YALE-NEW HAVEN HOSPITAL

October 3, 2014

VIA REGULAR & ELECTRONIC MAIL

Kimberly R. Martone, Director of Operations
Office of Health Care Access
410 Capital Avenue, MS #13HCA
P. O. Box 340308
Hartford, CT 06106

Re: Yale-New Haven Hospital
Inpatient Rehabilitation Unit at Milford Hospital

Dear Ms. Martone:

This is a follow-up on your inquiry regarding Yale-New Haven Health System's ("YNHHS") arrangement with Milford Hospital ("Milford") in connection with the provision of inpatient rehabilitation services. The purpose of this letter is to provide you with background on the transaction and explain why we believe no CON is required for this proposal.

YNHHS and Milford have entered into a lease for 15,000 square feet of space, located on the Milford Hospital campus, where Yale-New Haven Hospital ("YNHH") intends to operate an inpatient rehabilitation unit ("IRU"). The IRU currently operates in 20 beds on the YNHH Saint Raphael's Campus (SRC) in New Haven and serves as a discharge placement for inpatients in need of rehabilitative care after an acute care stay. The service is being relocated to Milford in order to address physical space constraints on the New Haven campuses.

YNHH intends to staff 20 inpatient rehabilitation beds at Milford for patients discharged from either an acute care floor at YNHH or another hospital in need of this level of service. The beds will operate under YNHH's license and the patients will be YNHH patients. (The cost center for the YNHH rehabilitation unit will remain unchanged.) Certain ancillary services will be provided by Milford pursuant to a services agreement including: Imaging, diagnostic laboratory, pharmacy, respiratory therapy, and rapid response team services. The YNHH inpatient rehabilitation service at Milford is expected to be operational in May of 2015, after completion of necessary construction to accommodate the unit.

Through outside counsel, YNHH had informal discussions with DPH and OHCA staff in May/June of this year regarding this proposal. Based upon these conversations, as well as our own knowledge of the OHCA statutes, we determined that no CON was required. YNHH is adding a service in Milford, however there is no longer CON jurisdiction for the addition of services. Moreover, this transaction

does not require an increase in licensed bed capacity at either hospital. The IRU beds will be YNHH licensed beds and the hospital has sufficient unstaffed bed capacity to accommodate this unit without adding beds to its license. DPH licensure staff also confirmed that this would not be considered the establishment of a new healthcare facility (which would require CON approval) and in fact, the site will likely not be added to YNHH's license as a satellite given the nature of the beds.

We would also note that there are no anticipated changes to the patient population or payer mix of the IRU based on this proposal. This service is almost entirely an inpatient referral service. Patients who are discharged from an acute care setting (primarily YNHH) are referred to this service for rehabilitative care. Currently, patients are transported from an acute care floor of YNHH (or even a different campus) to an IRU bed located on a different floor of the hospital. Going forward, these same exact patients will be transported approximately 13 miles (at no charge) to the IRU in Milford for follow-up care, similar to intra-facility transports between current YNHH locations (i.e. Guilford to New Haven). In addition, any patients from other hospitals who would have been transported to YNHH for inpatient rehabilitation services will simply be transported to the YNHH IRU at Milford. We therefore expect the patient population and payer mix to be identical to that currently served at the YNHH IRU in New Haven.

Based on the foregoing, we concluded that no CON was required for YNHH to add an inpatient rehabilitation service, using beds already licensed by DPH, at Milford. For this reason, we have not filed a CON Determination. YNHH routinely files determination requests when the CON requirements for a particular business initiative are unclear, and YNHH would have done so in this case had the analysis demonstrated that the CON requirements were ambiguous in any way.

We welcome the opportunity to discuss this with you and provide you with any additional information that you require.

Very Truly Yours,

Nancy Levitt Rosenthal
Vice President, YNHHS

20 York Street
New Haven, CT 06504

Olejarz, Barbara

From: Hansted, Kevin
Sent: Tuesday, February 24, 2015 9:55 AM
To: Olejarz, Barbara
Subject: FW: Yale/Milford IRU

Kevin T. Hansted
Staff Attorney
Department of Public Health
Office of Health Care Access
410 Capitol Ave., MS #13HCA
P.O. Box 340308
Hartford, CT 06134
Phone: 860-418-7044

From: Jennifer Groves Fusco [mailto:jfusco@uks.com]
Sent: Friday, November 14, 2014 3:04 PM
To: Hansted, Kevin
Cc: Martone, Kim
Subject: RE: Yale/Milford IRU

Thanks, Kevin. We will get that taken care of asap and let you know.

-----Original Message-----
From: Hansted, Kevin [Kevin.Hansted@ct.gov]
Sent: Friday, November 14, 2014 02:18 PM Eastern Standard Time
To: Jennifer Groves Fusco
Cc: Martone, Kim
Subject: Yale/Milford IRU

Good afternoon Jennifer,

We received your correspondence regarding the confidentiality of the Lease & Services Agreement. At this point OHCA would like to review the documents that are currently in the possession of the Attorney General's office, as you suggest in your letter. In order to do so, we need Yale New Haven Hospital and Milford Hospital to advise the Attorney General's office that we have permission to do so. Please let me know when this has been completed so we may proceed expeditiously on this matter.

Thank you,

Kevin T. Hansted

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Greer, Leslie

From: Hansted, Kevin
Sent: Wednesday, January 28, 2015 9:05 AM
To: Greer, Leslie
Cc: Martone, Kim
Subject: FW: YNHH Inpatient Rehabilitation Unit Relocation
Attachments: YNHH Milford Supplemental Letter.pdf

Leslie, please assign this a determination docket number. thanks

Kevin T. Hansted
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Phone: 860-418-7044

From: Martone, Kim
Sent: Friday, November 14, 2014 11:01 AM
To: Hansted, Kevin
Subject: FW: YNHH Inpatient Rehabilitation Unit Relocation

From: Jennifer Groves Fusco [mailto:jfusco@uks.com]
Sent: Friday, November 14, 2014 10:15 AM
To: Martone, Kim
Cc: Stephen Cowherd
Subject: YNHH Inpatient Rehabilitation Unit Relocation

Good morning, Kim.

Attached please find the joint response of Yale-New Haven Hospital (YNHH) and Milford Hospital to OHCA's November 5 correspondence regarding relocation of YNHH's IRU. Steve and I would like to discuss this with you once you've had a chance to review. Please let us know when you're available.

Thanks in advance.

Jen

Jennifer Groves Fusco, Esq.

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November 14, 2014

VIA REGULAR & ELECTRONIC MAIL

Kimberly R. Martone, Director of Operations
Office of Health Care Access
410 Capital Avenue, MS #13HCA
P. O. Box 340308
Hartford, CT 06106

Re: Yale-New Haven Hospital
Inpatient Rehabilitation Unit at Milford Hospital

Dear Ms. Martone,

We are in receipt of OHCA's November 5, 2014 correspondence requesting additional information regarding the relocation of Yale-New Haven Hospital's ("YNHH") Inpatient Rehabilitation Unit ("IRU") to leased space at Milford Hospital ("MH"). This request came in response to our October 30, 2014 letter, which was submitted to OHCA voluntarily and detailed the arrangement between YNHH and MH (collectively, the "Parties"). Please accept this letter as the Parties' joint response to OHCA's request.

Patient Population & Payer Mix Data

OHCA has asked for the following information relative to the YNHH IRU: (a) The percentage of total patient volume by payer source prior to and following the IRU's relocation to Milford; and (b) a list of towns within the IRU service area prior to and following its relocation to Milford.

Table A below shows payer source percentages for the IRU in New Haven for FY2014. This table also shows projected payer source percentages for the IRU once it relocates to Milford in May of 2015. The payer source percentages prior to and after the relocation are identical. This is due to the fact that the IRU is an inpatient referral-only service. Virtually all IRU patients are admitted immediately following an acute care hospital stay. After the relocation, the same exact patients who would have been admitted to the IRU in New Haven will be transported to Milford and admitted to the IRU at MH. Any fluctuations in payer mix going forward are the same year-to-year fluctuations that would occur if the IRU continued to operate in New Haven.

Table A: Payer Source Percentages Prior To and After Relocation

Payer	IRU in New Haven Prior To Relocation (FY 2014)	IRU in Milford After Relocation (Beginning May 2015)
Medicare	72%	72%
Medicaid	0.5%	0.5%
CHAMPUS & TriCare	0%	0%
Total Government	**72.5%**	**72.5%**
Commercial Insurers	26%	26%
Uninsured/Self-Pay	0%	0%
Workers Compensation	1.5%	1.5%
Total Non-Government	**27.5%**	**27.5%**
Total Payer Mix	**100%**	**100%**

Table B below lists towns within the Primary Service Area of the IRU prior to and after its relocation to Milford. The towns collectively represent 80% of patients admitted to the IRU in New Haven in FY 2014. They are expected to remain the top 80% of towns by patient origin once the IRU is relocated to Milford in May of 2015. The patient towns of origin prior to and after the relocation are identical because the IRU is an inpatient referral-only service. As previously mentioned, virtually all IRU patients are admitted immediately following an acute care hospital stay. After the relocation, the same exact patients who would have been admitted to the IRU in New Haven will be transported to Milford and admitted to the IRU at MH. Any fluctuations in patient towns of origin going forward are the same year-to-year fluctuations that would occur if the IRU continued to operate in New Haven.

Table B: Patient Town of Origin Prior To and After Relocation

TOP 80% TOWNS	
IRU in New Haven Prior To Relocation (FY 2014)	IRU in Milford After Relocation (Beginning May 2015)
New Haven	New Haven
Hamden	Hamden
East Haven	East Haven
West Haven	West Haven
North Haven	North Haven
Orange	Orange
Milford	Milford
Wallingford	Wallingford
North Branford	North Branford
Branford	Branford
Guilford	Guilford
Madison	Madison
Woodbridge	Woodbridge

Lease & Services Agreement

OHCA has also requested that the Parties provide *unredacted* copies of any Lease related to the relocation of YNHH's IRU and the Services Agreement between YNHH and MH for ancillary services, as referenced in our October 30 letter. Although we are willing to provide OHCA with these documents on behalf of our clients in the spirit of full transparency to a regulatory body and to further confirm that no CON is required in connection with this relocation, the Parties are justifiably concerned about proprietary and confidential business documents becoming part of a public record. Affording our competitors the ability to access the Lease and Services Agreement, which contain strategic information and reflect the results of private negotiations between the Parties, would be detrimental to both hospitals and contrary to past practices of OHCA.

The Freedom of Information Act ("FOIA") requires public access to records maintained by public agencies such as OHCA, subject to a number of exemptions. Conn. Gen. Stat. § 1-210. In particular, the exemptions to public disclosure under FOIA for commercial or financial information given in confidence, and not required by statute, as well as the trade secrets exemption allow OHCA to keep confidential the requested agreements related to the YNHH-MH transaction. Conn. Gen. Stat. § 1-210(5).

We believe that OHCA and the Parties could structure the submission of the documents to OHCA in their fully unredacted form to fit within the exemption to FOIA for commercial or financial information given in confidence, not required by statute. Conn. Gen. Stat. § 1-210(5)(B); *see Hollbrook v. Freedom of Info. Comm'n*, No. CV960563515S, 1997 WL 187177, at *1 (Conn. Super. Ct. Apr. 9, 1997) (copy attached as Exhibit A). In this case, because the Lease and Services Agreement memorialize the terms and conditions of a business arrangement between YNHH and MH, and include financial provisions, the information meets the "commercial or financial information" requirement of the exemption. The agreements will also be provided to OHCA on a voluntary basis, as the Parties are the not the subject of any formal CON proceeding related to the proposed relocation of YNHH's IRU. Nor are the Parties otherwise required by statute to produce these documents. Furthermore, the Lease and Services Agreement would be provided by the Parties through counsel with an expectation of confidentiality given that leadership from both hospitals have already communicated with OHCA staff regarding the importance of the transaction to their organizations and the need to keep the terms of these competitively sensitive agreements from being publicly available.

The forms of Lease and Services Agreement used in this transaction are also compilations of terms and other information that the Parties have developed in the ordinary course to support their respective business operations. These agreements are kept confidential and competitors could obtain economic value from their disclosure. Accordingly, they constitute trade secrets. Trade secret protection under FOIA applies to:

> [F]ormulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production

> budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value form their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy.

Conn. Gen. Stat. § 1-210(5)(A).

The Appellate Court clarified the definition of trade secret under FOIA in the matter of *Dep't. of Public Utilities of the City of Norwich v. Freedom of Info.Comm'n et al.*, 739 A.2d 328 (Conn. App. Ct. 1999) (copy attached as Exhibit B). This appeal arose from an initial finding by the Freedom of Information Commission ("FOIC") that a cost study conducted by the Department of Public Utilities of the City of Norwich ("DPU") was not a trade secret exempt from FOIA.

The Appellate and Superior Courts adopted the definition of trade secret from the Restatement of Laws, which provides, in part:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.
>
> Some of the factors to be considered in determining whether information is a trade secret are (1) the extent to which the information is a trade secret outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicate by others.

Id.; *see also Dep't. of Publ. Utilities, City of Norwich v. Connecticut Freedom of Info. Comm'n*, No. CV970573178, 1998 WL 310874, at *1 (Conn. Super. Ct. June 5, 1998) (copy attached as Exhibit C). In the *DPU* case, the court found that the cost study at issue was viewed by the DPU as confidential, cost a significant amount of money to generate and was not generally available to the public. *Id.* However, the courts also found that it was too widely disseminated for there to be an expectation of confidentiality under the trade secret exemption.

Applying the *DPU* analysis to the Lease and Services Agreement requested by OHCA, the trade secret exemption to FOIA applies. First, just like the DPU considered its cost study to be confidential, YNHH and MH consider and intend for these agreements to remain confidential. In addition, OHCA has historically afforded confidentiality protection to transactional documents submitted relative to CON matters.

The Parties have also gone to great measure to ensure the confidentiality of the Lease and Services Agreement and the information contained within those agreements has not been widely

disseminated, either within or outside of YNHH and MH. *See Plastic & Metal Fabricators, Inc. v. Roy*, 303 A.2d 725 (Conn. 1972) ("[A] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means… [However] absolute secrecy is not essential and the plaintiff does not abandon his secret 'by delivering it or a copy to another for a restrictive purpose, nor by a limited publication'"). The agreements were negotiated by a small group of hospital administrators with the assistance of in-house and outside counsel. The only non-hospital employees who have seen these documents are attorneys, including the undersigned, who are bound by an ethical obligation to maintain absolute confidentiality. Even the Parties' boards of trustees have been cautioned about the importance of maintaining confidentiality of the terms of the transaction.

Moreover, the information contained within the Lease and Services Agreement is of significant value to the Parties' competitors, who would benefit from knowing more about the strategic initiatives of YNHH and MH. Nor are there any proper means (outside of OHCA) for the Parties' competitors to obtain copies of the Lease and Services Agreement. *See Director, Dep't. of Info. Tech. of Town of Greenwich v. Freedom of Info. Comm'n*, 874 A2d. 785 (Conn. 2005) (copy attached as Exhibit D). The Parties' wish to fully cooperate with OHCA and submission of information related to a transaction for which no CON is required should not have the unintended consequence of giving their competitors access to confidential and proprietary information.

Lastly, a significant amount of time and effort went into negotiating and drafting the Lease and Services Agreement, a process that lasted several months. There was also significant cost born by both YNHH and MH related to these documents in the form of attorneys' fees. When considered in light of the factors from the DPU case set out above, the resources devoted to preparing and negotiating these documents further demonstrate that applying the "trade secrets" exemption to FOIA is appropriate here.

Based on the foregoing, it is our belief that the commercial or financial information given in confidence and/or trade secret exemptions to FOIA allow for confidential submission of the Lease and Services Agreement. The Parties are willing to provide OHCA with unredacted versions of these agreements upon confirmation that they will be kept strictly confidential and not made available to the public. In the alternative, OHCA can view the identical documents that are in the custody of the Attorney General's office.[1] Either or both options meet with the letter and spirit of the FOIA exemptions and would permit OHCA to further confirm that no CON approval is required for this transaction.

We thank you for your consideration of this information and our requests relative to the confidential treatment of the Lease and Services Agreement. Due to the importance of this transaction for our respective clients, we will be in touch shortly to determine next steps.

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[1] These agreements were provided to the Office of the Attorney General and are being maintained confidentially pursuant to Conn. Gen. Stat. § 35-42.

Respectfully Submitted,

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EXHIBIT A

1997 WL 187177
Only the Westlaw citation is currently available.

Superior Court of Connecticut.

Sidney J. HOLBROOK, Commissioner of Environmental Protection
v.
FREEDOM of INFORMATION COMMISSION of the STATE of CONNECTICUT et al.

No. CV960563515S. | April 9, 1997.

Memorandum of Decision

McWEENY, Judge.

***1** In this case the State of Connecticut Department of Environmental Protection (hereinafter "DEP") appeals from the final decision of the State of Connecticut Freedom of Information Commission (hereinafter "FOIC") ordering the DEP to provide Mark Errico access to or copies of information, shellfish harvesters voluntarily provide the DEP, reporting the specific landings of oysters and clams by volume and value.

The parties to this appeal are the DEP, the FOIC and Mr. Errico. The appeal is brought pursuant to General Statutes §§ 1-21i(d) and 4-183.

The dispute was initiated by Mr. Errico's desire to obtain the reports of individual companies revealing the landings of oyster and clams in bushel and dollars. The DEP collects the information on forms provided to the shellfish harvesters. (R. # 1, attachments.) The shellfish harvesters are advised that the information will be aggregated for Connecticut as to total landings of each species, number of workers employed in market shellfish harvesting and number of boats and vessels operated. The harvesters are assured that individual reports are strictly confidential and only aggregate summary data is forwarded to the National Marine Fisheries Service for publication in "Fishery Statistics of the United States." (R. # 16.)

The shellfish harvesters solicited by the DEP for such information are the nineteen commercial shellfish harvesters licensed by the State of Connecticut Department of Agriculture. Commercial fishing is regulated by the DEP pursuant to Chapter 490 of General Statutes §§ 26-1 to 26-186 relating to Fisheries and Game.

Shellfish harvesting is more akin to farming, while fishing is analogous to hunting (R. # 17, p. 16). Section 26-1 defines fishing as "taking or attempting to take any finfish crustacea or bait species for commercial purposes or by the use of any commercial fishing gear." Crustaceans include lobsters, crabs, shrimp and barnacles; but not edible shellfish, such as clams and oysters which are mollusks. American Heritage Dictionary of the English Language pp. 247, 318, 846, 939 (1975). Also, "commercial fishing gear" defined in § 26-1 does not include dredges, which are used to harvest shellfish (R. # 16). Apparently in recognition of this distinction "The Department of Agriculture shall be the lead agency on shellfish in Connecticut." Chapter 491 State Shell fisheries § 26-192a. The Department of Agriculture, as directed by § 26-192a, "shall coordinate the activities of other state agencies with regard to shellfish." DEP conservation officers are empowered pursuant to § 26-6 to enforce the licensing provision for shellfish harvesters set forth in § 26-192c-26-192h.

A review of this regulatory scheme is if not necessary, educational, in order to consider one of the Plaintiff's claims to exemption of these reports from the Freedom of Information Act's (FOIA) reach.

In that the documents are in the DEP's possession there is no question that they are public records, § 1-18a(d). Public records are disclosable to the public under the general rule of § 1-19. "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 inspect such records ..."

***2** The DEP asserts § 26-157b(c) as the state statutory basis of the exemption of these reports from individual shellfish harvesters. Section 26-157b(c) does specifically exempt reports from fishing licensees described in § 26-157b(a) and reports "submitted voluntarily upon request of the Commissioner ..."

The DEP introduced evidence as to their intent to cover these types of reports in supporting this legislation. The court accepts the testimony as to the DEP, but that is not evidence of the legislative purpose or intent in enacting § 26-157b(c).

Section 26-157b(c) is an exemption to the FOIA. "The general rule under the Freedom of Information Act is disclosure with the exceptions to this rule being narrowly construed. The burden of establishing the applicability of an exemption clearly rests upon the party claiming an exemption." *Perkins v. FOIC,* 228 Conn. 158, 167, 635 A.2d 783 (1993); *Superintendent v. FOIC,* 222 Conn. 621, 626, 609 A.2d 998 (1992); *Rose v. FOIC,* 221 Conn. 217, 232, 602 A.2d 1019; *Ottochian v. FOIC,* 221 Conn. 393, 397, 604 A.2d 351 (1992); *New Haven v. FOIC,* 205 Conn. 767, 775, 535 A.2d 1297 (1988); *Hartford v. FOIC,* 201 Conn. 421, 431, 518 A.2d 49 (1986); *Maher v. FOIC,* 192 Conn. 310, 315, 472 A.2d 321 (1984) and *Wilson v. FOIC,* 181 Conn. 324, 342, 435 A.2d 353 (1980).

Section 26-157b relates to reports from persons licensed by the DEP, specifically commercial fishing licensees. It would require a liberal construction of this exemption to cover all documents voluntarily reported to the DEP. A construction limited to reports from the Department of Agriculture licensee shellfish harvesters is also not apparent from the statutory language, and at odds with the public policy favoring disclosure.

The DEP also asserts the claim that the reports are exempt pursuant to § 1-19b(5) as "commercial or financial information given in confidence, not required by statute."

Prior to considering the merits of the 1-19b(5) exemption claim, the respondents FOIC and Errico raise a procedural issue.

The complaint to the FOIC was filed with that agency on October 13, 1995. A hearing was held on February 27, 1996 before an FOIC hearing officer, Commissioner Carolle Andrews. The DEP at the hearing only raised the § 26-157b(c) claim; neglecting to mention the § 1-19b(5) exemption.

The hearing officer issued a proposed decision (R. # 18) dated June 20, 1996 rejecting the § 26-157b(c) claim. The proposed decision was transmitted to the parties on July 3, 1996 with notice of the Commission's intent to consider and dispose of the matter at its July 24, 1996 meeting. The parties were allowed to file briefs or written memoranda of law prior to the meeting and afforded ten minutes for oral argument (R. # 18). This procedure is in accordance with § 4-179 of the Uniform Administrative Procedure Act (hereinafter UAPA). Section 4-179 provides that when a majority of agency members who are to render a final decision have not heard the evidence, the proposed final decision transmittal followed by "briefs and oral argument" must be followed. [1] The DEP asserted the § 1-19b(5) exemption after the proposed final decision and hearing, but before the final agency action.

***3** Respondents assert a waiver of such claim by the DEP.

The court finds that under the facts of this case the § 1-19b(5) claim must be considered.

In the first instance the DEP action is not a waiver of a legal right. At the most it is an initial mistaken reliance on one claim of exemption. "Waiver is the intentional abandonment of a known right." *Brown v. Employer's Reinsurance Corp.,* 206 Conn. 668, 675, 539 A.2d 138 (1988). "Waiver is the voluntary relinquishment of a known right. It involves the idea of assent and assent is an act of understanding ... intention to relinquish must appear ..."*Mackey v. Aetna Life Ins. Co.,* 118 Conn. 538, 547-48, 173 A. 783 (1939). Also see, *Phoenix Mutual Life Ins.* and *Soares v. Max Services, Inc.,* 42 Conn.App. 147, 175, 679 A.2d 37 (1996).

The procedure required by § 179 specifically permits a party to file briefs and make oral arguments which would necessarily include legal claims.

What appears to be envisioned by § 4-179 is the review of the evidentiary factual findings and the legal basis of a proposed decision. There is no reason to preclude a party from making a legal claim on the basis of the existing evidentiary record under § 4-179. A party may not introduce evidence before the full commission or successfully argue legal claims for which there is no evidentiary basis; however, a legal claim apparent from the record is appropriately argued pursuant to § 4-179.

In this case a cursory review of the form provided by the shellfish harvesters is sufficient to invoke the exemption (R. # 14). Specifically requested as to each species of shellfish are number of bushels landed and dollar value. This information is clearly "commercial or financial information." The information is also "given in confidence" and "not required by statute." No statute requires the shellfish harvester to provide such information to the DEP and it is solicited under a pledge of confidentiality (R. # 16). The overwhelming irrefutable evidence establishes the applicability of the § 1-19b(5) exemption to these individual reports.

The UAPA provides in § 4-183(j) that the court shall affirm the agency decision unless it finds that substantial rights of the appellant have been prejudiced because the decision is "(1) In violation of constitutional or statutory authority of the agency."

The FOIC violates § 1-19b(5). The DEP has been ordered to reveal information of a commercial and financial nature which it solicited under a pledge that "individual reports are strictly confidential." The DEP could be exposed to potential liability for the violation of such commitment. Accordingly, the appeal is sustained.

Pursuant to UAPA § 4-183(k) the court finds that the individual reports from shellfish harvesters are exempted from disclosure pursuant to law (§ 1-19b(5)). The FOIC is ordered to modify its decision and exempt such reports from public disclosure.

Footnotes

1 *Section 4-179. Agency proceedings. Proposed final decision.*(a) When, in an agency proceeding, a majority of the members of the agency who are to render the final decision have not heard the matter or read the record, the decision, if adverse to a party, shall not be rendered until a proposed final decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the members of the agency who are to render the final decision.

(b) A proposed final decision made under this section shall be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision.

(c) Except when authorized by law to render a final decision for an agency, a hearing officer shall, after hearing a matter, make a proposed final decision.

(d) The parties and the agency conducting the proceeding, by written stipulation, may waive compliance with this section.

End of Document

EXHIBIT B

55 Conn.App. 527
Appellate Court of Connecticut.

DEPARTMENT OF PUBLIC UTILITIES OF the CITY OF NORWICH
v.
FREEDOM OF INFORMATION COMMISSION et al.

No. 18549. | Argued April 20, 1999. | Decided Nov. 2, 1999.

City department of public utilities appealed order of the Freedom of Information Commission requiring disclosure to a competitor of a study that included a formula to determine the cost of supplying natural gas to a specific customer. The Superior Court, Judicial District of Hartford, McWeeny, J., dismissed. City department appealed. The Appellate Court, Francis X. Hennessy, J., held that the study was not a "trade secret" exempt from disclosure under the Freedom of Information Act (FOIA).

Affirmed.

West Headnotes (7)

[1] **Records**
Judicial enforcement in general

Appellate Court is required to defer to the subordinate facts found by the Freedom of Information Commission, if there is substantial evidence to support those findings.

Cases that cite this headnote

[2] **Statutes**
Questions of law or fact

The determination of the meaning of a statute presents a question of law, which is within the province of the trial court and of the Appellate Court.

1 Cases that cite this headnote

[3] **Records**
Trade secrets and commercial or financial information

City department of public utilities did not sufficiently limit the dissemination of a study reflecting a specific formula to determine the cost of supplying natural gas to an Indian tribe for study to qualify as "trade secret" exempt from disclosure under the Freedom of Information Act (FOIA) upon application of competitor; though the study was not available to the public or to competitors, essential element of secrecy necessary to fall within FOIA's disclosure exemption was compromised by the study's availability to various tribal members, the department's employees, the city utility commission, and the Bureau of Indian Affairs without any obligation to keep the contents confidential. C.G.S.A. § 1–19 (1998).

3 Cases that cite this headnote

[4] **Records**
Access to records or files in general

Records
Matters Subject to Disclosure; Exemptions

The general rule under the Freedom of Information Act (FOIA) is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the FOIA legislation. C.G.S.A. § 1–200 et seq.

Cases that cite this headnote

[5] **Records**
Evidence and burden of proof

The burden of proving the applicability of an exception to the Freedom of Information Act (FOIA) rests upon the party claiming it. C.G.S.A. § 1–200 et seq.

Cases that cite this headnote

[6] **Records**
Trade secrets and commercial or financial information

A substantial element of secrecy must exist in order for a document to be exempt from

disclosure as a trade secret under the Freedom of Information Act (FOIA), to the extent that there would be difficulty in acquiring the information except by the use of improper means. C.G.S.A. § 1–19 (1998).

1 Cases that cite this headnote

[7] **Records**

Trade secrets and commercial or financial information

Absolute secrecy is not essential in order for a document to be exempt from disclosure as a trade secret under the Freedom of Information Act (FOIA) and the plaintiff does not abandon his secret by delivering it or a copy to another for a restrictive purpose, nor by a limited publication. C.G.S.A. § 1–19 (1998).

2 Cases that cite this headnote

Attorneys and Law Firms

**329 *528 Roger E. Koontz, Hartford, for the appellant (plaintiff).

Victor Perpetua, appellate counsel, with whom, on the brief, was Mitchell W. Pearlman, general counsel, for the appellee (named defendant).

Joseph J. Cassidy, pro se, the appellee (defendant), with whom, on the brief, was Jodi M. Thomas, Hartford.

Before FOTI, SPEAR and FRANCIS X. HENNESSY, JJ.

Opinion

FRANCIS X. HENNESSY, J.

The plaintiff department of public utilities of the city of Norwich (Norwich) appeals from the judgment of the trial court upholding an order of the defendant freedom of information commission (commission)[1] requiring the plaintiff to disclose a study concerning the cost of serving a particular customer (study). The plaintiff specifically claims that the court improperly held that the study is not exempt from disclosure as a trade secret[2] pursuant to **330 General Statutes (Rev. to 1997) § 1–19(b)(5), now § 1–210(b)(5).[3] We affirm the judgment of the trial court.

*529 The following facts are relevant to this appeal. Yankee Gas Services Company (Yankee) supplies natural gas to the Tribal Utility Authority of the Mashantucket Pequot Tribe (Tribal Utility). Norwich, a supplier of natural gas and a competitor of Yankee, had entered into an agreement with Tribal Utility to provide it with natural gas by building a pipeline. Yankee thereafter requested a copy of the agreement between Norwich and Tribal Utility, but was provided only a copy without the portion that contained the study. The study is a fifteen to twenty page document that reflects a specific formula to allocate costs to deliver a volume of product at a determined rate. Norwich claims that the study contains confidential and proprietary information, as well as feasibility estimates and evaluations describing the cost of providing the contracted gas service to the Mashantucket Pequot Reservation. Norwich further claims that such information is not readily available from other sources, and disclosure would give its competitors, including Yankee, an unfair business advantage in knowing the methodology used to adjust the cost of the contracted gas service.

The defendant attorney Joseph J. Cassidy, representing Yankee, complained to the commission, which ordered the disclosure of the study. Norwich appealed from that order to the Superior Court, which affirmed the order of the commission. Norwich now appeals to this court.

Norwich claims that the study is a trade secret and, as such, is exempt from disclosure pursuant to § 1–19(b)(5). Norwich relies on the reasoning of our Supreme Court in *Triangle Sheet Metal Works, Inc. v. Silver,* 154 Conn. 116, 125–26, 222 A.2d 220 (1966), which held that a corporation's costs, pricing and bidding procedures *530 constitute confidential "trade secrets." Norwich also cites *Town & Country House & Homes Service, Inc. v. Evans,* 150 Conn. 314, 318–19, 189 A.2d 390 (1963), in which the court adopted the definition of trade secrets set forth in 4 Restatement, Torts § 757, comment (b), pp. 5–6 (1939), which provides in relevant part: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.... Some factors to be considered in determining whether given information is one's trade secret are (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business;

(3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." Norwich agrees that the court properly relied on *Town & Country* **331 *House & Homes Service, Inc. v. Evans,* supra, at 314, 189 A.2d 390, in determining the meaning of "trade secret," but with respect to the element of secrecy, claims that the court went beyond the ruling in *Town & Country House & Homes Service, Inc.,* in apparently requiring a formal confidentiality agreement to demonstrate secrecy.

Applying the criteria set forth in *Town & Country House & Homes Service, Inc.,* the court found that "(1) cost of service studies are routinely viewed as confidential by [the department of public utility control]; (2) the agreement is available to [the] plaintiff's personnel, the Norwich utility commissioner, the tribal personnel and the [United States] Bureau of Indian Affairs; (3) no evidence of confidentiality agreements *531 or internal controls is in the record. There is testimony that it would not generally be available to the public; (4) the cost of service study was paid for by the plaintiff at a cost of thousands of dollars and is desired by a competitor, Yankee Gas; (5) the cost of the consultant was incurred by the plaintiff; (6) the information is available to various members of the Mashantucket tribe, [the] plaintiff's employees, the Norwich Utility Commission and the Bureau of Indian Affairs."

On the basis of these findings, the court concluded that "[t]he evidence of dissemination of the study and the absence of any confidentiality agreement or any steps taken to limit its dissemination defeat the claim of secrecy or confidentiality essential to the definition of 'trade secret.' The plaintiff failed to meet its burden of establishing the application of the exemption."

[1] [2] General Statutes § 1–21i(d), now § 1–206(d), provides that "appeals from the decisions of the commission are taken pursuant to the Uniform Administrative Procedure Act (UAPA). General Statutes §§ 4–166 through 4–189.... This court is required to defer to the subordinate facts found by the commission, if there is substantial evidence to support those findings. *Dufraine v. Commission on Human Rights & Opportunities,* 236 Conn. 250, 259, 673 A.2d 101 (1996); *Newtown v. Keeney,* 234 Conn. 312, 319–20, 661 A.2d 589 (1995)." (Citations omitted; internal quotation marks omitted.) *Furhman v. Freedom of Information Commission,* 243 Conn. 427, 430–31, 703 A.2d 624 (1997). In the present case, the subordinate facts are not in dispute. Rather, it is the meaning of the statute that is disputed. "The determination of the meaning of a statute presents a question of law, which is within the province of the trial court and of this court." *Id.,* at 431, 703 A.2d 624.

[3] The court found, and Norwich agrees, that the definition of trade secrets adopted by our Supreme Court in *532 *Town & Country House & Homes Service, Inc. v. Evans,* supra, 150 Conn. at 318–19, 189 A.2d 390, is applicable. Norwich's claim turns, however, on the interpretation of the secrecy or confidentiality portion of the term "trade secrets."

[4] [5] "[I]t is well established that the general rule under the Freedom of Information Act [FOIA] is disclosure, and any exception to that rule will be narrowly construed in light of the 'general policy of openness expressed in the FOIA legislation.' *Board of Education v. Freedom of Information Commission,* [208 Conn. 442, 450, 545 A.2d 1064 (1988)]. 'The burden of proving the applicability of an exception to the FOIA rests upon the party claiming it.' *Rose v. Freedom of Information Commission,* 221 Conn. 217, 232, 602 A.2d 1019 (1992)." *Ottochian v. Freedom of Information Commission,* 221 Conn. 393, 398, 604 A.2d 351 (1992).

[6] [7] Norwich contends that the fact that some public officials reviewed the study does not defeat a claim of secrecy and, furthermore, that there was no evidence to show that access to it was allowed to the general public. See *Plastic & Metal Fabricators, Inc. v. Roy,* 163 Conn. 257, 269, 303 A.2d 725 (1972) (inspection by public official does not contradict element **332 of secrecy). "[A] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." (Internal quotation marks omitted.) *Id.,* at 265, 303 A.2d 725. However, "absolute secrecy is not essential and the plaintiff does not abandon his secret 'by delivering it or a copy to another for a restrictive purpose, nor by a limited publication.' " *Id.,* at 268, 303 A.2d 725.

Here, the trial court found that there was no evidence that the study was to be kept confidential. Although the court cited the lack of a confidentiality agreement as part of its reasoning for such a conclusion, it coupled *533 that with a finding that there were no efforts to limit the study's dissemination. Although we recognize that a thorough review of applicable case law reveals no case stating that a formal confidentiality

agreement is essential to preserve the secrecy of a document, when the facts do not reveal discernable measures taken to guard the secrecy of the information, as evidenced by a lack of warnings alerting individuals to the confidentiality of the information, as well as a lack of a requirement that strict limits be placed on its distribution, the essential element of secrecy is compromised. The fact that the study was available to various members of the Mashantucket Pequot Tribe, Norwich employees, the Norwich utility commission and the Bureau of Indian Affairs demonstrates that the study was given wide distribution. Although these entities had an interest in the contents of the study and it was not shown that either Norwich's competitors or members of the general public had access to the study, there was no evidence that those who were provided with the study were under any obligation to keep the contents confidential or to curtail its distribution. The court reasonably could have found, therefore, that Norwich failed to meet its burden of establishing the application of the statutory exemption from disclosure.

The judgment is affirmed.

In this opinion the other judges concurred.

Parallel Citations

739 A.2d 328

Footnotes

1 Attorney Joseph J. Cassidy, acting on behalf of Yankee Gas Services Company, requested the cost of service study from Norwich. After Norwich denied his request, he appealed to the commission, which ordered disclosure. Cassidy is a defendant in this appeal.

2 Norwich also claims that the court improperly determined that the study was not held in confidence where it was available only to Norwich, its customer and essential regulatory agencies. This claim is subsumed in the arguments addressed to the main issue of whether the study was a trade secret and whether it was exempt from disclosure under the statute.

3 General Statutes (Rev. to 1997) § 1–19, now § 1–210, provides in relevant part: "(a) 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 inspect such records promptly during regular office or business hours or to receive a copy of such records....

> "(b) Nothing in [the Freedom of Information Act] shall be construed to require disclosure of ... (5) trade secrets, which for purposes of [the Freedom of Information Act], are defined as unpatented, secret, commercially valuable plans, appliances, formulas or processes, which are used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities obtained from a person and which are recognized by law as confidential, and commercial or financial information given in confidence, not required by statute...."

End of Document

EXHIBIT C

1998 WL 310874

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

DEPARTMENT OF PUBLIC UTILITIES, City of Norwich
v.
CONNECTICUT FREEDOM OF INFORMATION COMMISSION and Joseph J. Cassidy.

No. CV97 0573178. | June 5, 1998.

Memorandum of Decision

ROBERT F. MCWEENY, J.

***1** The plaintiff Department of Public Utilities, City of Norwich (Norwich) appeals from a Freedom of Information Commission (FOIC) order requiring the disclosure of a document. The document in issue is an exhibit to a gas supply contract dated August 1, 1996, between Norwich and the Tribal Utility Authority of the Mashantucket Pequot Tribe (Utility Authority). Joseph J. Cassidy, Esq., who requested the document and complained to the FOIC, is also a party to this appeal. Mr. Cassidy is the attorney for Yankee Gas Service Company, which is a competitor of Norwich in the gas supply business. This appeal is brought pursuant to General Statutes § 1-21i(d) of the Freedom of Information Act (FOIA), General Statutes §§ 1-7 through 1-211 and General Statutes § 4-183 of the Uniform Administrative Procedure Act (UAPA), §§ 4-166 through 4-189. For the reasons set forth below, the appeal is dismissed.

Norwich is a public agency within the meaning of General Statutes § 1-18a(a) of the FOIA.

Cassidy by letter of November 7, 1996, requested of Norwich copies of three agreements including the Transportation Standby and Balancing Agreement (agreement) between Norwich and the Utility Authority. Norwich, by letter of November 13, 1996, indicated that the agreement would be provided except for "Exhibit 1" which Norwich claimed to be exempt from disclosure under General Statutes 1-19(b)(5). [1]

Cassidy by letter of November 22, 1996, complained to the FOIC of the denial of the requested document (Exhibit 1). The FOIC pursuant to § 1-19 heard this dispute as a contested case April 14, 1997.

In its decision the FOIC found that Norwich failed to prove that Exhibit 1 to the agreement constitutes a trade secret under § 1-19(b)(5) and that it was exempt as a feasibility study or evaluation under § 1-19(b)(7).

The subordinate facts in this case are not substantially in dispute. Yankee Gas had been the gas supplier for the Mashantucket Pequot Tribe (the tribe). Norwich entered into a contract with the tribe for supplying gas over a ten-year period. In order to effectuate the contract, Norwich would construct a gas pipeline to the tribal facility. The terms of the arrangement between Norwich and the Mashantucket Pequot Tribe are set forth in the August 1, 1996 agreement. (Return of Record (ROR), Item 5, Ex. C.)

The exhibit at issue is a 15-20 page cost of service study which measures Norwich's marginal or incremental costs. The cost of service study reflects a specific formula to allocate costs to deliver volume of product at a determined rate. Thus, the contract price of $0.75 per/MCF (cubic feet of gas) is adjusted based on volume. (ROR, Item 5, Ex. C, p. 15.)

The exhibit was produced by a consultant. It consists of a cost of service study obtained by Norwich for several thousands of dollars. (ROR, Item 9, p. 24.) The exhibit is not directly available to the public. (ROR, Item 9, p. 25.) It reflects a specific formula which allocates costs to deliver a volume of product within a rate determined. (ROR, Item 9, p. 22.) Norwich is not regulated by the Connecticut Department of Public Utility Control (Connecticut DPUC) and is not required by statute to file such information. (ROR, Item 9, pp. 8, 10-11, 14, 20.) Although it is a public agency, Norwich exists in a competitive environment and competes with Yankee Gas for the commercial business of supplying gas to the Mashantucket tribe. The Connecticut DPUC routinely treats cost of service studies as confidential information.

***2** In its final decision dated July 9, 1997, and mailed July 23, 1997, the FOIC ordered the disclosure of "Exhibit 1." Norwich is aggrieved by such decision. Norwich appealed the decision on August 26, 1997. The answer and record were filed on February 23, 1997. Briefs were filed by Norwich on January 22, 1998, Cassidy, on February 23, 1998, and the FOIC, on February 25, 1998. The parties were heard in oral argument on May 19, 1998.

Sections 1-19(b)(5) and 1-19(b)(7) as exceptions to the general FOIA principle of disclosure are to be narrowly construed. *New Haven v. FOIC,* 205 Conn. 767, 774, 535 A.2d 1297 (1998); *Perkins v. FOIC,* 228 Conn. 158, 167, 635 A.2d 783 (1993). To prevail on its claim that these exemptions apply, the plaintiff must meet the burden of proof to establish its applicability.*Superintendent of Police v. FOIC,* 222 Conn. 621, 626, 609 A.2d 998 (1992); *Ottochian v. FOIC,* 221 Conn. 393, 397, 604 A.2d 351 (1992).

The FOIC refers to the plaintiff's failure to prove the application of the exemptions. The court is required to defer to the facts found by the FOIC.*Dufraine v. Commission on Human Rights & Opportunities,* 236 Conn. 250, 259, 673 A.2d 101 (1996); *Newtown v. Keeney,* 234 Conn. 312, 319-20, 661 A.2d 589 (1995)."Here, however, the subordinate facts ... are not in dispute. Rather, it is the meaning of the statute that is disputed. The determination of. the meaning of a statute is within the province of the trial court ..."*Furhman v. Freedom of Information Commission,* 243 Conn. 427, 43 (1997) citing *Board of Education v. FOIC,* 217 Conn. 153, 158, 585 A.2d 82 (1991); *New Haven v. FOIC,* 205 Conn. 767, 773-74, 535 A.2d 1297. The statutory exemptions at issue have not been previously subjected to judicial review. Thus the deference normally afforded an agency's statutory construction is not applicable.*Connecticut Light & Power v. Texas-Ohio Power, Inc.,* 243 Conn. 635, 644, 708 A.2d 202 (1998); *Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services,* 244 Conn. 378, 389 (1998).

Connecticut law has adopted the definition of trade secrets from the Restatement of Laws. *Town & Country House & Home Service, Inc. v. Evans,* 150 Conn. 314, 189 A.2d 390 (1963). The definition in Restatement, 4 Torts § 757, Comment b, provides in part:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Some of the factors to be considered in determining whether given information is a trade secret are (1) the extent to which the information is a trade secret outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

***3** Applying such criteria to the facts of this case the court finds the following. (1) Cost of service studies are routinely viewed as confidential by DPUC. (2) The agreement is available to plaintiff's personnel, the Norwich utility commissioner, the tribal personnel, and the Bureau of Indian Affairs (R. Ex. 5 p. 33). (3) No evidence of confidentiality agreements or internal controls is in the record. There is testimony that it would not generally be available to the public. (ROR, Item 9, p. 25.) (4) The cost of service study was paid for by plaintiff at a cost of thousands of dollars and is desired by a competitor Yankee Gas. (5) The cost of the consultant was incurred by the plaintiff. (6) The information is available to various members of the Mashantucket Tribe, plaintiff's employees; the Norwich Utility Commission and the Bureau of Indian Affairs.

The evidence of dissemination of the study and the absence of any confidentiality agreement or any steps taken to limit its dissemination, defeat the claim of secrecy or confidentiality essential to the definition of trade secret. The plaintiff failed to meet its burden of establishing the application of the exemption.

Similarly, the plaintiff failed to establish the applicability of the § 1-19(b)(7)[2] exemption. The cost of service study related to a contract which was dated August 1, 1996. The cost of service study was not a feasibility estimate or evaluation when requested in November of 1996. The contractual provision for an additional cost of service study during the term of the contract would also indicate that it is not a feasibility estimate. (ROR, Item 5, Ex. C, P. 15.) The cost of service study is a cost allocation formula rather than an appraisal or engineering estimate. The supply of gas to the Mashantucket Tribe would also seem to constitute a private as opposed to the "public supply" contract referenced in § 1-19(b)(7).

The FOIC decision is affirmed and the appeal is dismissed.

Parallel Citations

22 Conn. L. Rptr. 192

Footnotes

1 General Statutes § 1-19(b)(5) provides in pertinent part: "trade secrets, which for purposes of sections 1-15, 1-18a, 1-19 to 1-19b, inclusive, and 1-21 to 1-21k, inclusive, are defined as unpatented, secret, commercially valuable plans, appliances, formulas or processes, which are used for the making, preparing, compounding, treating or processing of articles or materials which are trade commodities obtained from a person and which are recognized by law as confidential, and commercial or financial information given in confidence, not required by statute ...

2 General Statutes § 1-19(b)(7): "the contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by an agency relative to the acquisition of property or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all proceedings or transactions have been terminated or abandoned, provided the law of eminent domain shall not be affected by this provision ..."

End of Document

EXHIBIT D

274 Conn. 179
Supreme Court of Connecticut.

DIRECTOR, DEPARTMENT OF INFORMATION TECHNOLOGY OF THE TOWN OF GREENWICH,
v.
FREEDOM OF INFORMATION COMMISSION et al.

No. 17262. | Argued Jan. 6, 2005. | Decided June 21, 2005.

Synopsis

Background: Director of town's department of information technology appealed from decision of the Freedom of Information Commission ordering director to provide complainant with requested copies of computerized data from the town's geographic information system (GIS). The Superior Court, Judicial District of Stamford-Norwalk, Owens, J., dismissed the appeal, and director appealed.

Holdings: After transferring the appeal from the Appellate Court, the Supreme Court, Vertefeuille, J., held that:

[1] director had the burden to seek a public safety determination from the Commissioner of Public Works in support of his claim that the GIS data were protected from disclosure under the public safety exemption of the Freedom of Information Act;

[2] in determining whether public safety exemption applied, trial court was not required to balance the town's interest in public safety with the public's right to accessible information;

[3] the GIS data did not constitute a "trade secret" within meaning of the Act's trade secret exemption; and

[4] director failed to meet his burden to show that security or integrity of town's information technology system would be compromised by disclosure of the GIS data.

Affirmed.

West Headnotes (13)

[1] **Records**
In General; Freedom of Information Laws in General

The Freedom of Information Act makes disclosure of public records the statutory norm. C.G.S.A. § 1-200 et seq.

2 Cases that cite this headnote

[2] **Records**
In General; Freedom of Information Laws in General

Records
Matters Subject to Disclosure; Exemptions

The general rule under the Freedom of Information Act is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the Act. C.G.S.A. § 1-200 et seq.

2 Cases that cite this headnote

[3] **Records**
Evidence and Burden of Proof

The burden of proving the applicability of an exception to disclosure under the Freedom of Information Act rests upon the party claiming it. C.G.S.A. § 1-210(b).

Cases that cite this headnote

[4] **Records**
Judicial Enforcement in General

In an appeal involving the application of the well-settled meaning of the exemptions to disclosure under the Freedom of Information Act to the facts of the particular case, the appropriate standard of judicial review was whether the Freedom of Information Commission's factual determinations were reasonably supported by substantial evidence, in the record taken as a whole. C.G.S.A. § 1-210(b).

1 Cases that cite this headnote

[5] **Records**
Judicial Enforcement in General

When trial court issued decision upon review of Freedom of Information Commission's order requiring director of town's department of information technology to disclose certain records, the appropriate remedy for director's dissatisfaction with trial court's failure to elaborate on the applicability of the Freedom of Information Act's public safety exemption was to file a motion for articulation. C.G.S.A. § 1-210(b)(19).

2 Cases that cite this headnote

[6] **Records**
Matters Subject to Disclosure; Exemptions

Director of town's department of information technology had the burden to seek a public safety determination from the Commissioner of Public Works in support of his claim that computerized data from the town's geographic information system (GIS) were protected from disclosure under the public safety exemption of the Freedom of Information Act. C.G.S.A. § 1-210(b)(19).

Cases that cite this headnote

[7] **Records**
In General; Request and Compliance

Claimant of an exemption from disclosure under the Freedom of Information Act must provide more than conclusory language, generalized allegations or mere arguments of counsel; rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested. C.G.S.A. § 1-210(b).

6 Cases that cite this headnote

[8] **Records**
Matters Subject to Disclosure; Exemptions
Records
Discretion and Equitable Considerations; Balancing Interests

In deciding whether the Freedom of Information Act's public safety exemption applied to data from town's geographic information system (GIS), trial court was not required to balance the town's interest in public safety with the public's right to accessible information; Act's exemptions already incorporated the judgment of legislature with regard to balancing the public interest in disclosure of records with the need for confidentiality. C.G.S.A. § 1-210(b)(19).

2 Cases that cite this headnote

[9] **Records**
Judicial Enforcement in General

In concluding that Freedom of Information Act's public safety exemption did not apply to data from town's geographic information system (GIS), trial court did not impose an inappropriate burden on the director of town's department of information technology when it suggested that director could have demonstrated safety risk by using statistical data correlating criminal or terrorist activity with the disclosure of GIS data; trial court did not require the director to provide such statistical data. C.G.S.A. § 1-210(b)(19).

1 Cases that cite this headnote

[10] **Records**
Matters Subject to Disclosure; Exemptions

Generalized testimony of town's police chief, expressing his concerns regarding potential threat to the safety of town's residents if computerized data from the town's geographic information system (GIS) were disclosed, was insufficient to prove applicability of public safety exemption from disclosure under the Freedom of Information Act. C.G.S.A. § 1-210(b)(19).

Cases that cite this headnote

[11] **Records**
Trade Secrets and Commercial or Financial Information

Data from town's geographic information system (GIS) did not constitute a "trade secret" within meaning of trade secret exemption from disclosure under the Freedom of Information Act; the GIS database was a compilation of information that was already available to the public through various town departments, such that the GIS data failed to meet threshold test for trade secrets, i.e., that the information not be generally ascertainable by others. C.G.S.A. § 1-210(5)(A).

1 Cases that cite this headnote

[12] **Records**

Trade Secrets and Commercial or Financial Information

To qualify for a trade secret exemption from disclosure under the Freedom of Information Act, a substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means. C.G.S.A. § 1-210(5)(A).

2 Cases that cite this headnote

[13] **Records**

Matters Subject to Disclosure; Exemptions

Director of town's department of information technology failed to meet his burden to show that security or integrity of town's information technology system would be compromised by disclosure of computerized data from town's geographic information system (GIS), as required to invoke pertinent exemption under the Freedom of Information Act; director testified that he was concerned about vulnerability of town's network to a security breach and that computer firewalls were not foolproof, but did not provide specific examples of security breaches or evidence that any such breaches had been caused by disclosure of GIS data. C.G.S.A. § 1-210(b)(20).

Cases that cite this headnote

Attorneys and Law Firms

****787** Haden P. Gerrish, assistant town attorney, with whom were John K. Wetmore, Greenwich, town attorney, and Robert M. Shields, Jr., Hartford, for the appellant (plaintiff).

Clifton A. Leonhardt, chief counsel, with whom were M. Dean Montgomery and, on the brief, Mitchell W. Pearlman, general counsel, for the appellee (named defendant).

Daniel J. Klau, Lucy Dalglish, pro hac vice, David B. Smallman and Andrew L. Deutsch, pro hac vice, filed a brief for the Reporters Committee for Freedom of the Press et al. as amici curiae.

SULLIVAN, C.J., and NORCOTT, KATZ, PALMER and VERTEFEUILLE, Js.

Opinion

VERTEFEUILLE, J.

***181** The plaintiff, the director of the department of information technology of the town of Greenwich (town), appeals from the trial court's judgment dismissing his administrative appeal from a final decision of the named defendant, the freedom of information commission (commission). In its decision, the commission ordered the plaintiff to provide the complainant, Stephen Whitaker,[1] with copies of certain computerized data from the town's geographic information system (GIS). We affirm the judgment of the trial court.

***182** The trial court relied on the following relevant facts from the administrative record. In December, 2001, Whitaker submitted a written request to the town's board of estimate and taxation, asking for a copy of all GIS data concerning orthophotography, arc info coverages, structured query language server databases, and all documentation created to support and define coverages for the arc info data ****788** set.[2] His request was forwarded to the plaintiff, who subsequently denied Whitaker's request, claiming that the data was exempt from disclosure under the Freedom of Information Act (act), General Statutes § 1-200 et seq. Specifically, the plaintiff claimed that the data requested by Whitaker was exempt from disclosure pursuant to General Statutes § 1-210(b)(5)(A),[3] which provides an exemption from ***183** disclosure for trade secrets, and § 1-210(b)(20),[4] which exempts from disclosure information that

would compromise the security of an information technology system. Whitaker subsequently filed a complaint with the commission, claiming that the plaintiff refused to provide him with a copy of the town's computerized GIS records that he requested. The commission held a hearing in January, 2002, at which it found that the information requested by Whitaker was not exempt because it did not constitute either a trade secret within the meaning of § 1-210(b)(5)(A), or the type of information that would pose a threat to the security of the town's information technology system within the meaning of § 1-210(b)(20). Accordingly, the commission issued a final decision in November, 2002, in which it ordered the plaintiff to disclose the requested records, excluding only medical information and social security numbers, should any appear in the requested data.

The plaintiff subsequently appealed from the commission's decision to the trial court, which concluded, after a hearing, ****789** that the plaintiff had failed to substantiate his claim that the requested records were exempt from disclosure. Specifically, the trial court found that the plaintiff had failed to provide any specific evidence that would demonstrate that disclosure of the requested data would compromise the security or integrity of the town's information technology system. Further, the trial court found that the records did not constitute trade secrets within the meaning of § 1-210(b)(5)(A), ***184** because the requested data was merely a computerized compilation of the town's records that otherwise could be obtained by requesting the information piecemeal from various individual town departments. The trial court therefore dismissed the plaintiff's appeal. The plaintiff appealed from the trial court's judgment to the Appellate Court, and we thereafter transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

On appeal, the plaintiff claims that the trial court improperly determined that the commission was correct in concluding that the data requested by Whitaker was not exempt pursuant to § 1-210(b)(5)(A), (19) and (20). The plaintiff first argues that No. 02-133, § 1, of the 2002 Public Acts (P.A. 02-133)[5] amended § 1-210(b)(19)[6] to ****790** broaden the public safety exemption such ***185** that the data requested by Whitaker were exempt from disclosure, and the legislative history surrounding the enactment of the public act demonstrates that it was intended to address exactly this type of case.[7] Thus, the plaintiff claims that the commission improperly failed to ***186** apply the expanded exemption in this case. The plaintiff further claims that, although the act does not expressly require a balancing of the government's and the public's interests, the trial court failed to weigh appropriately the public's interest in disclosure against the town's public safety interest, and that the trial court improperly required the plaintiff to present statistical data showing a correlation between the disclosure of GIS data and a threat of criminal or terrorist activity. The plaintiff also contends that the requested GIS data satisfies the requirements of the trade secret exemption to the act in § 1-210(b)(5)(A), because the data constitutes a compilation that derives intrinsic economic value by not being readily ascertainable by those wishing to obtain economic value from its use. Finally, the plaintiff claims that the disclosure of the requested GIS data would compromise the integrity of the town's information technology system, possibly exposing it to computer hackers, which in turn would create a security risk for the town.

The commission counters that the policy of the act favors free access to government records, and, although the commission's final decision and the trial court's memorandum of decision did not discuss at length P.A. 02-133, § 1, both the commission and the trial court considered the public act in analyzing the existence of any threat to public safety posed by the disclosure of the requested data. Further, the commission claims that the trial court correctly balanced any possible safety risk against the public's right to access the requested data, and the trial court did not require statistical data correlating criminal and terrorist activity with disclosure, but, rather, merely observed that such correlation data would have been a method by which the plaintiff could have met his burden of showing the existence of a safety risk. The commission also argues that the right to information under P.A. 02-133, § 1, includes the right ***187** to access the data in the same computerized form that the government agency itself uses. In addition, the commission claims that disclosure of the requested GIS data will not reveal any exempt trade secrets in violation of § 1-210(b)(5)(A), because the plaintiff ****791** is not engaged in a trade and is not protecting secrets of such a trade. The commission further argues that there is no evidence that the disclosure of the GIS data presents a security threat to the town's information technology system within the meaning of § 1-210(b)(20). We agree with the commission, and, accordingly, we affirm the judgment of the trial court.

[1] **[2]** **[3]** By way of background, we cite briefly the policy of the act and the burden of a party claiming exemption from disclosure under the act. The act "makes disclosure of public records the statutory norm." (Internal quotation

marks omitted.) *Chairman, Criminal Justice Commission v. Freedom of Information Commission,* 217 Conn. 193, 196, 585 A.2d 96 (1991). "[I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act].... [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Citation omitted; internal quotation marks omitted.) *Ottochian v. Freedom of Information Commission,* 221 Conn. 393, 398, 604 A.2d 351 (1992).

[4] As a preliminary matter, we set forth the applicable standard of review. "[T]he present case involves applying the well settled meaning of [the exemptions laid out in] § 1-210(b) ... to the facts of this particular case. The appropriate standard of judicial review, therefore, is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." ***188** *Rocque v. Freedom of Information Commission,* 255 Conn. 651, 659-60, 774 A.2d 957 (2001).

I

[5] We begin by addressing whether the trial court improperly failed to consider the applicability of P.A. 02-133, § 1, to the records sought by Whitaker. The plaintiff claims that the trial court did not apply § 1-210(b)(19) as amended by P.A. 02-133, § 1, and it improperly failed to remand the matter to the commission to determine whether the requested records were exempt under the public act. The commission counters that the trial court properly considered the applicability of P.A. 02-133, § 1. We agree with the commission. In setting forth the standard of review applicable to the commission's decision, the trial court explicitly referenced § 1-210(b)(19), as amended, and it analyzed whether the requested GIS data were exempt due to public safety concerns. The trial court decision thereby implicated § 1-210(b)(19) and (20), both of which subdivisions provide exemptions from disclosure under certain circumstances when public safety is at risk. Accordingly, contrary to the plaintiff's claim, the trial court did consider the amended version of § 1-210(b)(19). [8]

****792** **[6]** Section 1-210(b)(19) sets forth the procedure through which a state or municipal agency may pursue an exemption from disclosure under the act when there ***189** are reasonable grounds to believe that disclosure would pose a safety risk to any person or government-owned facility. When there are reasonable grounds to believe disclosure may pose a risk to public safety, "[s]uch reasonable grounds shall be determined ... with respect to records concerning any executive branch agency of the state or any municipal, district or regional agency, by the Commissioner of Public Works, after consultation with the chief executive officer of the agency ...." General Statutes § 1-210(b)(19)(A). In the present case, the plaintiff specifically argues that he was not afforded the opportunity to have the requested GIS data reviewed by the commissioner of public works in order to ascertain whether its disclosure would pose a safety risk within the meaning of § 1-210(b)(19) as amended. The plaintiff claims that the trial court was remiss in not remanding the matter to the commission so that the commissioner of public works could conduct such a review. We disagree.

Although § 1-210(b)(19) does not specifically provide which party is to seek a public safety determination by the commissioner of public works, we conclude that the plaintiff bore the burden of seeking such a determination. It is axiomatic that the burden of proving the applicability of any exemption in the act rests with the party claiming the exemption. See *Ottochian v. Freedom of Information Commission,* supra, 221 Conn. at 398, 604 A.2d 351. Here, that is the plaintiff. It follows that the plaintiff, therefore, was obligated to seek a public safety determination from the commissioner of public works in support of his claim that the GIS records were exempt from disclosure. Moreover, we note that the floor debate in the legislature regarding the passage of P.A. 02-133, § 1, described the law as providing that municipalities, certain state agencies, public service companies, telecommunication companies and water utilities may *apply* for permission to keep sensitive documents from ***190** the public. 45 H.R. Proc., Pt. 15, 2002 Sess., pp. 4580-81. The use of the word "apply" makes clear the legislative intent that the party claiming a public safety exemption must seek the determination from the commissioner. The plaintiff never sought the required consultation with the commissioner of public works. Nor did he at any time request that the trial court remand the case so that the public works commissioner could make a public safety determination. Accordingly, we conclude that the plaintiff's first claim on appeal is unavailing.

II

We turn next to the plaintiff's assertion that the trial court improperly failed to balance the town's interest in public

safety with the public's right to disclosure under the act, and that the trial court improperly required the plaintiff to present statistical data correlating criminal or terrorist activity with the disclosure of GIS data. The commission responds that the trial court did balance appropriately the town's interest in public safety with the public's right to accessible information, and that the trial court did not "require" the plaintiff to produce statistical data. We conclude that the trial court was not required to undertake any balancing to resolve the public safety exemption and that the trial court did not require that the plaintiff submit statistical data.

The following additional facts are relevant to the resolution of this issue. At the hearing before the commission, Peter J. Robbins, the town's chief of police, testified ****793** generally about his concerns regarding the potential threat to the safety of the town's residents if the requested GIS data were to be disclosed. Robbins testified that, "[b]ecause of [the town's] affluence [it is] frequently targeted for criminal activity ...." He further testified that the town's proximity to the Merritt Parkway, Interstate 95, and the waterfront made the ***191** town an inviting target for professional thieves. When asked how the disclosure of the GIS data would assist in such criminal activities, Robbins responded, "that type of information can certainly have a severe impact on the community," and that he thought that "it also can provide some serious risk for homeowners because that access ... would provide overhead views of structures, the footprints of those structures, fence lines, the topography, in some cases it may, depending on when those photos were taken from the air, could reveal some security measures that individual homeowners have put in place." Robbins further testified that the GIS data might be used to carry out identity theft or disturb the privacy of public figures who live in the town, or it could be used to interfere with the safety and security of town residents or to allow someone to compromise the police radio system and communications network.

In assessing whether this testimony was sufficient to establish the existence of a legitimate public safety risk, the trial court observed that "[t]here is no nexus between [Robbins'] opinion and the ultimate conclusion. More importantly, [the] plaintiff fails to provide through [Robbins'] testimony any specific statistical data that correlates criminal activity or potential terrorist type activity with disclosure of GIS data. Additionally, no specific evidence was provided to demonstrate how disclosure of the requested data would compromise the security or integrity of the GIS."

[7] As we noted previously, "[t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.) *Ottochian v. Freedom of Information Commission,* supra, 221 Conn. at 398, 604 A.2d 351. In particular, "[t]his burden requires the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a ***192** sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." *New Haven v. Freedom of Information Commission,* 205 Conn. 767, 776, 535 A.2d 1297 (1988). With regard to weighing the interests of a party claiming an exemption against the public's interest in disclosure, this court has stated that "within the language itself of the [act], the legislature has [already balanced] the public's right to know and the private needs for confidentiality.... Therefore, neither the [commission] nor the courts are required to engage in a separate balancing procedure beyond the limits of the statute." (Citation omitted; internal quotation marks omitted.) *Chairman, Criminal Justice Commission v. Freedom of Information Commission,* supra, 217 Conn. at 200-201, 585 A.2d 96.

[8] The exemptions provided in § 1-210(b) of the act incorporate the judgment of the legislature with regard to balancing the public interest in disclosure of records with the need for confidentiality. As the passage of P.A. 02-133, § 1, demonstrates, the legislature adjusts the balance between the right to know and the need for confidentiality as circumstances change. The text of § 1-210(b)(19), as amended, does not require the courts to conduct any balancing in order to determine the applicability of that exemption. The silence on this issue is in contrast to exemptions where such a balancing explicitly is required, ****794** such as, for example, § 1-210(b)(1). We find no merit to the plaintiff's unsupported claim that the trial court's judgment should be reversed for the court's failure to undertake a balancing of public interest disclosure against necessary confidentiality when the statute providing the exemption does not require such a balancing.

[9] **[10]** We further conclude, contrary to the plaintiff's contention, that the trial court did not *require* specific statistical data correlating criminal and terrorist activity with the disclosure of GIS data. The trial court stated ***193** that it did not find convincing the generalized testimony by Robbins as the plaintiff's sole evidence to support his argument that the release of the GIS data would pose a legitimate public safety concern. Such generalized claims of a possible safety risk do not satisfy the plaintiff's burden of

proving the applicability of an exemption from disclosure under the act. See *New Haven v. Freedom of Information Commission,* supra, 205 Conn. at 776, 535 A.2d 1297. In explaining why it was not convinced by Robbins' testimony at the commission hearing, the trial court stated that the town did not present any evidence through the police chief to establish a nexus between his opinion and the conclusion that the release of the data would pose a safety risk. In doing so, the trial court merely suggested that one way of demonstrating the safety risk would have been through the use of statistical data correlating criminal or terrorist activity with the disclosure of GIS data. The trial court similarly suggested that the plaintiff could have provided evidence demonstrating how the disclosure of GIS data would compromise the security or integrity of GIS. Nowhere in its opinion, however, did the trial court *require* the plaintiff to provide such statistical data to prove a correlation between criminal or terrorist activity and the disclosure of GIS data. Accordingly, the trial court did not improperly impose an inappropriate burden on the plaintiff.

III

Finally, we address the issue of whether the trial court properly found that the plaintiff failed to meet his burden of proof to show that the requested GIS data were exempt under the act because disclosure would either reveal a trade secret within the meaning of § 1-210(b)(5)(A), or pose a threat to the security of the town's information technology system within the meaning of § 1-210(b)(20). The plaintiff contends that the requested documents fall within the definition of a ***194** trade secret under the act because the GIS database derives its economic value from not being available to members of the public, such as Whitaker, who may use the information for their own economic gain. The plaintiff further claims that the requested information falls within the § 1-210(b)(20) security exemption under the act because its disclosure would pose a security risk to the town's information technology system. The commission counters that neither exemption applies to the records sought in this case. We agree with the commission.

As we have noted previously, the party claiming an exemption from disclosure under the act has the burden of proving its applicability, and in order to meet that burden, the party claiming the exemption must provide more than general or conclusory statements in support of its contention. See *Chairman, Criminal Justice Commission v. Freedom of Information Commission,* supra, 217 Conn. at 196, 585 A.2d 96; *New Haven v. Freedom of Information Commission,* supra, 205 Conn. at 776, 535 A.2d 1297.

[11] **[12]** To qualify for an exemption within the meaning of § 1-210(b)(5)(A), ****795** the requested records must constitute a trade secret within the meaning of the act, which is defined as "information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy ...." In order to qualify for a trade secret exemption under § 1-210(b)(5)(A), "[a] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." (Internal quotation marks omitted.) *Dept. of* ***195** *Public Utilities v. Freedom of Information Commission,* 55 Conn.App. 527, 532, 739 A.2d 328 (1999). The requested GIS data in the present case, however, *is* readily available to the public, and, accordingly, it does not fall within the plain language of § 1-210(b)(5)(A) as a trade secret. As the trial court noted, the GIS database is an electronic compilation of the records of many of the town's departments. Members of the public seeking the GIS data could obtain separate portions of the data from various town departments, where that data is available for disclosure. The requested GIS database simply is a convenient compilation of information that is already available to the public. The records therefore fail to meet the threshold test for trade secrets, that the information is not generally ascertainable by others.

[13] We turn now to the plaintiff's claim that the trial court improperly found that the plaintiff did not meet his burden of proof that the records were exempt under § 1-210(b)(20). That subsection provides an exemption to disclosure for "[r]ecords of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system ...." General Statutes § 1-210(b)(20). The trial court found that the plaintiff did not meet his burden in attempting to show that the requested disclosure would compromise the security of the town's entire information technology system. As the trial court noted, the plaintiff did not present any specific evidence to demonstrate how the disclosure of the requested GIS data would compromise the overall security of the town's information technology

system. The plaintiff testified that he was concerned about the vulnerability of the town's network to a security breach should the network become available to the public. In support of this concern, the plaintiff stated that computer firewalls are not foolproof, and that the firewalls of "[m]any high ***196** security agencies" had been breached. The plaintiff, however, did not provide specific examples of such security breaches, or evidence that any such breaches had been caused by the disclosure of GIS data.

We agree with the trial court that the plaintiff failed to meet his burden to show that the security or integrity of the town's information technology system would be compromised by disclosure of the GIS data. Accordingly, the evidence presented in this case was insufficient to establish that the requested GIS data were exempt from public disclosure under the act.

The judgment is affirmed.

In this opinion the other justices concurred.

Parallel Citations

874 A.2d 785, 33 Media L. Rep. 2128

Footnotes

1 Whitaker is also named as a defendant in this appeal. For purposes of clarity, we refer to him by name.

2 Orthophotography consists of high resolution photographic images of the town taken from aircraft flying overhead. Arc info coverages are data compiled by the town for its use with the GIS software, including points, lines, and polygons depicting road center lines, building footprints, possibly water and sewer lines, planned fiber optic networks, and survey points, which can be overlaid on the orthophotography. The structured query language server databases consist of data compiled by the town for use in its tax assessment databases, which includes information about property ownership, assessed value, prior assessed value, and addresses. The support documentation consists of records of when the data was input, what source was used, who input the date, the accuracy of the data, and how often the data is updated. During testimony before the trial court, the data was summarized as a "composite" of maps of individual and commercial properties and high resolution aerial photographs of the town.

3 General Statutes § 1-210(b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of ...

> "(5)(A) Trade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy ...."

We note that since December, 2001, when Whitaker first sought disclosure of the requested information, § 1-210 has been amended several times, however, subsection (b)(5)(A) has remained virtually unchanged. For purposes of clarity, we refer herein to the current revision of the statute.

4 General Statutes § 1-210(b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of ...

> "(20) Records of standards, procedures, processes, software and codes, not otherwise available to the public, the disclosure of which would compromise the security or integrity of an information technology system ...."

We note that since December, 2001, when Whitaker first sought disclosure of the requested information, § 1-210 has been amended several times, however, subsection (b)(20) has remained virtually unchanged. For purposes of clarity, we refer herein to the current revision of the statute.

5 Public Act 02-133, § 1, added to § 1-210(b)(19) a list of factors to be considered in determining whether reasonable grounds exist to believe that disclosure of records may result in a safety risk.

6 General Statutes § 1-210(b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of ...

> "(19) Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. Such reasonable grounds shall be determined (A) with respect to records concerning any executive

branch agency of the state or any municipal, district or regional agency, by the Commissioner of Public Works, after consultation with the chief executive officer of the agency; (B) with respect to records concerning Judicial Department facilities, by the Chief Court Administrator; and (C) with respect to records concerning the Legislative Department, by the executive director of the Joint Committee on Legislative Management. As used in this section, 'government-owned or leased institution or facility' includes, but is not limited to, an institution or facility owned or leased by a public service company, as defined in section 16-1, a certified telecommunications provider, as defined in section 16-1, a water company, as defined in section 25-32a, or a municipal utility that furnishes electric, gas or water service, but does not include an institution or facility owned or leased by the federal government, and 'chief executive officer' includes, but is not limited to, an agency head, department head, executive director or chief executive officer. Such records include, but are not limited to:

"(i) Security manuals or reports;

"(ii) Engineering and architectural drawings of government-owned or leased institutions or facilities;

"(iii) Operational specifications of security systems utilized at any government-owned or leased institution or facility, except that a general description of any such security system and the cost and quality of such system, may be disclosed;

"(iv) Training manuals prepared for government-owned or leased institutions or facilities that describe, in any manner, security procedures, emergency plans or security equipment;

"(v) Internal security audits of government-owned or leased institutions or facilities;

"(vi) Minutes or records of meetings, or portions of such minutes or records, that contain or reveal information relating to security or other records otherwise exempt from disclosure under this subdivision;

"(vii) Logs or other documents that contain information on the movement or assignment of security personnel at government-owned or leased institutions or facilities;

"(viii) Emergency plans and emergency recovery or response plans; and

"(ix) With respect to a water company, as defined in section 25-32a, that provides water service: Vulnerability assessments and risk management plans, operational plans, portions of water supply plans submitted pursuant to section 25-32d that contain or reveal information the disclosure of which may result in a security risk to a water company, inspection reports, technical specifications and other materials that depict or specifically describe critical water company operating facilities, collection and distribution systems or sources of supply ...."

In addition to the changes effected by P.A. 02-133, § 1, subsection (b)(19) of § 1-210 was further amended in 2003. See Public Acts, Spec. Sess., June, 2003, No. 03-6, § 104. For purposes of clarity, we refer herein to the current revision of the statute.

7 Public Act 02-133, § 1, was enacted in October, 2002, as part of the state's effort to bolster security in the wake of the September 11, 2001 terrorist attacks. See 45 H.R. Proc., Pt. 15, 2002 Sess., p. 4579. The public act was not in effect at the time of the proceedings before the commission, but it took effect in October, 2002, shortly before the commission issued its final decision. The plaintiff did not amend his answer before the commission to request an exemption under the public act, and, hence, the plaintiff did not formally inject the newly amended § 1-210(b)(19) into the proceedings.

8 We note that the plaintiff did not expressly mention § 1-210(b)(19) in his posttrial brief to the trial court. Rather, the first mention of that statutory section was made by the *commission* in its brief to the trial court. In addition to his failure to raise the section on which he now relies, the plaintiff did not file a motion for articulation when the trial court issued its decision without discussing in detail the applicability of the exemption of § 1-210(b)(19) as amended by P.A. 02-133, § 1. Although the trial court's consideration of § 1-210(b)(19) provides a record sufficient to preserve the claim, the appropriate remedy for the plaintiff's dissatisfaction with the trial court's failure to elaborate would have been to file a motion for articulation. See, e.g., *McLaughlin v. Bronson,* 206 Conn. 267, 277, 537 A.2d 1004 (1988).

End of Document

February 4, 2015

VIA REGULAR & ELECTRONIC MAIL

Marianne I. Horn, Esq., Legal Director
Department of Public Health
410 Capital Avenue, MS #12HSR
P. O. Box 340308
Hartford, CT 06106

Re: Yale-New Haven Hospital
Inpatient Rehabilitation Unit at Milford Hospital

Dear Ms. Horn:

The undersigned counsel for Yale-New Haven Hospital ("YNHH") and Milford Hospital ("MH") respectfully submit the following supplemental information for your review in this matter. We understand that a decision is forthcoming with respect to whether the relocation of YNHH's inpatient rehabilitation unit ("IRU") to leased space at MH requires CON approval. We believe that this information is relevant to OHCA's decision and ask that it be considered prior to a determination of jurisdiction by the agency.

As a threshold matter, we would like to reiterate that there is no legal basis for OHCA to conclude that the relocation of YNHH's IRU is a "termination of inpatient or outpatient services offered by a hospital" under Section 19a-638(a)(4) of the Connecticut General Statutes. The word "termination" is not defined in the OHCA statutes. However, it is a well-accepted rule of statutory construction that in the absence of any ambiguity, the "plain meaning" of a statute controls its interpretation.

This concept has been codified in Connecticut General Statutes Section 1-2z as follows:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

Similarly, Section 1-1(a) of the General Statutes states as follows:

> In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.

The plain meaning and commonly approved usage of the word "termination," per the Oxford Dictionary, is "[t]he action of bringing something or coming to an end." Section 19a-638(a)(4) therefore mandates CON approval only when a hospital is ending or discontinuing a service. Relocating a service does not bring it to an end, particularly when there will be no changes in the nature of the service, staffing or patient population once it is relocated. To find that a relocation of services is a "termination" would be contrary to the plain meaning and common usage of the word and would yield the absurd and unworkable results that Section 1-2z seeks to avoid as OHCA and the entities it regulates would then be in the equally untenable positions of determining how much of a service relocation (e.g., across campus, across town, etc.) constitutes a service termination without any legislative guidance on the issue. This would clearly be detrimental to the health care delivery system and it would also be inconsistent with the legislative history of Section 19a-638 as discussed in our previous submissions.

In addition, an agency's construction of a statute is not entitled to any special deference, and is a question of law for the courts, where it has not previously been subjected to judicial scrutiny or "time-tested" interpretation by the agency. *Connecticut State Medical Society et al. v. Connecticut Board of Examiners in Podiatry et al.*, 208 Conn. 709, 718 (1988) (Exhibit A). A court will only accord deference to a "time-tested" agency interpretation of a statute when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous and the agency's interpretation is reasonable. *Connecticut State Medical Society et al.*, at 719. As mentioned above, the language of 19a-638(a)(4) is unambiguous. In addition, OHCA has not consistently interpreted relocations of services by hospitals to be terminations requiring CON approval, as the examples below demonstrate. Moreover, interpreting the word "termination" to encompass relocations is not a reasonable interpretation of the plain language of Section 19a-638(a)(4).

OHCA has previously allowed the relocation of hospital services without CON approval. For example, OHCA authorized the relocation of Hartford Hospital's Child and Adolescent Partial Hospital Program from Bloomfield to the Institute of Living in Hartford (Report No. 11-31704-DTR, attached as Exhibit B; *see also* Report Nos. 11-31729 DTR (L&M outpatient cancer services); 13-31881-DTR (L&M blood draw services); & 14-31936-DTR (St. Vincent's heart and vascular testing services). In the Hartford Hospital example, the relocation of the program was not considered a termination of services under Section 19a-638(a)(4) despite the fact that the service was no longer available in Bloomfield. Instead, OHCA determined that the patient population and payer mix were not changing with the relocation and approved it under Section 19a-639c of the General Statutes. The situation with YNHH's IRU is no different. In fact, because the YNHH IRU is an inpatient referral-only service, the impact of relocation on access is far less significant than in the outpatient context described above. Finally, we note that even under prior law that was more restrictive in terms of service relocations, OHCA issued

determinations that permitted relocations to proceed without CON approval. *See* Exhibit C, OHCA Report 05-30501-DTR (relocation of MH's urgent care center did not require a CON).

Alternatively, based on the exigent circumstances facing both hospitals and the need to avoid the time and expense of a CON process, YNHH would be willing to accept the characterization of its IRU as a "facility" for purposes of Section 19a-639c. Federal regulations under 42 CFR Part 412 define a PPS exempt rehabilitation unit of an acute care hospital as an Inpatient Rehabilitation Facility. A copy of a September 30, 2014 CMS letter to YNHH confirming the IRU's certification as an IRF is attached as Exhibit D.[1] YNHH has shown that neither the payer mix nor the patient population for this "facility" will change with the relocation. Therefore, no CON is required.

We thank you for the opportunity to submit this additional information. We believe that this information, along with the prior submissions of our clients, demonstrate that no CON approval is required for relocation of the YNHH IRU. We would welcome the opportunity to discuss this with you in greater detail prior to the issuance of any decision by OHCA.

[1] Please note that the six bed increase referenced in the CMS letter was accommodated within YNHH's total licensed bed capacity and did not result in an increase in licensed beds.

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EXHIBIT A

208 Conn. 709
Supreme Court of Connecticut.

CONNECTICUT STATE MEDICAL SOCIETY et al.
v.
CONNECTICUT BOARD OF
EXAMINERS IN PODIATRY et al.

Nos. 13334, 13335. | Argued June 9, 1988. | Decided Aug. 23, 1988.

Medical Society and physician members appealed from declaratory ruling of Board of Examiners in Podiatry with regard to scope of podiatry practice in state. On remand, 203 Conn. 295, 524 A.2d 636, the Superior Court, in the Judicial District of New Haven, J. Flanagan, J., sustained appeal, and defendants appealed. The Supreme Court, Hull, J., held that notwithstanding contrary interpretation by Board of Examiners in Podiatry, statute defining scope of podiatry practice in state, as treating ailments "of the foot," did not include treatment of ankle.

No error.

West Headnotes (5)

[1] **Administrative Law and Procedure**
Discretion of Administrative Agency

Administrative Law and Procedure
Fact Questions

Administrative agency's factual and discretionary determinations are accorded considerable weight by reviewing courts.

30 Cases that cite this headnote

[2] **Health**
Regulation of Professional Conduct; Boards and Officers

Interpretation of podiatry practice statute by Board of Examiners in Podiatry was not entitled to any special deference by reviewing court in that statutory definition of podiatry practice was question of law, which had not yet been subjected to judicial scrutiny or time-tested agency interpretations. C.G.S.A. § 20–50.

39 Cases that cite this headnote

[3] **Health**
Regulation of Professional Conduct; Boards and Officers

Board of Examiner's knowledge of and acquiescence in certain podiatric practices did not rise to level of statutory construction entitled to judicial deference when court reviewed statute defining scope of podiatric practice. C.G.S.A. § 20–50.

2 Cases that cite this headnote

[4] **Health**
Regulation of Professional Conduct; Boards and Officers

Court reviewing Board of Examiner's interpretation of statute defining podiatric practice did not fail to give proper deference to Attorney General opinion, in that opinion merely referred matter to Board for "factual determination" and contained no legal analysis of type to which court traditionally granted deference.

8 Cases that cite this headnote

[5] **Health**
Regulation of Professional Conduct; Boards and Officers

Notwithstanding contrary interpretation by Board of Examiners in Podiatry, statute defining scope of podiatry practice in state, as treating ailments "of the foot," did not include treatment of ankle. C.G.S.A. § 20–50.

1 Cases that cite this headnote

Attorneys and Law Firms

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Linda L. Randell, with whom were Jeanette C. Schreiber, New Haven, and Andrew W. Roraback, Litchfield, for appellees (plaintiffs).

Before *709 PETERS, C.J., and CALLAHAN, GLASS, COVELLO and HULL, JJ.

Opinion

*711 HULL, Associate Justice.

The dispositive issue in this appeal is whether the trial court erred in sustaining the appeal of the plaintiffs, the Connecticut State Medical Society and Enzo Sella, M.D., from a declaratory ruling of the defendant Connecticut Board of Examiners in Podiatry (board). In proceedings to determine whether the scope of podiatry practice, as defined in General Statutes § 20–50, [1] includes treatment of the ankle in certain respects, [2] the board had declared that "the ankle is part of the foot and the foot is part of the ankle." We conclude that the court applied the correct standard of review of the board's ruling in determining that as a matter of law the board had erroneously construed the applicable statute. Accordingly, we find no error.

*712 This case has its genesis in the following ruling by a Medicare intermediary in January, 1984: "Podiatrists meet the Medicare definition of physician to the extent that state law permits their practice. In Connecticut that practice is limited to the diagnosis, prevention and treatment of foot ailments; therefore, services involving the ankle are not covered by Medicare." This ruling caused great concern to doctors of podiatric medicine. In a letter dated March 18, 1984, the board sought an opinion from the attorney general on the following question: "Is the diagnosis and treatment of sprains, strains and positional abnormalities of the ankle ... within the scope of podiatry practice in Connecticut?" In its request, the board noted that "[p]odiatrists in Connecticut have conservatively treated minor sprains, strains and fractures of the foot and ankle for many years without any regulatory or reimbursement questions being raised."

The attorney general responded by letter dated May 30, 1984, and stated that the "question posed in the request for advice is one which calls for a factual determination. In order to respond, analysis must first be conducted of the human anatomy to ascertain whether the ankle is, in fact, part of the foot, or vice-versa. Once accomplished, the analysis would have to continue with the determination of whether a sprain or strain of the ankle is, in fact, an 'ailment of the foot.' Conn.Gen.Stat. § 20–50." 62 Op.Conn.Atty.Gen. 229, 231 (1984). The attorney general concluded that "[these] factual issues identified above are best addressed **832 by the Board of Examiners in Podiatry directly." Id. The attorney general's opinion then set forth three mechanisms that the board could utilize to resolve these factual issues: (1) a declaratory ruling pursuant to General Statutes § 4–176; (2) regulations pursuant to General Statutes § 19a–14(a)(4); or (3) adjudication of a disciplinary complaint concerning a podiatrist claimed to *713 be acting beyond the scope of his licensure, pursuant to General Statutes § 20–59. Id.

After issuance of the attorney general's opinion, three doctors of podiatric medicine, the defendants Steven Perlmutter, Kove J. Schwartz and Harvey D. Lederman, wrote separately to the board requesting clarification of the opinion. In September, 1984, the board issued a notice of hearing, pursuant to § 4–176, [3] stating that a hearing would be held "for the purpose of issuing a declaratory ruling as requested on the issue of: Whether the diagnosis and treatment of sprains, strains and positional abnormalities of the ankle [are] within the scope of podiatry practice in Connecticut." The commissioner of health services and the three named doctors of podiatric medicine were designated as parties to the proceedings.

The board conducted the hearing on November 7, 1984, and received fifteen exhibits and heard testimony from eleven witnesses, both podiatrists and medical doctors, concerning the anatomical relationship between the foot and the ankle. [4] It subsequently issued a declaratory ruling that the ankle is part of the foot and that podiatrists could, therefore, treat ankle ailments. The *714 plaintiffs appealed from the board's ruling, pursuant to General Statutes § 4–183(a). [5] The defendants moved to dismiss the appeals on the ground that the plaintiffs failed to allege sufficient facts from which aggrievement could be found. The trial court granted the motion to dismiss. On the plaintiffs' appeal from the judgment of dismissal, we reversed and remanded, holding that the allegations of the plaintiffs' complaint satisfied the pleading requirements for aggrievement. *Connecticut State Medical*

Society v. Board of Examiners in Podiatry, 203 Conn. 295, 303–304, 524 A.2d 636 (1987).

On remand, the trial court found that the plaintiffs were aggrieved and sustained their administrative appeal. The court characterized the issue as whether the board's actions represented a valid interpretation of the statute or an impermissible attempt to expand the scope of podiatry practice. It acknowledged that the board, as an agency within the meaning of General Statutes § 4–166(1), may properly issue declaratory rulings, pursuant to § 4–176, predicated on its interpretation of statutes made for its guidance and which it is charged with administering. It noted, however, that such an agency must act strictly ****833** within its statutory authority and cannot modify, abridge or otherwise change the statutory provisions under which it acquires authority. The court stated that its review was not limited to a determination of whether the board's declaratory ruling interpreting a statute was clearly ***715** erroneous in view of the reliable, probative and substantial evidence on the whole record, but that while the court should not substitute its judgment for that of the agency on factual issues, it may disturb the agency's ruling if it is in violation of statutory provisions or affected by other **error of law**. The court concluded that, since General Statutes § 20–50 has not previously been subjected to judicial scrutiny, its construction was a question of law on which an administrative ruling is not entitled to special deference and that the court may review the ruling to determine whether it was correct as a matter of law.

The court then considered § 20–50, noting that it concerned "foot ailments" and, in four separate areas, referred to "feet." It reasoned that words and phrases are to be construed according to the commonly approved usage of the language. It further concluded that where language is clear and unambiguous, there is no room for construction, and that a statute does not become ambiguous merely because the parties argue for or would prefer different meanings. The court finally concluded that the statute clearly and specifically limits the practice of podiatry to diagnosis of foot ailments and surgery on the feet. In doing so it relied on common understanding and the definition of "foot" contained in Webster's Third New International Dictionary. The court decided that "foot" has a well accepted and common meaning that does not include the ankle, and therefore, the board's ruling clearly expanded the ambit of podiatry practice as defined in § 20–50 because it is contrary to the **plain meaning** of the statutes.

The board and the podiatrists filed separate appeals to the Appellate Court. Pursuant to Practice Book § 4023, we transferred these appeals to this court.

On appeal, the podiatrists claim that: (1) the trial court erred in reviewing the board's declaratory ruling ***716** under a de novo standard of review, rather than under the statutory review criteria contained in § **4–183**(g); and (2) the board correctly concluded, on the basis of the facts found at the evidentiary hearing held on November 7, 1984, that the diagnosis and treatment of sprains, strains and positional abnormalities of the ankle are within the scope of podiatry practice in Connecticut.

The board assigns as error: (1) the trial court's ruling that the proper interpretation of the term "foot" as used in § 20–50 is purely a question of law rather than a mixed question of law and fact; (2) the trial court's conclusion that the board's declaratory ruling served to expand the ambit of podiatry practice as set forth in § 20–50; and (3) the trial court's ruling that the term "foot" as used in § 20–50 is to be accorded its commonly understood meaning as reflected in Webster's Dictionary.

For clarification, we construe these various claims of error as two issues: (1) whether the trial court applied the appropriate standard of review to the board's rulings; and (2) whether the trial court correctly interpreted § 20–50.

STANDARD OF REVIEW

The podiatrists argue that the trial court conducted a de novo review of the board's declaratory ruling and disregarded entirely the opinion of the attorney general and the board's factual findings and conclusions of law. They claim that the court substituted its judgment for that of the agency as to the weight of the evidence on questions of fact in violation of General Statutes § **4–183**(g). They further claim that the court erred in failing to afford "special deference" to the board's factual findings, and to time-tested agency interpretations.

***717** **[1]** The standard of judicial review of administrative agency rulings is well established. Section **4–183**(g) permits modification or reversal of an agency's decision "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, ordecisions ****834** 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." The trial court may not retry the case or substitute its judgment for that of the agency on the weight of the evidence or questions of fact. General Statutes § **4–183**(g); *Griffin Hospital v. Commission on Hospitals & Health Care,* 200 Conn. 489, 496, 512 A.2d 199, appeal dismissed, 479 U.S. 1023, 107 S.Ct. 781, 93 L.Ed.2d 819 (1986); *Hospital of St. Raphael v. Commission on Hospitals & Health Care,* 182 Conn. 314, 318, 438 A.2d 103 (1980); *Madow v. Muzio,* 176 Conn. 374, 376, 407 A.2d 997 (1978). Rather, an agency's factual and discretionary determinations are to be accorded considerable weight by the courts. *Connecticut Hospital Assn., Inc. v. Commission on Hospitals & Health Care,* 200 Conn. 133, 140, 509 A.2d 1050 (1986); *Board of Aldermen v. Bridgeport Community Antennae Television Co.,* 168 Conn. 294, 298–99, 362 A.2d 529 (1975); *Westport v. Norwalk,* 167 Conn. 151, 355 A.2d 25 (1974).

On the other hand, it is the function of the courts to expound and apply governing principles of law. *N.L.R.B. v. Brown,* 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); *International Brotherhood of Electrical Workers v. N.L.R.B.,* 487 F.2d 1143, 1170–71 (D.C.Cir.1973), aff'd sub nom. ***718** *Florida Power & Light Co. v. International Brotherhood of Electrical Workers,* 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974); *Connecticut Hospital Assn., Inc. v. Commission on Hospitals & Health Care,* supra; *Real Estate Listing Service, Inc. v. Real Estate Commission,* 179 Conn. 128, 138–39, 425 A.2d 581 (1979). This case presents a question of law turning upon the interpretation of a statute. See *Brannigan v. Administrator,* 139 Conn. 572, 577, 95 A.2d 798 (1953); *Bridgeport v. United Illuminating Co.,* 131 Conn. 368, 371, 40 A.2d 272 (1944). Both the board and the trial court had to construe § 20–50 to determine the permissible scope of podiatry practice in Connecticut. In our view, this is purely a question of law, requiring that the intent of the legislature be discerned. Such a question invokes a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. *Robinson v. Unemployment Security Board of Review,* 181 Conn. 1, 5, 434 A.2d 293 (1980).

[2] Ordinarily, we give great deference to the construction given a statute by the the agency charged with its enforcement. *Griffin Hospital v. Commission on Hospitals & Health Care,* supra, 200 Conn. at 496–97, 512 A.2d 199; *Corey v. Avco–Lycoming Division,* 163 Conn. 309, 326, 307 A.2d 155 (1972) (*Loiselle, J.,* concurring), cert. denied, 409 U.S. 1116, 93 S.Ct. 903, 34 L.Ed.2d 699 (1973). We agree with the trial court, however, that, in this case, the board's interpretation of § 20–50 is not entitled to any special deference. "Ordinarily, the construction and interpretation of a statute is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where, as here, the statute has not previously been subjected to judicial scrutiny or time-tested agency interpretations. *Texaco Refining & Marketing Co. v. Commissioner,* 202 Conn. 583, 599, 522 A.2d 771 (1987); ***719** *Schlumberger Technology Corporation v. Dubno,* 202 Conn. 412, 423, 521 A.2d 569 (1987); see also *Board of Education v. Board of Labor Relations,* 201 Conn. 685, 698–99, 519 A.2d 41 (1986); *Wilson v. Freedom of Information Commission,* 181 Conn. 324, 342–43, 435 A.2d 353 (1980)." *New Haven v. Freedom of Information Commission,* 205 Conn. 767, 773–74, 535 A.2d 1297 (1988).

Neither the board nor the courts have previously ruled on the issue presented here. Accordingly, such deference is not due the board's construction of § 20–50.

[3] The podiatrists also argue the related principle of deference to a time-tested ****835** agency interpretation of a statute. They claim that "a practical construction placed on legislation over many years" will be accorded special deference by a reviewing court, citing *Schieffelin & Co. v. Department of Liquor Control,* 194 Conn. 165, 174, 479 A.2d 1191 (1984). We have accorded deference to such a time-tested agency interpretation of a statute, but only when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency's interpretation is reasonable. *Texaco Refining & Marketing Co. v. Commissioner,* supra; *Sutton v. Lopes,* 201 Conn. 115, 120, 513 A.2d 139, cert. denied sub nom. *McCarthy v. Lopes,* 479 U.S. 964, 107 S.Ct. 466, 93 L.Ed.2d 410 (1986); *Schieffelin & Co. v. Department of Liquor Control,* supra; *Clark v. Town Council,* 145 Conn. 476, 485, 144 A.2d 327 (1958); *Wilson v. West Haven,* 142 Conn. 646, 657, 116 A.2d 420 (1955). The defendants rely on the fact that podiatrists have long performed the procedures in question in this case. We disagree that such practices constitute time-tested agency interpretation of the statute. Further, we do not consider the board's knowledge of and acquiescence in certain

podiatric practices to rise to the level of statutory construction entitled to judicial deference.

*720 [4] We also disagree that the court failed to give proper deference to the opinion of the attorney general. "Although an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive." *Connecticut Hospital Assn., Inc. v. Commission on Hospitals & Health Care,* supra, 200 Conn. at 143, 509 A.2d 1050. We note that the opinion of the attorney general, although so labeled and published in 62 Op.Conn.Atty.Gen. 229, 231 (1984), is an opinion in name only. It contains no legal analysis of a contested issue for the guidance of those interested. Rather, the "opinion" merely referred the matter to the board for a "factual determination" and contained no legal analysis of the type to which our court has earlier granted deference. See *Connecticut Hospital Assn., Inc. v. Commission on Hospitals & Health Care,* supra.

The board's contention that the issue presented was a mixed question of law and fact is also without merit. Interpretation of the statute should effect the intent of the legislature and not expand the law's meaning to accommodate unauthorized practices simply because they have been performed in the past.

Since we consider the issue in this case to be one of statutory interpretation to determine the legislature's intent with regard to the scope of podiatry practice, we conclude that the trial court applied the appropriate standard in reviewing the board's construction of § 20–50.

INTERPRETATION OF THE TERM "FOOT"

[5] General Statutes § 20–50 defines podiatry as "the diagnosis, prevention and treatment of foot ailments ... the practice of surgery upon the feet ... the dressing, padding and strapping of the feet; the making of models of the feet and the palliative and mechanical treatment of functional and structural ailments of *721 the feet, not including the amputation of the leg, foot or toes or the treatment of systemic diseases other than local manifestations in the foot." Our principal objective in construing statutory language is to ascertain the apparent intent of the legislature. *Rawling v. New Haven,* 206 Conn. 100, 105, 537 A.2d 439 (1988). "In construing a statute, this court will consider its plain language, its legislative history, its purpose and the circumstances surrounding its enactment." *State v. Parmalee,* 197 Conn. 158, 161, 496 A.2d 186 (1985).

General Statutes § 1–1(a) requires that "[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." If the statutory language is clear and unambiguous, there is no room for construction. **836 *New Haven v. United Illuminating Co.,* 168 Conn. 478, 485, 362 A.2d 785 (1975). If there is no ambiguity in the language of the statute, it does not become ambiguous merely because the parties argue for or would prefer different meanings. *Caldor, Inc. v. Heffernan,* 183 Conn. 566, 570, 440 A.2d 767 (1981). When language used in a statute is clear and unambiguous, its meaning is not subject to modification or construction. *Cilley v. Lamphere,* 206 Conn. 6, 9–10, 535 A.2d 1305 (1988). When a statute does not define a term, it is appropriate to look to the common understanding expressed in the law and in dictionaries. *Doe v. Manson,* 183 Conn. 183, 186, 438 A.2d 859 (1981).

Webster's Third New International Dictionary defines "foot" as "[t]he terminal part of the vertebrate leg upon which an individual stands consisting in most bipeds (as man) and in many quadrupeds (as the cat) of all the structures (as heel, arches, and digits) below the ankle joint...." The podiatrists argue, however, *722 that the board's ruling, rather than the dictionary definition, is consistent with the legislative intent underlying the podiatry statutes. We are not so persuaded.

In 1915, the legislature passed the first statute licensing chiropody. Public Acts 1915, c. 229. Prior to that time anyone could practice chiropody in Connecticut. *Connecticut Chiropody Society, Inc. v. Murray,* 146 Conn. 613, 616, 153 A.2d 412 (1959). The practice of chiropody was not defined, however, until the enactment of § 1188c of the 1935 Cumulative Supplement to the Public Acts of 1915. The statutory language adopted in 1935 equated chiropody and podiatry and delineated the areas of practice as follows: diagnosis of foot ailments and the practice of minor surgery on the feet, including all structures of the phalanges but limited to those structures of the foot superficial to the inner layer of the fascia of the foot;[6] dressing, padding and strapping of the feet; and making of plaster models of the feet and the palliative and mechanical treatment of functional disturbances of the feet as taught and practiced in the schools of chiropody recognized by

the examining board. The reference to the teaching and practice in schools of chiropody was eliminated by § 1023e of the 1937 Cumulative Supplement to the General Statutes. The podiatrists, relying on the testimony of the state health commissioner (commissioner) at a hearing before the Joint Standing Committee on Public Health and Safety, claim that this change was made to authorize the board to define the scope of podiatric practice in Connecticut. Conn. Joint Standing Committee Hearings, Public Health and Safety, 1937 Sess., p. 135. They argue that the fact that the commissioner ***723** was instrumental in fashioning the definition lends strong support to the board's ruling.

We are unconvinced that the assertions of the commissioner are entitled to the weight the podiatrists urge us to accord them. See *Hartford Electric Light Co. v. Water Resources Commission,* 162 Conn. 89, 291 A.2d 721 (1971). "While relevant to our inquiry, [excerpts from legislative proceedings] are by no means conclusive in determining legislative intent.... As to occurrences at legislative public hearings, these are not admissible as a means of interpreting a legislative act and may not be considered." Id., at 98, 291 A.2d 721. Further, our examination of the statutory scheme as it now exists belies such a conclusion.

A centrifugal professional force tending to expand podiatry may be seen from the early legislative history of the podiatry statutes. For instance, Public Acts 1969, No. 578, amended the pertinent drug statute to allow podiatrists, for the first time, to administer drugs, and Public Acts 1976, No. 76–99, made a major change in the podiatry statutes by eliminating the word "minor" from the surgery on the feet authorized for podiatrists. Presently, the podiatry statutes, General Statutes §§ 20–50 ****837** through 20–65, both authorize the practice of podiatry and define its limits. The provisions limiting the scope of podiatry and, thus, tempering the expansion, however, are the predominant theme of the statutes. This is in marked contrast to chapter 370 of the General Statutes, entitled "Medicine and Surgery," wherein the scope of practice of medicine and surgery is not defined, and chapter 371 concerning osteopathy where no such specific definitions limiting the scope of practice are contained. To the contrary, specific limitations on the practice of podiatry are contained in § 20–50. That the thrust of the podiatry statutes is primarily limiting in nature is made clear by General Statutes § 20–63 which provides that "[n]o person granted ***724** a certificate under this chapter shall display or use the title 'Doctor' or its synonym without the designation 'Podiatrist' and shall not mislead the public as to the limited professional qualifications to treat human ailments." Further, among the grounds for revocation of a podiatrist's license or for disciplinary action against a podiatrist, General Statutes § 20–59(9) includes "undertaking or engaging in any medical practice beyond the privileges and rights accorded to the practitioner of podiatry by the provisions of this chapter...." A final example of such a limitation is the provision in § 20–50, as amended by Public Acts 1976, No. 76–99, authorizing "the practice of surgery upon the feet, provided if an anesthetic other than a local anesthetic is required, such surgery shall be performed in a general hospital accredited by the Joint Commission on Accreditation of Hospitals by a licensed podiatrist who is accredited by the credentials committee of the medical staff of said hospital to perform podiatric surgery in conformance with rules promulgated by the chief of the surgical department of said hospital, taking into account the training, experience, demonstrated competence and judgment of each such licensed podiatrist, and *such podiatrist shall comply with such rules....*" (Emphasis added.) The subjection of podiatrists to hospital rules is a striking example of a legislative intent to restrain any expansion of the scope of podiatry practice that is not statutorily authorized. We conclude, therefore, that it was not the intention of the legislature to empower the board to define the scope of podiatry practice in Connecticut.

The podiatrists and the board also contend that the term "foot" should be construed according to its technical or anatomical definition, and be understood to include the ankle.[7] We discern no support for this position in either the statute or case law.

***725** All parties, as well as the trial court, cite *Rivera v. I.S. Spencer's Sons, Inc.,* 154 Conn. 162, 223 A.2d 808 (1966). *Rivera* involved compensation for disfigurement under the then Workmen's Compensation Act, General Statutes (Rev. to 1962) § 31–308. We were asked to determine whether the phrase "legs below the knees" in the statute included the foot. We found that, in common usage, the leg sometimes does and sometimes does not include the foot, but concluded that the issue could not be resolved solely on the basis of common usage. Our examination of the legislative history disclosed several amendments expanding the coverage, under the disfigurement provisions, by the enumeration of additional specific portions of the body, consistent with increasing exposure of modern dress. Bearing in mind that a scar on the foot was less likely to be exposed to view than one above the foot but below the knee, we concluded that the foot was not contemplated by the statutory language. Id., at 164–66,

223 A.2d 808. *Rivera* is nonetheless inapposite to the present case, since the result in *Rivera* was compelled by legislative development quite different from that underlying the podiatry statutes.

The podiatrists rely heavily on *Finoia v. Winchester Repeating Arms Co.,* 130 Conn. 381, 385, 34 A.2d 636 (1943), in which we interpreted "hands" as used in a workers' compensation statute in its common anatomical sense as including the wrist and not the forearm. *Finoia,* like *Rivera,* ****838** sheds no light on the case before us. In *Finoia,* the question presented was whether, in the context of an award of compensation for disfigurement, the term "hand" was to be accorded its common meaning or a broader one, suggested by its use in the statutory provisions covering loss of use of a member, to include the forearm. Id., at 382–83, 34 A.2d 636. Based on the intent we found in the history of the workers' compensation ***726** statutes, we concluded that different legislative purposes were reflected in the loss of use and disfigurement provisions and that application of the broader definition was unwarranted. Id., at 383–84, 34 A.2d 636. As the podiatrists note, we stated, in *Finoia,* that "hand," when used in its common anatomical sense, included the wrist but not the forearm. We can see no basis, however, for translating that statement into a declaration that the legislature intended the foot to include the ankle within the meaning of the podiatry statutes.

The podiatrists also propose that we adopt the Washington Court of Appeals' reasoning in *Jaramillo v. Morris,* 50 Wash.App. 822, 750 P.2d 1301, reh. denied, —— Wash. ——, —— P.2d —— (July 5, 1988). In *Jaramillo,* a podiatrist was sued for malpractice in ankle surgery. The trial court refused to submit to the state podiatry board the question of whether the ankle surgery was outside the scope of the podiatrist's license, and held that "[i]t is plain to see from the exhibits and from the affidavits of medical experts that where the leg bones end the foot begins and vice versa." Id., 750 P.2d at 1305. The Court of Appeals found this refusal to be error, citing the special competence of the board to determine the meaning of the ambiguous term "foot." In so ruling, the court relied on the doctrine of primary jurisdiction which "does not displace the jurisdiction of a court, but merely allocates power between courts and agencies to make initial determinations; the court normally retains power to make the final decision." Id., 750 P.2d at 1304. In reaching its conclusion, the *Jaramillo* court stated that "[t]his is not a case ... wherein the practitioners of a medical specialty are attempting to expand their license authority beyond statutory bounds." Id., 750 P.2d at 1306.

We find *Jaramillo* inapplicable to this case and conclude that the term "foot" should be construed according ***727** to its commonly understood meaning. In light of our statutory scheme governing podiatry practice, the construction we give to the term "foot" must not expand the scope of podiatry practice beyond the intent of the legislature. Moreover, § 20–50 expressly authorizes treatment of foot ailments and performance of surgical procedures, other than amputation, on the foot or feet and makes no mention of the ankle, nor has treatment of the ankle been expressly included in the definition of podiatry practice in any of the predecessors to § 20–50. Had the legislature intended to include the ankle in the definition of "foot," it could easily have done so. "The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. *Frazier v. Manson,* 176 Conn. 638, 642, 410 A.2d 475 (1979); *Kulis v. Moll,* 172 Conn. 104, 110, 374 A.2d 133 (1976); *Colli v. Real Estate Commission,* 169 Conn. 445, 452, 364 A.2d 167 (1975); *United Aircraft Corporation v. Fusari,* 163 Conn. 401, 410–11, 311 A.2d 65 (1972). Where there is no ambiguity in the legislative commandment, this court cannot, in the interest of public policy, engraft amendments onto the statutory language." *Burnham v. Administrator,* 184 Conn. 317, 325, 439 A.2d 1008 (1981).

We, therefore, conclude that the trial court did not err in sustaining the plaintiffs' appeal and that it properly relied on common usage and the dictionary definition of "foot" in construing General Statutes § 20–50.

There is no error.

In this opinion the other Justices concurred.

Parallel Citations

546 A.2d 830

Footnotes

1 "[General Statutes] Sec. 20–50. PODIATRY DEFINED. REQUIREMENTS FOR SURGERY. . Podiatry is defined to be the diagnosis, prevention and treatment of foot ailments including the prescription, administering and dispensing of drugs and controlled substances in schedules II, III, IV or V, in accordance with subsection (d) of section 21a–252, in connection therewith; the practice of surgery upon the feet, provided if an anesthetic other than a local anesthetic is required, such surgery shall be performed in a general hospital accredited by the Joint Commission on Accreditation of Hospitals by a licensed podiatrist who is accredited by the credentials committee of the medical staff of said hospital to perform podiatric surgery in conformance with rules promulgated by the chief of the surgical department of said hospital, taking into account the training, experience, demonstrated competence and judgment of each such licensed podiatrist, and such podiatrist shall comply with such rules; the dressing, padding and strapping of the feet; the making of models of the feet and the palliative and mechanical treatment of functional and structural ailments of the feet, not including the amputation of the leg, foot or toes or the treatment of systemic diseases other than local manifestations in the foot."

2 The memorandum of decision of the board is as follows: "It is the ruling of the Board of Examiners in Podiatry, after reviewing all the testimony, exhibits and supporting statements offered in connection with the hearing held 7 November 1984, that the ankle is part of the foot, and the foot is part of the ankle. The Board further rules that sprains, strains, and positional abnormalities of the ankle constitute ailments of the foot, and that diagnosis and treatment of sprains, strains, and positional abnormalities of the ankle are therefore within the scope of podiatry practice in Connecticut."

3 "[General Statutes] Sec. 4–176. DECLARATORY RULINGS. Each agency may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency, and each agency shall provide by regulation for the filing and prompt disposition of petitions seeking such rulings. If the agency issues an adverse ruling, the remedy for an aggrieved person shall be an action for declaratory judgment under section 4–175 unless the agency conducted a hearing pursuant to sections 4–177 and 4–178 for the purpose of finding facts as a basis for such ruling, in which case the remedy for an aggrieved person shall be an appeal pursuant to section **4–183**. If the agency fails to exercise its discretion to issue such a ruling, such failure shall be deemed a sufficient request by the plaintiff for the purposes of section 4–175. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases."

4 The plaintiff Enzo Sella, M.D., was granted intervenor status and testified at the hearing.

5 General Statutes § 4–176 authorizes an appeal, pursuant to General Statutes § **4–183**, from a declaratory ruling where, as here, the agency conducted a hearing. Section § **4–183**(a) provides: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review by way of appeal under this chapter, provided, in case of conflict between this chapter and federal statutes or regulations relating to limitations of periods of time, procedures for filing appeals or jurisdiction or venue of any court or tribunal, such federal provisions shall prevail. A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

6 Public Acts 1971, No. 859, deleted the reference in General Statutes § 20–50 to the "phalanges but limited to those structures of foot superficial to the inner layer of the fascia of the foot," and substituted "forefoot forward of the tarsal bones, but excluding operations on the bones of the tarsus." This latter language was excised by Public Acts 1976, No. 76–99. Since then, the statute has contained no language qualifying the term "foot."

7 In its declaratory ruling, the board found that "the ankle and foot are inseparable." In so finding, the board expressly credited the testimony of Gary P. Jolly, D.P.M., who stated that it is impossible, from a clinical standpoint, to treat the foot as separate from the ankle.

End of Document

EXHIBIT B

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH

Office of Health Care Access

July 14, 2011

Mark Cesaro
Director, Strategic Planning and Business Development
Hartford Hospital
80 Seymour Street
P.O. Box 5037
Hartford, CT 06102-2127

Re: Certificate of Need Determination; Report Number: 11-31704-DTR
Hartford Hospital
Relocate Hartford Hospital/Institute of Living's Child and Adolescent Partial Hospital Program from Bloomfield to Hartford

Dear Mr. Cesaro:

On June 15, 2011, the Office of Health Care Access ("OHCA") received your determination request on behalf of Hartford Hospital ("Hospital"), a subsidiary of Hartford HealthCare Corporation ("HHC"), with respect to whether a certificate of need ("CON") is required for the Hospital to relocate its Child and Adolescent Partial Hospital Program ("Program") from Bloomfield to HHC's Institute of Living in Hartford.

The Program offers partial hospital, intensive outpatient and traditional outpatient psychiatric services to children and adolescents between the ages of 8 and 17. During FY 2010, 36% of its patients came from Hartford compared to 6% from Bloomfield. The only other town with greater than 10% patient population during FY 2010 was the town of West Hartford with 11%. The Program's current payer mix is 43% commercial insurance and 57% Medicaid. Since the Program's current patient population is primarily from Hartford and the surrounding towns, the Applicant does not expect a change in the patient population or the payer mix.

Based upon the foregoing, it appears that the proposed relocation of the Program from Bloomfield to Hartford will not result in a significant change in population or payer mix; therefore, a CON is not required for this proposal pursuant to General Statutes § 19a-639c.

Thank you for informing OHCA of your plans and if you have any questions regarding this letter, please contact Steven W. Lazarus, Associate Health Care Analyst at (860) 418-7012.

Sincerely,

Kimberly R. Martone
Director of Operations, OHCA

C: Rose McLellan, License and Applications Supervisor, DPH, DHSR

EXHIBIT C

File

STATE OF CONNECTICUT
OFFICE OF HEALTH CARE ACCESS

M. JODI RELL
GOVERNOR

CRISTINE A. VOGEL
COMMISSIONER

RECEIVED
JUN 24 2005
V.P. FINANCE

June 21, 2005

Joseph Pelaccia.
Vice President, Finance
Milford Hospital, Inc.
300 Seaside Avenue
P.O. Box 3015
Milford, CT 06460-0815

Re: Certificate of Need Determination; Report Number 05-30501-DTR
Milford Hospital, Inc.
Relocation of Urgent Care Center

Dear Mr. Pelaccia:

The Office of Health Care Access ("OHCA") is in receipt of your request for a CON Determination Report for the relocation of Milford Hospital's urgent care center from 300 Seaside Avenue to 831-849 Boston Post Road in Milford.

Upon review of the information contained in the request, OHCA finds the following:

1. Milford Hospital, Inc. ("Hospital") is a non-profit healthcare provider offering a full range of inpatient and outpatient services.

2. The Hospital proposes to relocate its Urgent Care Center to an offsite facility at 831-849 Boston Post Road in Milford.

3. As part of the Emergency Department, the Hospital provides a dedicated urgent care center called Quick Care ("Center"). The center is open from 9:00 am to 10:00 pm, seven days a week. The Center provides non-emergency sick visits and minor trauma services to approximately 14,000 patients annually.

4. The Hospital stated that the Center's total visits totaled 19,000 annually since 1998. The Center's volume has increased by 68% to over 32,000 visits annually, which is far in excess of the planned growth capacity.

5. The Hospital plans to rent approximately 3,500 square feet of space located at 831-849 Boston Post Road in Milford for the Center, which is approximately 1.5 miles from the Hospital.

6. The facility will be owned by Torry Corp., a for-profit non-licensed real estate entity owned by the Hospital's parent corporation, Milford Health and Medical.

7. The existing urgent care treatment space will be utilized by the Emergency Department to expedite and improve timely care for patients in need of acute emergency services.

8. The total capital expenditure associated with the relocation is $583,230 for equipment.

9. There are no new services to be provided at the new site of the Center.

10. The Center will serve the same population as currently served at the Hospital.

11. The staffing level will be the same as currently experienced at the current site on the Hospital campus.

Based on these findings, OHCA has determined that CON approval is not required for the relocation of the Hospital's Urgent Care Center to 831-849 Boston Post Road in Milford, pursuant to Section 19a-638 of the Connecticut General Statutes.

If you have any questions concerning the above, please feel free to contact Kim Martone, CON Supervisor, at (860) 418-7029.

Sincerely,

Cristine A. Vogel
Commissioner

c: Rose McLellan, Licensing Examination Assistant, DPH, DCBR

CAV:km

EXHIBIT D

Department of Health & Human Services
Centers for Medicare & Medicaid Services
JFK Federal Building, Government Center
Room 2325
Boston, MA 02203

Northeast Division of Survey & Certification

September 30, 2014

Richard D'Aquila, President & Chief Operating Officer
Yale-New Haven Hospital
20 York Street
New Haven, CT 06504

RE: **CMS Certification Number: 07-T022**

Dear Mr. D'Aquila:

On Tuesday, September 23, 2014, we received your letter dated September 18, 2014 wherein you request a six bed increase of Yale-New Haven Hospitals' inpatient rehabilitation unit (IRF) prospective payment system (PPS) excluded unit, effective October 1, 2014. Federal regulations at 42 CFR 412.25(b) states in part, "...changes in the number of beds or square footage considered to be part of an excluded unit under this section are allowed one time during a cost reporting period if the hospital notifies its Medicare contractor and CMS RO in writing of the planned change at least 30 days before the date of change..." In accordance with 42 CFR 412.25(b), the 30 day notification requirement will be applied in determining the effective date of this request.

The Centers for Medicare & Medicaid Services (CMS) has approved an increase in the number of beds excluded from the prospective payment systems specified under 42 CFR 412.1(a)(1) in order to be paid under the prospective payment system specified at 42 CFR 412.1(a)(3) for rehabilitation hospitals and units. Effective October 18, 2014, the total number of excluded beds is 24. The additional beds are located in rooms 375, 3588 and 4538 (two beds each) located at the St. Raphael Campus.

Exclusion status for all hospitals and units is reviewed annually. You will be notified if there is a change in your facility's exclusion status as a result of the annual review. Please note that all Inpatient Rehabilitation Facilities (IRFs) must notify their Medicare Administrative Contractor and the CMS Regional Office (RO) in writing before making any changes to their operations (e.g., increase in bed size or square footage, relocation to a new location, change of ownership, etc.). Generally, changes in the size of an excluded unit are "allowed one time during a cost reporting period if the hospital notifies its Medicare contractor and the CMS RO in writing of the

planned change at least 30 days before the date of the change." Please see Federal regulations at 42 CFR Part 412, Subpart B.

If you have any questions, please contact Kathy Mackin at (617) 565-1211.

Sincerely,

Kathy Mackin, Health Insurance Specialist
Survey Branch

cc: CT Department of Public Health
NGS

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH

Office of Health Care Access

February 24, 2015 VIA FACSIMILE ONLY

Jennifer G. Fusco, Esq.
Updike, Kelly & Spellacy, P.C.
One Century Tower
265 Church Street
New Haven, CT 06510

Stephen M. Cowherd, Esq.
Jeffers Cowherd P.C.
55 Walls Drive
Fairfield, CT 06824

RE: Certificate of Need Determination Report Number 15-31974-DTR
Yale-New Haven Hospital
Termination of Inpatient Rehabilitation Services

Dear Attorneys Fusco and Cowherd:

On October 30, 2014 and November 17, 2014, the Office of Health Care Access ("OHCA") received your correspondence with respect to the discontinuation of inpatient rehabilitation services at the Saint Raphael's campus of Yale-New Haven Hospital ("YNHH") and the provision of these same services at Milford Hospital's ("MH") campus in Milford, Connecticut.

YNHH currently operates a 24-bed inpatient rehabilitation unit ("IRU") on its Saint Raphael's campus ("SRC") in New Haven, Connecticut. The IRU serves as a discharge placement for inpatients in need of rehabilitative care after an acute care stay. YNHH intends to cease offering the IRU services at SRC and begin offering the IRU services within leased space at MH's campus in Milford, Connecticut. The IRU will operate in Milford using YNHH licensed beds and the patients will be YNHH patients. Professional services will be provided by YNHH clinical staff and IRU patients' records will be part of YNHH's electronic medical record system. In their initial correspondence dated October 30, 2014, YNHH and MH indicated that they were not requesting a Certicate of Need ("CON") determination but were providing OHCA with information to allay any concerns that OHCA may have that the proposed arrangement will result in a termination of services or otherwise require CON approval. As discussed below, OHCA concludes that the proposed transaction is a termination of services and requires a CON.

Connecticut General Statutes § 19a-638(a)(4) requires CON authorization for the "termination of inpatient or outpatient services offered by a hospital…". "Termination" is not defined in statute or regulation. Nor is there anything in statute or regulation that supports an interpretation of "termination" that would exempt a health care facility from obtaining CON authorization prior to ceasing services at its hospital campus and offering the services within leased space at another facility. However, the legislative intent surrounding Connecticut General Statutes § 19a-638(a)(4) supports the conclusion that a CON is required for the aforementioned proposal.

Based upon Connecticut General Statutes § 19a-638(a)(4) and the legislative history surrounding terminations, the cessation of IRU services at the SRC campus constitutes a termination of inpatient services offered by YNHH. Based upon the foregoing, OHCA concludes that ***a CON is required*** for the aforementioned proposal.

Sincerely,

Kimberly R. Martone
Director of Operations

C: Rose McLellan, License and Applications Supervisor, DPH, DHSR

* * * COMMUNICATION RESULT REPORT (FEB. 24. 2015 10:06AM) * * *

FAX HEADER:

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REASON FOR ERROR
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E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
OFFICE OF HEALTH CARE ACCESS

FAX SHEET

TO: JENNIFER G. FUSCO, ESQ.

FAX: 203 772-2037

AGENCY: UPDIKE, KELLY & SPELLACY, P.C.

FROM: OHCA

DATE: 2/24/15 **Time:**

NUMBER OF PAGES: 3
(including transmittal sheet

Comments:
Determination for Yale-New Haven Hospital
Report Number: 15-31974-DTR

PLEASE PHONE Barbara K. Olejarz IF THERE ARE ANY TRANSMISSION PROBLEMS.

Phone: (860) 418-7001 ***Fax: (860) 418-7053***

410 Capitol Ave., MS#13HCA
P.O.Box 340308
Hartford, CT 06134

* * * COMMUNICATION RESULT REPORT (FEB. 24. 2015 10:07AM) * * *

FAX HEADER:

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E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
OFFICE OF HEALTH CARE ACCESS

FAX SHEET

TO: STEPHEN M. COWHERD, ESQ.

FAX: 203 259-1070

AGENCY: JEFFERS COWHERD P.C.

FROM: OHCA

DATE: 2/24/15 **Time:**

NUMBER OF PAGES: 3
(including transmittal sheet

Comments:

Determination for Yale-New Haven Hospital
Report Number: 15-31974-DTR

PLEASE PHONE Barbara K. Olejarz IF THERE ARE ANY TRANSMISSION PROBLEMS.

Phone: (860) 418-7001 ***Fax: (860) 418-7053***

410 Capitol Ave., MS#13HCA
P.O.Box 340308
Hartford, CT 06134

MILFORD HOSPITAL

March 20, 2015

Hon. Janet M. Brancifort, MPH
Deputy Commissioner
Office of Health Care Access
Division of Department of Public Health
410 Capitol Avenue
P.O. Box 340308
Hartford, CT 06134-0308

Re: Yale-New Haven Hospital Inpatient Rehabilitation Unit (IRU)

Dear Deputy Commissioner Brancifort:

I am writing to wholeheartedly support Yale-New Haven Hospital's certificate of need application to relocate its 24-bed IRU to Milford Hospital. As OHCA is aware, the approval of this CON would authorize YNHH to relocate its IRU to Milford Hospital. This is essential for the survival of Milford Hospital as a healthcare provider to its community.

YNHH will transfer operations of its current IRU under its hospital license to a customized space at Milford Hospital. There will be no disruption or discontinuation of services that could negatively impact patient access at either facility. In fact, after the relocation, the same patients who would have been admitted to the IRU on YNHH's St. Raphael campus following an acute care stay will be transported to Milford and admitted to the IRU located at our hospital. Many family members, friends [and community physicians] caring for these patients will find it far more convenient to travel to Milford.

The relocation will improve the financial strength of both institutions. Not only does YNHH save on the cost of constructing new space to house an IRU, Milford Hospital gains much needed revenue from the lease payments. This revenue will assist Milford Hospital in providing acute care services to the community.

Collaborative arrangements like the one we are pursuing through the IRU relocation should be encouraged in today's health care environment. This arrangement fulfills many of the major goals of health reform by promoting quality and accessibility to care while efficiently using existing infrastructure and resources.

300 Seaside Avenue, P.O. Box 3015, Milford, Connecticut 06460-0815 Tel 203 876 4000 Fax 203 876 4198
www.milfordhospital.org

On behalf of Milford Hospital, its Board of Directors and the over 800 physicians, nurses and other health care workers it employs, we hope OHCA will grant prompt approval to this vitally important project.

Very truly yours.

Joseph Pelaccia

Joseph Pelaccia
President & CEO

cc: Kimberly Martone, OHCA Director of Operations