NO. CV 11 6009147S		SUPERIOR COURT
CONNECTICUT DEPARTMENT OF PUBLIC HEALTH	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	MARCH 28, 2012
NO. CV 11 6009209S	:	SUPERIOR COURT
THE GREENWICH TIME	:	JUDICIAL DISTRICT OF NEW BRITAIN
V.	:	
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	MARCH 28, 2012

MEMORANDUM OF DECISION

The plaintiff in the first case, the department of public health (the department) appeals from a January 13, 2011 final decision of the defendant freedom of information commission (FOIC) with an additional defendant the Greenwich Time (the Time), the complainant before the FOIC. The plaintiff in the second case is the Time, also appealing from the January 13, 2011 final decision with the defendants the FOIC and the department.[1] The department's appeal claims that the FOIC erred in ordering disclosure

[1] The Time also named two intervenors before the FOIC as defendants, who prevailed before the FOIC. The Time made no claims against the intervenor-defendants and they have not participated in this appeal.

to the Time of documents known as National Practitioner's Data Bank (NPDB) records, but agrees with the FOIC that it properly denied disclosure of documents known as Healthcare Integrity and Protection Data Bank (HIPDB) records. The Time's appeal claims that the FOIC correctly ordered disclosure of the NPDB records and erroneously refused disclosure of the HIPDB records.[2]

These appeals arose from a January 14, 2010 complaint to the FOIC by the Time claiming that the department had denied it copies of NPDB and HIPDB records relating to a physician. On June 4, 2010, a hearing was conducted by the FOIC. After a proposed final decision was issued by an FOIC hearing officer, the FOIC approved the final decision on January 13, 2011. The final decision made the following relevant findings:

* * *

2. It is found that certain allegations were made by the interveners, a married couple, against Dr. Ramaley, a Greenwich obstetrician/gynecologist, who was the physician of one of the interveners.

3. It is found that the respondent department investigated the matter, which investigation was conducted by Dr. Robert J. Gfeller.

4. It is found that Dr. Gfeller issued a report, and that the report included the records he reviewed during the course of his investigation, which records he identified as Exhibits

---

[2] Both the department and the Time are aggrieved for purposes of General Statutes § 4-183 (a).

A through F.

5. It is found that the complainant[3] made a request for the report and that the respondents provided all responsive records except for Exhibits A and C.[4]

6. By letter dated November 17, 2009, the complainant, through counsel, made a request to the respondents for copies of "all records relied upon or otherwise reviewed by Dr. Robert J. Gfeller in connection with his October 31, 2007 report . . . and not previously produced to the Time. This request specifically includes, but is not limited to, the materials annexed to the Gfeller Report as Exhibits A and C."

7. By letter filed with the Commission on January 14, 2010, the complainant alleged that the respondents violated the Freedom of Information (hereinafter "FOI") Act by failing to comply with its request for Exhibits A and C (hereinafter "the requested records").

* * *

12. With respect to the records identified by Dr. Gfeller as Exhibit A, the respondents submitted a copy of such records for *in camera* review. Such records are hereby identified as IC-2010-026-1 through IC-2010-026-9.

13. It is found that IC-2010-026-1 through IC-2010-026-9 include National Practitioner's Data Bank (hereinafter "NPDB") records and Healthcare Integrity and Protection Data Bank (hereinafter "HIPDB") records.

---

[3] The final decision names the Time as the complainant.

[4] While the final decision deals with both Exhibit A and C, it is only the records of Exhibit A that are before this court for review.

* * *

15. The federal law governing information from the NPDB is 45 Code of Federal Regulations 60.15(a).

16. The respondents contend that they are precluded from disclosing the NPDB records because they were instructed to withhold them by the U.S. Department of Health and Human Services (hereinafter "HHS"). It is found that the Acting Director of HHS's Division of Practitioner Data Banks provided the respondents with a letter outlining HHS's interpretation of the regulation. The HHS contends that the last sentence in the regulation, which allows for release of NPDB information if authorized by state law applies only to NPDB information provided to NPDB.

17. It is found that IC-2010-026-6 through IC-2010-026-9 consists of records received from the NPDB, within the meaning of the regulation.

18. At the hearing on this matter, the complainant contended that the NPDB records are not exempt from disclosure by federal law because the regulation unambiguously provides for state law, such as the Connecticut FOIA, to authorize a party, such as the respondent Commissioner, to disclose information from the Data Bank. [The complainant also relied upon *Director of Health Affairs Policy Planning* v. *Freedom of Information Commission,* 293 Conn. 164, 180, note 13 (2009).]

19. The Commission notes that the language in the regulation regarding records received from the NPDB does not mandate that such records be confidential or not subject to disclosure, as does the language referencing records provided to the NPDB. Moreover, contrary to what HHS, and consequently, the respondents contend, the last sentence in the regulation references the entire paragraph,

not simply the first sentence therein.

20. It is concluded that the regulation does not provide a basis to withhold IC-2010-026-6 through IC-2010-026-9, as the respondents contend. Accordingly, it is concluded that the respondents violated §§ 1-210(a) and 1-212(a), G.S., by failing to provide the complainant with a copy of such records.

21. With respect to the HIPDB records, the respondents contend that 42 U.S.C. § 1320a-7e and 45 Code of Federal Regulations 61.14(a), provide a basis for withholding those records.

* * *

24. It is found that IC-2010-026-1 through IC-2010-026-5 are records received from the HIPDB and that such records were provided to the respondents for the purpose of investigating the allegations made against the physician described in paragraph 2, above. It is found, therefore, that their use is limited to that purpose and may not be disclosed by the respondents.

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

1. Forthwith, the respondents shall provide the complainant with a copy of the NPDB records, described in paragraph 17, above, free of charge.

2. In complying with the order in paragraph 1, above, the respondents shall redact any actual dollar amounts of malpractice claims that were paid by or on behalf of Dr. Ramaley in connection with a malpractice judgment, award or settlement.

These administrative appeals followed. The court's review of the department's and the Time's claims on appeal are guided by well established principles as set forth by our Supreme Court. "[J]udicial review of the [commission's] action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion.

"Cases that present pure questions of law, however, traditionally invoke a broader standard of review than ordinarily is involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that we will defer to an agency's interpretation of a statutory term only when that interpretation of the statute previously has been subjected to judicial scrutiny or to a governmental agency's time-tested interpretation and is reasonable." (Citations omitted; internal quotation marks omitted.)

Board of Selectmen v. *Freedom of Information Commission*, 294 Conn. 438, 446, 984 A.2d 748 (2010).

The present appeal turns on the scope and meaning of federal regulations, calling for the same approach as statutory interpretation.[5] "[W]ell settled principles of statutory interpretation govern our review. . . . Under those principles, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. The sources to which we may look to make this determination are limited by the legislature's plain meaning rule. See General Statutes § 1-2z. ('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.')." (Citations omitted; internal quotation marks omitted.) *University of Connecticut* v. *Freedom of Information Commission*, 303 Conn. 724, 733, __ A.3d __ (2012).

The department's appeal concerns the confidentiality of the NPDB records. In Finding 20 the FOIC concluded that the Time was entitled to a copy of the records and

---

[5] Under § 1-210 (b) (10), an appropriately-worded federal regulation provides an exemption from the state freedom of information act (FOIA).

federal regulation 45 C.F.R. § 60.15 (a) did not provide an exemption from FOIA. The department contests this Finding in its appeal, arguing that 45 C.F.R. § 60.15 provides an exemption from FOIA. The regulation provides that information "reported to the NPDB is considered confidential" and "[p]ersons. . . who receive information from the NPDB . . . must use it solely with respect to the purpose for which it was provided." The last sentence of the regulation states, however, that "nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable State law to make such disclosure."

In 2009, our Supreme Court considered whether the FOIC had properly ordered NPDB records disclosed. The Court relied upon the last sentence of what is now 45 C.F.R. § 60.15 (a)[6] and stated: "Because we conclude that disclosure of the requested records was required under [FOIA], we further conclude that 45 C.F.R. § 60.13 (a) does not bar disclosure of the four records that the plaintiff asserts were obtained from the data bank. . . . [FOIA] not only authorizes the plaintiff [a department of the University of Connecticut Health Center] to make the disclosure; it makes such disclosure *mandatory*. Section 60.13 (a), therefore, is inapplicable." (Emphasis in original). *Director of Health Affairs Policy Planning* v. *Freedom of Information Commission*, 293 Conn. 164, 180, n.3,

---

6
The regulation at that time was numbered 45 C.F.R. § 60.13 (a); while the numbering has changed, the substance of the regulation has not.

977 A.2d 148 (2009). This decision was relied upon by the Time and incorporated by the FOIC in Finding 18. *Health Affairs* specifically resolves that the NPDB records are disclosable under FOIA, and thus runs contrary to the department's contention.

The department was not a party to *Health Affairs*; rather a department of the University of Connecticut Health Center brought that administrative appeal. The department now seeks to re-argue in this court the validity of *Health Affairs*. It points out that the Supreme Court when considering *Health Affairs* did not have before it a statement of the federal legislative history of the NPDB, a complete compilation of regulations governing the NPDB, or a comprehensive discussion of the U.S. Department of Health and Human Services (HHS) of the meaning of 45 C.F.R. § 60.15 (a). The department provided a letter from HHS to the FOIC hearing officer in this case. See Finding 16.

The problem with the department's efforts to overturn *Health Affairs* is that the Supreme Court has specifically held that 45 C.F.R. § 60.15 (a) does not provide an exemption from FOIA. While the department is free to take the record in this case and attempt to have the Supreme Court reverse its precedential holding, this court does not have that authority. As the Supreme Court pointed out in *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 651, 6 A.3d 60 (2010), the only decision for this court to make regarding the holding in *Health Affairs* is "whether it was binding precedent that

controlled [this court's] resolution of the issues before it." Were this court to disregard an appellate decision that addressed identical facts and issues, it would violate "the purpose of a hierarchical judicial system." Id., 650. Since the holding in *Health Affairs* is binding precedent, the court dismisses the appeal by the department.

The Time in its appeal contends that the FOIC erred in not ordering the department to disclose the HIPDB records of Exhibit A, and that the FOIA exemption for federal law of § 1-210 (b) (10) is not applicable. As this issue was not raised in *Health Affairs*, the court is not bound by precedent. *Potvin*,, supra, 298 Conn. 651-52. The court agrees with the final decision of the FOIC that a federal statute, 45 U.S.C. § 1320a-72 and a federal regulation 45 C.F.R. § 61.14 (a) clearly exclude private parties from access to HIPDB records. Each provision states that these records are confidential, except for certain health providers. Therefore the Time's appeal is also dismissed.

On this basis, the court concludes that the FOIC has not acted unreasonably, arbitrarily, legally or in abuse of discretion. Both appeals are dismissed.

Henry S. Cohn, Judge