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AbleChild,
Complainant(s)
against

Chief Medical Examiner, State of Connecticut, Office of the Chief Medical Examiner; and State of Connecticut, Office of the Chief Medical Examiner,
Respondent(s)

Notice of Meeting

Docket #FIC 2013-197

September 25, 2013

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 23, 2013.** 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 11, 2013.*** 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 11, 2013.*** **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 **fourteen (14) copies** be filed ***ON OR BEFORE October 11, 2013,*** 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: Jonathan W. Emord, Esq.,
Peter A. Arhangelsky, Esq.
Kevin Heitke, Esq.
Patrick B. Kwanashie, Esq.

9/25/13/FIC# 2013-197/Trans/wrbp/VDH//TAH

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

AbleChild,

Complainant

against

Docket #FIC 2013-197

Chief Medical Examiner,
State of Connecticut,
Office of the Chief Medical Examiner;
and State of Connecticut,
Office of the Chief Medical Examiner,

Respondents

September 19, 2013

The above-captioned matter was heard as a contested case on August 22, 2013, 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 March 5, 2013, the complainant submitted a request to the respondents seeking copies of the following records: "The complete autopsy report, toxicology reports, and prescription drug history possessed by your office for and concerning the decedent Adam Lanza." The complainant clarified that its request should be construed as one seeking "all public records and files . . . concerning or relating to the presence of drugs in Mr. Lanza's serum and organs and concerning or relating to drugs prescribed to Mr. Lanza." It is further found that the complainant requested that, to the extent that there were outstanding results for tests performed on Mr. Lanza's body, it also be provided with these results as soon as they were received by the respondents.

3. It is found that, by letter dated March 19, 2013, the respondents acknowledged the complainant's request, and informed the complainant that "[a]ccess to these records is governed by statute and regulations under the jurisdiction of the Commission on Medicolegal Investigations, Conn. Gen. Stat. § 19a-401-1 et. seq." It is found that the respondents further stated that the kind of records requested by the complainant were

"available to next of kin, attorneys involved in litigation or attorneys handling the estate of the deceased, as well as physicians involved in the patient's care, insurance claims agents and investigative authorities." It is found that the respondents denied AbleChild's request for records because it did not fit into any of the aforementioned categories.

4. By letter dated June 18, 2013 and filed June 20, 2013, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by denying its request for records.

5. 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.

6. 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 . . . 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 records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a), 1-212(a), G.S.

9. The respondents contend that the requested records are exempt from disclosure pursuant to §19a-411, G.S.

10. Section 19a-411, G.S., provides, in relevant part, that:

> (a) The Office of the Chief Medical Examiner shall keep full and complete records properly indexed, giving the name, if known, of every person whose death is investigated, the place where the body was found, the date, cause and manner of death and containing all other relevant

information concerning the death and a copy of the death certificate. The full report and detailed findings of the autopsy and toxicological and other scientific investigation, if any, shall be a part of the record in each case. The office shall promptly notify the state's attorney having jurisdiction of such death and deliver to the state's attorney copies of all pertinent records relating to every death in which further investigation may be advisable. Any state's attorney, chief of police or other law enforcement official may, upon request, secure copies of such records or other information deemed necessary by such official for the performance of his or her official duties. (Emphasis supplied).

(b) The report of examinations conducted by the Chief Medical Examiner, Deputy Chief Medical Examiner, an associate medical examiner or an authorized assistant medical examiner, and of the autopsy and other scientific findings may be made available to the public only through the Office of the Chief Medical Examiner and in accordance with this section, section 1-210 and the regulations of the commission. Any person may obtain copies of such records upon such conditions and payment of such fees as may be prescribed by the [Commission on Medicolegal Investigations], except that no person with a legitimate interest in the records shall be denied access to such records, and no person may be denied access to records concerning a person in the custody of the state at the time of death. . . . (Emphasis supplied).

(c) Upon application by the Chief Medical Examiner or state's attorney to the superior court for the judicial district in which the death occurred, or to any judge of the superior court in such judicial district when said court is not then sitting, said court or such judge may limit such disclosure to the extent that there is a showing by the Chief Medical Examiner or state's attorney of compelling public interest against disclosure of any particular document or documents. Public authorities, professional, medical, legal or scientific bodies or universities or similar research bodies may, in the discretion of the commission, have access to all records upon such conditions and payment of such fees as may be prescribed by the commission. Where such information is made available for scientific or research purposes, such conditions shall include a requirement that the identity of the deceased persons shall remain

confidential and shall not be published. (Emphasis supplied).

11. In Galvin v. Freedom of Information Commission, the Supreme Court determined that §19a-411, G.S., is a state statute that falls within the "except as otherwise provided" provision of §1-210(a), G.S. See Galvin, 201 Conn 448, 462 (1986). The Galvin court recognized that a request for records from the Office of the Chief Medical Examiner ("OCME") required "the reconciliation of the provisions of the [FOI Act and §19a-411, G.S.], each of which deals with the public's right of access to records kept on file by public agencies." Id. at 454. The court determined that the statutory guidelines of §19a-411, G.S., "impose stricter limitations on the disclosure of such records than the [FOI Act] permits." Id.

12. The Galvin court further found that §19a-411, G.S., set forth three classes of record seekers. See Galvin, 201 Conn. at 457. The first class included "[a]ny state's attorney, chief of police or other law enforcement official." Id. The court stated that such an official "may, upon request, secure copies of such records or other information *deemed necessary by him to the performance of his official duties.*" Id. (Emphasis in original). The court found that the second class of record seekers included "public authorities, professional, medical, legal or scientific bodies or universities or similar research bodies." Id. Within this category, the court stated that access to records kept by the medical examiner's office is "in the discretion of the commission [on medicolegal investigations] . . . *upon which conditions and payment of fees as may be prescribed by the commission.*" Id. (Emphasis in original). Finally, the court identified a third class of record seekers that included members of the general public. In this regard, the court stated that "autopsy reports and other investigative reports may be made available to the public *only through the office of the chief medical examiner and in accordance with . . . the regulations of the commission.*" Id. at 458. (Emphasis in original).

13. It is found that AbleChild is a non-profit organization, which functions as a public interest group and a media organization. It is further found that its mission is to ensure the safety of parents and caregivers when those for whom they care have been diagnosed as mentally ill and are prescribed drug treatments that may induce adverse events, including thoughts of murder and suicide. The complainant contends that it is critical to its interests that it be able to determine whether the killings committed by Mr. Lanza in Newtown, Connecticut in December 2012 were in any way causally connected to prescription medication. Ablechild contends that it has a legitimate interest in such records because professional assessment of the records, and any resulting recommendations, will be published by AbleChild to caregivers and the public. AbleChild further contends that the results of its endeavors will better enable caregivers to work with health care professionals in choosing therapies for the treatment of mental illness, and will promote a more informed debate on measures to prevent tragedies like the kind that occurred in Newtown, Connecticut.

14. It is found that AbleChild has requested the records described in paragraph 2, above, as a member of the general public.

15. It is found that, because the complainant is making the request as a member of the general public, the respondents' regulations control the release of records. See Galvin, 201 Conn. at 454.

16. Regulations of Connecticut State Agencies, §§19a-401-12(a) and (c)(2) provide, respectively, and, in relevant part, as follows:

> (a) Reports of investigations and of autopsies are prepared on standard forms issued by the Office of the Medical Examiner. The original reports of investigations, reports of hospital deaths, and of authorized autopsies are transmitted to the Office of the Medical Examiner and copies are obtainable only from the Chief Medical Examiner. The standard forms utilized by the Office of the Medical Examiner include: (1) telephone notice of death; (2) report of investigation; (3) hospital report of death; (4) identification form; (5) autopsy report; (6) receipt of evidence.
>
> . . .
>
> (c) Inquiries and requests for copies of records. Inquiries concerning a death may be made in person or by letter to the Chief Medical Examiner, Office of the Medical Examiner, 11 Shuttle Rd., Farmington, Connecticut 06032. Copies of reports prepared by personnel of the Office of the Medical Examiner, Assistant Medical Examiners and designated pathologists and other laboratories where pertinent, or detailed findings of other scientific investigations, are furnished upon payment of fees and upon conditions established by the Commission on Medicolegal Investigations. Copies of such reports may be obtained as follows:
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> . . . .
>
> (2) If the requester of the records is a member of the general public, he or she may obtain access to such records if the person has a legitimate interest in the documents and no court has issued an order prohibiting disclosure pursuant to section 19a-411(c) of the Connecticut general statutes. (Emphasis supplied).

17. It is found that, on the OCME's website, the respondents' Commission on Medicolegal Investigations has defined a person with a legitimate interest as follows:

> In accordance with the regulations of the Commission on Medicolegal Investigation, the complete records of all investigations are made available to the family of the deceased, to any federal state or municipal governmental agency or public health authority [that] investigate death; to insurance companies with a legitimate interest in the death; to all parties in civil litigative proceedings, and to treating physicians. In addition, records may be made available to any other individual with the written consent of the family or by court order. . . . (Referred to hereinafter as the "Next of Kin Rule").

18. The complainant contends that the Next of Kin Rule violates Connecticut's notice and ruling-making requirement. Specifically, the complainant contends that, because the Next of Kin Rule is, in effect, a regulation permanently foreclosing AbleChild's ability to articulate a legitimate interest, the rule should have been promulgated in accordance with the formal notice and comment rule-making provisions set forth in the Uniform Administrative Procedure Act ("UAPA"). See § 4-168(a), G.S.[1] Because the Next of Kin Rule allegedly was not properly promulgated, the complainant contends that this Commission should not recognize it. It further contends that the OCME's informal adoption of this rule violates Connecticut's open meeting laws. The complainant further contends that enforcement of the Next of Kin Rule violates certain constitutional protections. The complainant also contends that, because the Chief Medical Examiner has disclosed pieces of the requested records to various media organizations, he has waived the right to claim that the records are exempt. Finally, the complainant contends that the records at issue are judicial records to which it has a right to access as a member of the general public.

19. The respondents do not claim that the procedures set forth in the UAPA with regard to formal rule-making were followed in adopting the Next of Kin Rule. The respondents contend, however, that, regardless of the procedures they did or did not follow, it was within the discretion of the OCME to implement this rule.

20. At the start of the contested case hearing, the respondents provided the complainant with two one-page records. It is found that that the first record is a toxicology report from the respondents' office. It is found this record provides some toxicological findings with regard to Adam Lanza. It is further found that this document

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[1] Section 4-168(a), G.S., states, in relevant part, that "[e]xcept as provided in subsections (f) and (g) of this section, an agency, not less than thirty days prior to adopting a proposed regulation, shall (1) give notice by having the Secretary of the State post a notice of its intended action online. The notice shall include (A) either a statement of the terms or of the substance of the proposed regulation or a description sufficiently detailed so as to apprise persons likely to be affected of the issues and subjects involved in the proposed regulation, (B) a statement of the purposes for which the regulation is proposed, (C) a reference to the statutory authority for the proposed regulation, (D) when, where and how interested persons may obtain a copy of the small business impact and regulatory flexibility analyses required pursuant to section 4-168a, and (E) when, where and how interested persons may present their views on the proposed regulation. . . ."

directs the reader to "[p]lease see attached NMS Labs Report." It is found that the NMS Labs Report was not attached to the record provided to the complainant. It is found that this record was released by the respondents with Adam Lanza's father's permission. It is found that the second record provided to the complainant is a newspaper article from the Huffington Post entitled, "Adam Lanza Toxicology Tests Shows No Drugs, Alcohol, Prescription Meds In Shooter's Body: Officials."

21. The Commission must decide this case in accordance with the direction provided in Galvin, wherein the Connecticut Supreme Court stated the following: "We hold therefore that autopsy reports are not records accessible to the general public pursuant to General Statutes [§1-210, G.S.]." See Galvin, 201 Conn. at 461.

22. It is found that the guidelines set forth in §19a-411, G.S., concerning the disclosure of records maintained by the OCME "vary according to the categories of persons seeking disclosure." Galvin, 201 Conn. at 457. It is further found that, for both the specific classes of persons and for the general public, the statute "embodies a policy of conditional rather than unfettered disclosure." Id. at 459.

23. With regard to public access of autopsy records, the Galvin Court made the following observations:

> [§19a-411, G.S.] expressly mandates that disclosure must be "in accordance with . . . the regulations of the commission." In seeking copies of records, disclosure seekers are subject to "such conditions and payment of such fees as may be prescribed by the commission." The source of the records is similarly restricted: the public's access is "only through the office of the chief medical examiner."

Id. at 459.

24. It is found that, for several years, the respondents have defined a person with a "legitimate interest" to be one of the individuals enumerated in the Next of Kin Rule. See ¶ 17, above. This Commission takes administrative notice of a previous decision in which it recognized the validity of the respondents' Next of Kin Rule. See Paul J. Ganim and the Bridgeport Probate Court v. State of Connecticut, Office of the Chief Medical Examiner, Docket #FIC 2010-328 (Apr. 27, 2011).

25. Where the main issue, as in this case, turns not so much on the agency's finding of fact, but on its interpretation of the legal requirement under the statutes and regulations it is charged with enforcing, it is found that deference to the agency's interpretation is sometimes merited. "[C]ourts should accord great deference to the construction of the statute [and regulation] by the agency charged with its enforcement. [W]here the governmental agency's time-tested interpretation is reasonable, it should be accorded great weight by the courts." Anderson v. Ludgin, 175 Conn. 545, 555-56

(1978); accord, Longley v. State Employees Retirement Comm'n, 284 Conn. 149, 162-67 (2007).

26. It is found that if this Commission were to find that Ablechild has a legitimate interest in the requested records as a member of the general public, it would be permitting Ablechild more access than is allotted to members of scientific or research groups, as these groups, unlike the general public, are required to keep the identity of the deceased confidential. See §19a-411(c), G.S. In light of the detailed access scheme set forth in the statute, the Galvin court cautioned against such an irrational construction:

> [The requesters'] construction of §19a-41 1, however, would allow the general provisions of the statute governing "the public" to supersede the express provisions governing the specifically enumerated classes of disclosure seekers. Under the [requesters'] construction . . . a representative of a medical school conceivably could evade the restrictions that §19a-411 imposes on disclosure for scientific or research purposes by obtaining an autopsy report as a member of the "the public," whose right to disclosure . . . is limited only by [§1-210, G.S.]. Such a broad construction would defeat the policy behind the principle that specific statutory references prevail over general references where the same subject is concerned. (Citations omitted).

27. The complainant contends that the Chief Medical Examiner's posture is that of an unbridled official who can permit or deny access to the requested records, or to information contained therein, as he sees fit. The complainant contends that such unchecked discretion violates the Free Speech Clause of both the Connecticut and United States Constitutions. The complainant further contends that the Chief Medical Examiner's selective disclosure of records or information to one group, while denying the same records or information to another group, violates the Equal Protection Clause of both the Connecticut and the United States Constitutions.

28. While it is found that the Chief Medical Examiner has provided some information to certain media organizations at different times throughout the course of his investigation, it is found that it is for the courts, not this Commission, to comment on, or to clarify and fine-tune the discretion that the Chief Medical examiner has (or believes he has) to selectively disclose agency information under the provisions of §19a-411, G.S. See Bridgeport Hosp. v. Comm'n on Human Rights and Opportunities, et al., 232 Conn. 91, 109-10 (1995) ("Where . . . the court determines that an agency's interpretation of a statute is not plausible or reasonable, the court should not defer to such interpretation."). In fact, the UAPA expressly contemplates judicial review of complaints concerning invalid or ultra vires agency action. See §4-175, G.S.[2]

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[2] Conn. Gen. Stat. §4-175 provides, in relevant part, as follows:
"(a) If a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the

29. Finally, the complainant's contention that the records at issue are "judicial records," only serves to buttress this Commission's determination that it may not override the respondents' determination that the complainant is not a member of the general public with a legitimate interest, and order the requested records disclosed. See §1-200(1), G.S. (defining a public agency to include "any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions").

30. Based on the foregoing, it is found that the complainant is not a person with a "legitimate interest," as such term of art has been defined by the Commission on Medicolegal Investigations.

31. Based on the foregoing, it is concluded that the respondents did not violate the FOI Act as alleged by the complainant.

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

1. The complaint is dismissed.

Valicia Dee Harmon

Valicia Dee Harmon
as Hearing Officer

plaintiff and if an agency (1) does not take an action required by subdivision (1), (2) or (3) of subsection (e) of section 4-176, within sixty days of the filing of a petition for a declaratory ruling, (2) decides not to issue a declaratory ruling under subdivision (4) or (5) of subsection (e) of said section 4-176, or (3) is deemed to have decided not to issue a declaratory ruling under subsection (i) of said section 4-176, the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances. The agency shall be made a party to the action.

(b) When the action for declaratory judgment concerns the applicability or validity of a regulation, the agency shall, within thirty days after service of the complaint, transmit to the court the original or a certified copy of the regulation-making record relating to the regulation. . . ."