents shall strictly comply with the promptness provisions of §§ 1-210(a) and 1-212(a), G.S.
2. The respondents forthwith shall provide to the complainants free of charge a copy of the requested records as directed in paragraph 26 . . . 41 and 45 of the findings of fact, above.

The DPS has timely appealed from these findings and orders. The FOIC argues that the DPS cannot assert the privacy rights of the deceased or his wife (who is not a party), and therefore the DPS is not aggrieved, as required by § 4-183 (a). On the other hand, the order quoted above directs the DPS to “strictly comply with the promptness provisions” of the freedom of information act. This directive is sufficient for a finding that the DPS is aggrieved. See *Domestic Violence Services of Greater New Haven, Inc. v. FOIC*, 240 Conn. 1, 9, 688 A.2d 314 (1997) (risk of criminal sanctions for noncompliance). Moreover, “[s]tanding requires no more than a colorable claim of injury.” (Citation omitted.) *Wesley v. Schaller Subaru, Inc.*, 277 Conn. 526, 538, 893 A.2d 389 (2006). The court concludes that the DPS is aggrieved for the purposes of these appeals.

The court decides the issues raised by the DPS under the limited scope of judicial review afforded by the Uniform Administrative Procedure Act, §§ 4-166 through 4-189. The court must decide “in view of all of the evidence, whether the agency, in issuing its

order, acted unreasonably, arbitrarily or illegally, or abused its discretion.” *Lewin v. Freedom of Information Commission*, 91 Conn. App. 521, 525, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005). The test with regard to facts found is whether the FOIC’s final decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 774 A.2d 957 (2001); see also *Board of Selectmen v. Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d (2010).

The first issue of the DPS, still outstanding in this appeal, involves records⁵ to which the exemption of § 1-210 (b) (2) (“medical files . . . the disclosure of which would constitute an invasion of personal privacy”) is said to apply. This exemption precludes disclosure only when “[1]the information sought by a request does not pertain to legitimate matters of public concern and [2] is highly offensive to a reasonable person.” *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 175, 635 A.2d 783 (1993). See also *Director, Retirement & Benefits Services Division v. Freedom of Information Commission*, 256 Conn. 764, 774 (2001).

The court has conducted its own in-camera review of these records, as did our Supreme Court in *Rocque v. Freedom of Information Commission*, 255 Conn. 651, 667, 775 A.2d 981 (2001). The court concludes that the DPS has failed to carry its burden that

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FOIC in camera documents 2008-607-106, 107, 108, 109, 110.

the documents either lack public interest or are highly offensive. See *Director, Retirement & Benefit Services Division v. Freedom of Information Commission*, supra, 256 Conn 774. Documents 106, 108, and 109 refer to innocuous medical conditions and medications that had been prescribed for the deceased. Document 107 is a work identity card. Document 110 is a print-out of drug company's description of a commonly-prescribed medication. The court agrees with the FOIC that the exemption of § 1-210 (b) (2) does not apply.

With regard to Documents 118-120, to the extent that these are gambling records, the court understands that the DPS has agreed to release such records to Wood and Collins. To the extent that Documents 118-120 and Document 125-126 relate to possible disclosure of the deceased's driver's license number, the court agrees with the FOIC that any exemption under the Freedom of Information Act had been resolved in favor of disclosure in *Davis v. Freedom of Information Commission*, 47 Conn. Sup. 309, 790 A.2d 1188 (2001), aff'd, 259 Conn. 45, 787 A.2d 530 (2002).

Davis holds specifically that the federal "Drivers Privacy Protection Act" limits disclosures by the state motor vehicle department and General Statutes § 14-10 (c) and (d) "similarly limit and regulate disclosure of personal information in the records of the department of motor vehicles." *Id.*, 315-316, relying on *Kirschner v. Freedom of Information Commission*, Superior Court, judicial district of Hartford-New Britain at

Hartford, Docket No. CV 97 0567162 (January 15, 1998, *McWeeny, J.*) (“A narrow construction precludes the use of § 14-10 (c) to prevent the disclosure of license information compiled in an internal affairs report.”)⁶ The court agrees with the FOIC that these records are not exempt from disclosure.

The final issue regarding Documents 111-112 refers to the NCIC record of the deceased obtained by the DPS during its investigation. While the DPS claims an exemption based on federal law to disclosure of these records, the court holds otherwise as it did in *Commissioner, Dept. Of Correction v. Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV 08 4016692 (November 17, 2009, *Cohn, J.*), appeal pending: “The [department of correction, DOC] . . . argue[s] that the § 1-210 (b) (10) exemption for ‘federal law’ may be derived from a ‘user agreement’ governing access by state of Connecticut law enforcement officials to the national NCIC data base. The agreement is drawn from 28 U.S.C. § 534. This agreement is “subject to cancellation if dissemination is made outside the receiving departments or related agencies.” 28 U.S.C. § 534 (b). On this point the court agrees with the

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The court does not agree with DPS that *Davis* may be distinguished because there the motor vehicle information was obtained by the tax assessor, while here the DPS obtained access to department of motor vehicles’ records through the COLLECT system. The rationale of *Davis* is that, in allowing an exemption from the freedom of information act on the basis of a statutory provision, the court must narrowly construe the statutory language. The federal “Drivers Privacy” act and § 14-10 were held in *Davis* to provide an exemption only to the motor vehicle department.

conclusions of the FOIC. The DOC may not contract away its statutory obligations under FOIA. *Lieberman v. Board of Labor Relations*, 216 Conn. 253, 271, 579 A.2d 505 (1990). As in *Maher v. Freedom of Information Commission*, 192 Conn. 310, 318, 472 A.2d 321 (1984), nothing in the federal regulatory scheme 'per se prevents a state legislature from enacting binding legislation, as part of its Freedom of Information Act or elsewhere' that is inconsistent with 28 U.S.C. § 534." Thus, as the FOIC indicated in its findings, there is no federal law exemption to the disclosure of the deceased's NCIC report.

As the DPS has not demonstrated that the FOIC has acted illegally or abused its discretion in ordering the DPS to disclose the records at issue in this matter, these appeals are hereby dismissed.



Henry S. Cohn, Judge