NO. HHB CV15-6027970S	:	STATE OF CONNECTICUT
FIRST SELECTMAN, TOWN OF TRUMBULL, ET AL.	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	NOVEMBER 5, 2015

Memorandum of Decision

The plaintiffs, the First Selectman and the Sewer Administrator for the town of Trumbull and the town of Trumbull itself (Trumbull), appeal from a ruling by defendant freedom of information commission (commission) holding that the plaintiffs must provide defendants William Robinson and the Water Pollution Control Authority of Bridgeport (WPCA) with a copy of an electronic data base containing the names and addresses of Trumbull wastewater customers. The commission determined that the database was not a trade secret and therefore was not exempt from disclosure under the Freedom of Information Act. For the reasons that follow, the court affirms the commission's decision and dismisses the appeal.

I

The commission, in its November, 2014 final decision, found the following facts. (Return of Record (ROR), pp. 471-77.) In 1997, WPCA and Trumbull entered into an agreement by which WPCA would provide wastewater treatment services for approximately 9,600 properties in Trumbull and Trumbull pay a user charge to WPCA. Pursuant to the agreement, WPCA assesses a negotiated discounted price for the services provided to the Trumbull properties. WPCA does not bill the Trumbull properties directly, but instead sends a bill to Trumbull, which

pays the bill and then collects fees from the 9,600 property owners. Trumbull collects the discounted price set by WPCA plus an additional amount that Trumbull applies to its own infrastructure maintenance.

In 2012, WPCA sought to terminate the existing agreement and renegotiate a new one. Trumbull objected and, at the time of the submission of briefs in this case, that dispute was in arbitration. WPCA continues to provide wastewater services for its customers during the interim.

Trumbull bills property owners with the aid of an electronic data base maintained by a third party company named Computil. Trumbull's assistant tax collector enters on Computil's software the names and addresses of the property owners that use the WPCA's facilities. The assistant tax collector receives the names and addresses from the sewer department, which compiles and updates this information.

To duplicate the electronic database, one might have to cross-reference and reconcile three paper files: one that contains more than 10,000 addresses of sewer laterals, which are the connections of pipe coming to the property line, a second file that contains approximately 9,600 addresses of properties that are actually connected to the laterals, and a third file containing the grand list, which would be used to determine current property ownership.

In June, 2012, WPCA made a Freedom of Information Act (act) request of Trumbull for the "electronic database of WPCA customers located in the Town of Trumbull. . . ." WPCA sought only the names and addresses of the customers and not other information stored in the database such as billing history.

Upon the failure of Trumbull to provide the database, WPCA filed a complaint with the

commission. In September, 2014, the commission rejected Trumbull's arguments that the database was exempt from disclosure under various exemptions to the Freedom of Information Act, General Statutes § 1-200 et seq. (Act), and ordered disclosure of the database. (ROR, pp. 439-44.)

Trumbull then appealed to this court. In a May 16, 2014 decision, the court, *Prescott, J.*, first rejected Trumbull's claim that the database was a record "pertaining to strategy and negotiations with respect to pending claims or pending litigation . . . ." under General Statutes § 1-210 (b) (4).

The court next considered whether the database was a "trade secret" under § 1-201 (b) (5) (A).[1] The court first found that the commission, in rejecting the trade secret exemption, relied on an improperly narrow definition of the phrase "customer lists" contained in that section.[2] The court then remanded the case to the commission for further proceedings to consider the other aspects of whether the database met the statutory definition of "trade secret." (ROR, pp. 426-36.)

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[1]Section 1-210 (b) provides that "[n]othing 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, 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 from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy. . . ."

[2]The court ruled that the commission employed a definition of "customer lists" that erroneously "imports an added notion of business loyalty that is not suggested by the plain meaning of the words employed by the legislature." (ROR, p. 434.) On appeal here, there is no further dispute that the lists of property owners who use the sewer services in question qualifies as a "customer list."

On remand, the commission, in its November 19, 2014 final decision, first made an implicit finding that Trumbull had failed to prove that the data in question was "not . . . readily ascertainable by proper means . . . ." (ROR, pp. 474-75.) The commission observed that the electronic database is '"merely a computerized compilation of each department's records. The public could inconveniently go to each department and request public data. The . . . database is a convenience to the town so that all the departments' records can be accessed from one system."' (ROR, p. 475) (quoting *Director, Department of Information Technology of the Town of Greenwich v. FOI Commission,* CV02-059153, 2003 Conn. Super. LEXIS 3617, *8 (January 2, 2004), aff'd, 274 Conn. 179, 874 A.2d 785 (2005)). The commission added that "the paper records from which the data base is compiled are open to public inspection and would be provided to the [WPCA] were they to request the information in that form." (ROR, p. 474.)

The commission found, in addition, that Trumbull had not proven that use of the database could "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 . . . ." The commission reasoned that "the same economic value from access [to the database] would accrue to the WPCA if they compiled the user list manually from the paper records, as the WPCA stated that such a laborious and costly undertaking would most likely be passed on to the Trumbull users." (ROR, p. 476.)

Accordingly, the commission found that Trumbull had failed to prove that the electronic database of names and addresses of the Trumbull users is a trade secret. The commission, therefore, ordered Trumbull to provide the requested portions of the database to WPCA. (ROR,

p. 476).[3]

Trumbull appeals to this court.

II

Under the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., judicial review of an agency decision is "very restricted." (Internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection*, 257 Conn. 128, 136-37, 778 A.2d 7 (2001). Section 4-183 (j) of the General Statutes provides as follows: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions 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." Stated differently, "[j]udicial review 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." (Internal quotation marks omitted.) *Schallenkamp v. DelPonte*, 229 Conn. 31, 40, 639 A.2d 1018 (1994). "It is fundamental that a plaintiff has the burden of proving that the [agency], on the facts before

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[3]The commission allowed the plaintiffs to provide the business addresses rather than the residential addresses of certain property owners who had submitted requests for nondisclosure of their residential addresses. (ROR, p. 476.)

[it], acted contrary to law and in abuse of [its] discretion." (Internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000).

Our Supreme Court has stated that "[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . ." (Internal quotation marks omitted.) *Longley v. State Employees Retirement Commission*, 284 Conn. 149, 163, 938 A.2d 890 (2007). "Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation. . . . [When the agency's] interpretation has not been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board v.*

Freedom of Information Commission, 310 Conn. 276, 281-83, 77 A.3d 121 (2013).

III

A

The Act "makes disclosure of public records the statutory norm. . . . [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." (Citations omitted; internal quotation marks omitted.) *Director, Dept. of Information Technology v. Freedom of Information Commission,* 274 Conn. 179, 874 A.2d 785 (2005) (*Director*).

Exemption (b) (5) (A) provides that the following are exempt from disclosure: "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, 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 from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy. . . ."

As noted, there is no further dispute that the database in question contains a "customer list" within the meaning of the exemption. Thus, the first contested issue in this case is whether the commission reasonably concluded that the database does not satisfy the requirement that it "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 . . . ." Although there is no genuine dispute that the database information is "not . . . generally known to" the public, the parties disagree on whether the information is "not . . . readily ascertainable by proper means . . . ."

In *Director,* our Supreme Court faced the question of whether a "geographic information system" or "GIS" database maintained by the town of Greenwich was a trade secret. The GIS consisted of a composite of maps of individual and commercial properties and high resolution aerial photographs of the town that were integrated or overlaid with various other data. The Court noted that "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." Id., 195. Accordingly, the Court concluded that the GIS data did not qualify as a trade secret. Id.

The circumstances in the present case are similar. Trumbull makes no challenge to the commission's finding that all of the paper records from which the data base is compiled are open to public inspection and available under the Act. Thus, perhaps the most straightforward way of reconstructing Trumbull's electronic database, as suggested in the commission's brief, would be first to obtain the same list of names and addresses of property owners receiving wastewater service that the sewer department supplies to the tax collector and then put that list into electronic form. Alternatively, a person could obtain the three lists of sewer connections and

property owners that the commission described in its decision. Although there was testimony that compiling the database in this manner would be laborious, it does not appear any more so than recreating the GIS database of numerous maps and aerial photographs in *Director,* which the Court nonetheless found to be generally ascertainable to the public. The key criteria appears to be that all of the underlying information or data – the name and address of each customer – is available to the public.

The plaintiffs rely heavily on *University of Connecticut v. Freedom of Information Commission*, 303 Conn. 724, 36 A.3d 663 (2012) (*University of Connecticut*) and claim that it limited *Director* to its facts. The *University of Connecticut* opinion, of course, said no such thing. Indeed, in *University of Connecticut,* the Supreme Court did not reach the issue of whether the data base in question, which consisted of customer lists of university athletic and other events, was "not . . . readily ascertainable by proper means . . . ." Id., 731. Instead, the holding of the court was that public agencies can create and maintain trade secrets even though they might not generally engage in trade. Id., 734.[4] The plaintiffs attempt to argue that the opinion is meaningless under the commission's view because the underlying data for a public agency's trade secret based on customer lists would always be subject to public disclosure, thus making it impossible for an agency to maintain a customer list as a trade secret. However, it is

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[4]The Court reasoned as follows: "[the trade secrets exemption] focuses exclusively on the nature and accessibility of the information, not on the status or characteristics of the entity creating and maintaining that information. More particularly, there is no requirement, express or implied, that the entity generally must be engaged in a 'trade,' however one might define that term. In the absence of any such limitation, it is self-evident that there cannot be any basis to apply that limitation to public, but not private, entities. If the information meets the statutory criteria, it is a trade secret and the entity creating that information would be engaged in a trade for purposes of the act even if it was not so engaged for all purposes." Id., 734.

entirely possible that the underlying data of a public agency customer list could consist of preliminary drafts, notes, or other items exempt from disclosure under the act; see General Statutes § 1-210 (b) (1).[5] In that event, *University of Connecticut* would not affect *Director* but rather would stand solely for the proposition that a public agency can have trade secrets based on customer lists under the act.[6]

In the present case, however, there is no information sought that is truly "secret." WPCA does not seek Computil's software. It seeks only the names and addresses of customers, information that is ultimately in the public domain. As *Director* instructs, the fact that an electronic format is a more "convenient compilation" of the data sought in this case does make it into a trade secret. *Director,* supra, 274 Conn. 195. Therefore, the commission reasonably concluded that the database information was "readily ascertainable by proper means . . . ."

B

Because Trumbull bears the burden of proving that it is fully entitled to the exemption upon which it relies, and because it cannot prove that the data in question is not "readily ascertainable," it is not necessary to consider the other elements of the trade secret exemption.

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[5]Section 1-210 (b) (1) provides that the act does not require the disclosure of "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure . . . ."

[6]The plaintiffs also attempt to distinguish *Director* on the ground that all taxpayers were paying for the GIS data base in that case whereas in the present case only property owners who receive sewer services pay the user fee related to the database at issue. The court can discern no statutory basis for this argument. Whether an item is a "public record' within the meaning of the act would not seem to depend on the type or source of public funding for the item. See generally General Statutes § 1-210 (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 . . . .")

The parties nonetheless brief the issue of whether the plaintiff proved the additional element of exemption (b) (5) (A) (i) that focuses on whether, in this case, the database "[derives] independent economic value, actual or potential, from not being generally known to . . . other persons who can obtain economic value from their disclosure or use . . . ." The commission found that "the same economic value from access [to the database] would accrue to the WPCA if they compiled the user list manually from the paper records, as the WPCA stated that such a laborious and costly undertaking would most likely be passed on to the Trumbull users." This finding is not unreasonable, arbitrary, illegal, or in abuse of the commission's discretion so as to meet the plaintiff's burden on appeal. See *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission,* supra, 310 Conn. 281-83. The value to WPCA of the database is the list of names and addresses contained within it, rather than any "independent economic value" of the electronic list. Thus, there is no basis to overturn the commission's conclusions with regard to § 1-210 (b) (5) (A) (i).[7]

IV

The court affirms the commission's decision and dismisses the appeal.

It is so ordered.

Schuman, J.

Carl J. Schuman
Judge, Superior Court

[7]Accordingly, there is no need to reach the commission's final argument in support of its decision that Trumbull failed to prove that it has made "efforts that are reasonable under the circumstances to maintain secrecy. . . ." under § 1-210 (b) (5) (A) (ii).