Docket No.: FIC 2013-197

ABLECHILD	:	FREEDOM OF INFORMATION COMMISSION
v.	:	
OFFICE OF CHIEF MEDICAL EXAMINER	:	SEPTEMBER 5, 2013

RESPONDENT'S POST-HEARING BRIEF

FACTS

In this case of not letting a disaster go to waste, the issue is whether reports of autopsies and other examinations performed under the auspices of the Office of the Chief Medical Examiner ("OCME") and of scientific findings by the OCME are subject to public disclosure under the Freedom of Information Act ("FOIA") as to give the Freedom of Information Commission ("FOIC") jurisdiction over the OCME's denial of access to such reports. Believing that psychiatric disorders are unreal, the complainant, AbleChild, advertises itself as an organization dedicated to educating parents on the risks associated with treating children with psychotropic drugs and to promoting psychotropic drug free education.[1]

Following a December, 2012, incident during which Adam Lanza shot his way into the Sandyhook elementary school in Newtown, Connecticut, and killed twenty-six people and himself, the Complainant requested from the Respondent copies of Lanza's autopsy report, toxicology report, and prescription drug history records. Asserting that it

[1] http://ablechild.org/about-us/ (last visited on August 28, 2013.)

has an interest in advising its members and the public about depression treatment that will be advanced by determining whether the use of antidepressants contributed to Lanza's murders and suicide, it sought particularly records concerning the presence of drugs in Lanza's serum and organs. The Respondent denied the request, finding that the Complainant failed to satisfy the legitimate interest test of Conn. Gen. Stat. § 19a-411 and Regs., Conn. State Agencies § 19a-401-12 for the mandatory disclosure of such records to members of the public. The Complainant has brought this appeal claiming that the Respondent's denial of its request violated, inter alia, the FOIA, Conn. Gen. Stat. § 19a-411 and Regs., Conn. State Agencies § 19a-401-12(c)(2). For the reasons stated below, the Complainant's complaint must, respectfully, be dismissed.

ARGUMENT

I. THE COMPLAINANT IS NOT ENTITLED TO ACCESS TO THE REQUESTED RECORDS

It is worth noting at the outset that the Respondent has now furnished the Complainant with Lanza's toxicological report following its public release with the consent of Lanza's next of kin and that the Respondent does not have Lanza's prescription records. (See Respondent Ex.'s 1 and 2.) Therefore, the sole issue properly before the FOIC in this appeal is whether the respondent's failure to furnish the complainant with Lanza's autopsy report violated the FOIA. Because the Respondent's autopsy and other examination reports and findings are not subject to compelled disclosure, the answer to this question is no, meaning that the FOIC must, respectfully, dismiss the complaint.

A. The Requested Records Are Exempt from Disclosure under the FOIA

While favoring the open conduct of government and free public access to government records, the FOIA does not confer upon the public an absolute right to all government information. Lieberman v. State Board of Labor Relations, 216 Conn. 253, 266 (1990). Rather, "where the legislature has determined that some other public interest overrides the public's right to know, it has provided explicit statutory exceptions." Id. Hence, in addition to providing some exceptions itself, the FOIA, Conn. Gen. Stat. § 1-210(a) provides:

> 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 (1) inspect such records promptly during regular office or business hours, (2) copy such records . . . or (3) receive a copy of such records . . . .

(Emphasis added.)

In providing that the public may inspect or copy public records "[e]xcept as otherwise provided by any federal law or state statute," § 1-210(a) recognizes that federal law and other state statutes may exclude such records from disclosure. Groton Police Department v. Freedom of Information Commission, 104 Conn. App. 150, 155 (2007). Thus, the section makes public records available to the public for inspection and copying, provided no federal law or state statute bars or restricts the disclosure of such records.

In this case, Conn. Gen. Stat. § 19a-411 permits the nondisclosure to a member of the public of the medical and scientific records of the Respondent if the member does

not have a legitimate interest in the records and, hence, qualifies as a state statute that provides otherwise within the meaning of § 1-210(a). Galvin v. Freedom of Information Commission, 201 Conn. 448, 456 (1986). It states in relevant part:

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

(Emphasis added.)

Conn. Gen. Stat. § 19a-411(b) thus sets forth guidelines for the public disclosure of autopsy reports and other records of investigations undertaken by the OCME. Those guidelines impose stricter limitations on such disclosure than Conn. Gen. Stat. § 1-210 permits, authorizing, as they do, the Commission on Medicolegal investigation, of which the Respondent is the operational arm, to restrict public access to such records. Because subjection of such records to the unfettered access that the FOIA grants would conflict with the guidelines, such records fall under the "except as otherwise provided by ... other state statute" exemption to § 1-210(a) and are not records accessible to the public under that section.[2] Galvin, supra at 456, 461-62. Accordingly, the

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[2] In Galvin, the Supreme Court held that § 19a-411(b)'s reference to § 1-210 did not vitiate the disclosure restrictions of § 19a-411(b) but only incorporated those

Footnote continued on next page.

Complainant's claim that the denial of its request for such records violated the FOIA must fail and its complaint dismissed.

B. The FOIC Lacks Jurisdiction to adjudicate the Complainant's Right to the Requested Records under Conn Gen. Stat. § 19a-411 and Regs., Conn. State Agencies § 19a-401-12

Conn. Gen. Stat. § 19a-411(b) does provide that the OCME may not deny access to its investigative reports and findings to any member of the public with a legitimate interest in such records, and Regs., Conn. State Agencies §19a-401-12(c)(2) states that such a member may obtain access to such records if no court has issued an order under section 19a-411(c) prohibiting disclosure. Claiming that the Respondent's interpretation of the legitimate interest test of these statutory and regulatory provisions is invalid, the Complainant's urges the FOIC to find that it has a legitimate interest in the requested records and order the Respondent to release the records to it. In addition to lacking merit, this claim is not properly before the FOIC.

Records exempt from disclosure under the FOIA do not fall within the FOIC's jurisdiction. Commissioner, Department of Public Safety, v. FOIC, 204 Conn. 609, 623 (1987); Albright-Lazzari v. Freedom of Information Commission, 136 Conn. 76, 83-87 (2012). As discussed above, § 19a-411 exempts the records in this case from disclosure under the FOIA. Consequently, whether or not the complainant has a legitimate interest in them as to entitle it to access to them under §§ 19a-411(b) and

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provisions of § 1-210--including the exceptions to disclosure set forth in § 1-210(b) applicable to the types of records covered by § 19a-411--not inconsistent with those restrictions. Galvin, 201 Conn. at 458-60.

19a-401-12(c)(2) is not a matter over which the FOIC has jurisdiction . Therefore, the Complainant's attempt to have the FOIC adjudicate that issue must fail.

C. The Complainant Does Not Have a Legitimate Interest in the Requested Records

Even had the FOIC jurisdiction over the Complainant's legitimate interest claim, the complainant has not demonstrated any such interest. A "legitimate interest," in a record is a compelling, direct bona fide good faith personal interest in the record. In re Sheldon G., 216 Conn. 563, 568, 583-84 (1990) (§ 46b-124 required litigant to demonstrate not just bona fide good faith interest, but also compelling need to obtain juvenile's court records); In re Jessica, 25 Conn. L. Rptr. 388, 1999 WL 775753 *3 (Conn. Super. 1999) ("legitimate interest" as used in Conn. Gen. Stat. § 46b-124(e)[3] meant direct bona fide good faith personal interest); State. v. Rashad C., 2013 WL 1189323 **4-5 (Conn. Super. 2013) (seeker of juvenile's records under § 46b-124 must show "compelling" or "legitimate" need). A person claiming a legitimate interest in a record under § 19a-411(b) must, thus, demonstrate, at the minimum, a personal interest that is compelling, direct and bona fide. That this is the case is confirmed by the fact that § 19a-411 makes separate provisions for persons seeking access to the Respondent's investigative records for official business and research purposes, restricting such access to law enforcement officials, public authorities, and professional,

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[3] Conn. Gen. Stat. § 46b-124(e) states in part: "Records of cases of juvenile matters involving delinquency proceedings, or any part thereof, may be disclosed upon order of the court to any person who has a legitimate interest in the information and is identified in such order. ..."

medical, legal or scientific bodies or universities or similar research bodies. Conn. Gen. Stat. § 19a-411(a) and (c).

A statute must be read as a whole to reconcile its separate parts and render a reasonable overall interpretation." Ganim v. Roberts, 204 Conn. 760, 763 (1987). Harmonizing the various parts of § 19a-411 to give effect to all its provisions, including the restrictions on access for official business and research purposes, the legitimate interest requirement of § 19a-411 serves to limit mandatory public access to the Respondent's investigative records to access for personal legal, business or other purposes. to obtain access to such records, a member of the public claiming a legitimate interest in those records as the Complainant does must, therefore, demonstrate a genuine, as opposed to a hypothetical or speculative, personal interests in the records. Examples of such direct bona fide personal interests are found in Regs., Conn. State Ag. § 19a-401-12(c)(4)(e) and (f) and include such interests as the interests of attorneys, pro se litigants and insurance claims agents seeking such records for estate, litigation or insurance claims purposes.

Here, the complainant contends that its purported interest in advising its members and the public on the safety of antidepressants constitutes a legitimate interest under § 19a-411(b) because the requested records would enable it to determine whether antidepressants contributed to Lanza's murders and suicide (Complainant's Ex. 1). There is nothing personal or direct about the Complainant's purported interest, however. Nothing in the complainant's submissions indicates that it is licensed to practice medicine and render medical advice. Nor does anything in those submissions

suggest that the requested records pertain to any patient of the complainant as to make them directly relevant to the patient's treatment. Rather, the Complainant's asserted interest is no different from the interest of a medical or scientific researcher. Yet, besides the fact that researchers may under § 19a-411(c) obtain the Respondent's investigative records only at the Respondent's discretion, the Complainant has failed to demonstrate that it has competence to conduct medical or psycho-pharmacological research or that the federal Food and Drug Administration (FDA), the federal agency charged with ensuring the safety of drugs approved for sale in the United States, has qualified it to evaluate and advise the public on the efficacy and safety of antidepressants or other psychotropic drugs. See 21 U.S.C. § 355(k) (Complainant's Ex. 4(A) pp. 28-29). Thus, not only has the Complainant not demonstrated a direct personal interest in the requested records, it has not demonstrated a research interest.

Further, there is nothing bona fide, good faith or compelling about the Complainant's asserted interest. That some children and adolescents using antidepressants experience increased suicidal ideation when they first start taking such medications has been known for some time now. Because of that risk, the FDA began in 2005 to require antidepressant manufacturers to include a warning to the labeling of all antidepressants describing the risk of sulcidality in children and adolescents taking antidepressants and emphasizing the need for monitoring and close observation of such young patients. The FDA concurrently directed manufacturers to develop Medication Guides to be approved by the FDA for distribution at the pharmacy to patients, families and caregivers with each prescription or refill of a medication with a view to improving

monitoring. (Complainant's Ex. 4(A) pp. 28-33.) Also, that same year, the FDA began a comprehensive review of 295 individual antidepressant trials that included over 77,000 adult patients with major depressive disorder and other psychiatric disorders for the purpose of examining the risk of suicidality in adults taking antidepressants. That review culminated in the FDA proposing in 2007 that all antidepressant makers update their products' labeling to warn about the increased risks of suicidal thinking and behavior in young adults ages 18 to 24 generally during the first one to two months of treatment, to state that scientific data did not show this increase risk in adults older than 24 and that adults ages 65 and older taking antidepressants have a decreased risk of suicidality, and to emphasize that depression and certain other serious psychiatric disorders are themselves the most important causes of suicide (Complainant's Ex. 4(B)).

In claiming that it could advise parents and caregivers on the appropriateness of antidepressants for treating psychiatric disorders based on Lanza's case, the Complainant is claiming that it can based on an isolated case formulate treatment recommendations of general applicability superior to the FDA's, which derived from numerous placebo-controlled studies. It is claiming that it can, contrary to accepted scientific methodologies, determine the overall safety of antidepressants based on one case. The implausibility of this claim belies any claim that the complainant's interest in rendering such advice is bona fide and compelling. For even if Lanza was using antidepressants at the time of his murders and suicide, any general treatment recommendation based on that isolated case would have to rely on incomplete and

unscientific data and would be scientifically unsound. Furthermore, given that the risk of suicidality posed by untreated or inadequately treated depression and other psychiatric disorders outweighs that posed by antidepressants, one does not have to support the excessive use of psychotropic medications to appreciate that such pseudoscientific recommendation would be dangerous as it could cause some patients to forego life-saving treatment to their detriment and the detriment of the general public. Thus, the Complainant's interest in making such recommendation is neither bona fide nor compelling.

Granted, given the infamy of the carnage perpetrated by Lanza, being able to attribute the carnage to antidepressants would be of great propaganda value to the Complainant and might even help it persuade many members of the public of the rightness of its quest to "rid our schools" of such drugs. That benefit cannot, however, legitimize the harm that would result from over generalizing from the Lanza case to other patients who, instead of working with their physicians to manage their risks, would be scared or misled into foregoing taking medications that they require to function or even survive. Having once been victimized by Lanza's tragic actions, the public must not be victimized a second time by the peddling of scientifically unfounded generalizations that serve no legitimate purpose. Accordingly, the Complainant lacks a compelling good faith interest in the requested records.

Having failed to demonstrate a compelling, direct, good faith personal interest in the requested records, the Complainant has no legitimate interest in those records as to

entitle it to them under Conn. Gen. Stat. §19a-411 and Regs., Conn. State Agencies § 19a-401-12(c)(2). The Respondent was, therefore, correct to so find and to deny the Complainant access to the records.

CONCLUSION

For the foregoing reasons, the Respondent urges the FOIC to dismiss the complainant's appeal.

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CERTIFICATION

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