

FREEDOM OF INFORMATION COMMISSION
STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Jennifer Damon,

Complainant

against

Docket # FIC 2024-0165

Secretary of the State, State of Connecticut,
Office of the Secretary of the State; and
State of Connecticut, Office of the Secretary
of the State,

Respondents

March 12, 2025

The above-captioned matter was heard as a contested case on July 24, 2024, at which time the complainant and the respondents appeared and presented testimony, exhibits, and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that, by email dated December 27, 2023, the complainant requested that the respondents provide her with a list of vendors that submitted proposals in response to the respondents' request for proposal ("RFP") #18326, which sought proposals for a statewide voter scanner and tabulator system, along with a list of machines each vendor presented.
3. It is found that on December 28, 2023, in accordance with the respondents' instruction, the complainant resubmitted the request described in paragraph 2, above, through the respondents' GovQA¹ portal. It is found that the complainant also requested that the respondents provide her with copies of the following records:
 - (a) a link to any video presentations made to ROVs [registrars of voters] as required in the RFP;
 - (b) a copy of each vendor's proposal; and
 - (c) a copy of any RFP, IRP, bid, or solicitation for any machine, tabulator, memory card, or voting software made on or after 1/7/22.

¹ GovQA is an online, electronic management system that the respondent agency uses to manage public records requests.

4. It is found that on December 28, 2023, the complainant submitted a second request through the respondents' GovQA portal, requesting copies of the following records:

- (a) all invoices made to KnowInk LLC ("KnowInk") as reflected on an attached spreadsheet downloaded from CT Open Checkbook between January 2, 2023 and December 28, 2023; and
- (b) the contract for payments made to KnowInk between January 2, 2023 and December 28, 2023.

5. It is found that on December 28, 2023, the respondents acknowledged the requests described in paragraphs 2, 3, and 4, above.

6. It is found that, by email dated March 7, 2024, the complainant requested that the respondents provide her with a status on the processing of her requests.

7. It is found that, by email dated March 25, 2024 and filed on March 26, 2024, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide her with a copy of all of the requested records.

8. Section 1-200(5), G.S., provides the following:

"[p]ublic records of files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method.

9. Section 1-210(a), G.S., provides the following in relevant part:

[e]xcept 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... (3) receive a copy of such records in accordance with section 1-212.

10. Section 1-212(a), G.S., provides in relevant part that "[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record."

11. It is concluded that the requested records described in paragraphs 2, 3, and 4, above, are public records within the meaning of §§1-200(5) and 1-210(a), G.S.

12. At the hearing on this matter, while the complainant indicated that the respondents had provided her with copies of some of the requested records, she contended that the respondents had failed to provide her with copies of: 1) the list of vendors referenced in paragraph 2, above; 2) the proposals submitted by the vendors referenced in paragraph 3.b, above; and 3) two pages from the contract for payments referenced in paragraph 4.b, above.

The Request for the List of Vendors and the RFP Records

13. The respondents contended that they do not maintain a list of vendors. The respondents further contended that the requested RFP records were exempt in their entirety pursuant to §1-210(b)(24), G.S.

14. Counsel for the respondents appeared and testified at the contested case hearing on behalf of the respondents. Based upon the testimony provided, it is found that the respondents do not maintain a list of vendors.

15. Because the respondents did not maintain a list and because nothing in the FOI Act requires public agencies to create a record in response to a request, it is concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., with respect to the complainant's request for a list of the vendors.

16. With regard to the respondents' claim of exemption concerning the requested RFP records, §1-210(b)(24), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require the disclosure of:

[r]esponses to any requests for proposals or bid solicitation issued by a public agency or any record or file made by a public agency in connection with the contract award process, until such contract is executed or negotiations for the award of such contract have ended, whichever occurs earlier, provided the chief executive officer of such public agency certified that the public interest in the disclosure of such response, record or file is outweighed by the public interest in the confidentiality of such responses, record or file....

17. It is found that on or about October 1, 2023, the respondents issued RFP #18326, which sought proposals for "the procurement, deployment, training, and maintenance of new voter scanner and tabulator systems statewide."

18. Based upon counsel's testimony on behalf of the respondents, it is found that, at the time the respondents received the complainant's request for the vendors' proposals, a finalized contract had not been executed in connection with RFP #18326, nor had the negotiations for the

terms of such contract been completed. It is further found that the contract was not fully negotiated, awarded, or executed at the time of the contested case hearing on this matter.

19. It is found that, by email dated April 30, 2024, the respondent Secretary of State conveyed to the complainant that she was aware of the public's interest in disclosure of the RFP records. It is further found, however, that the respondent Secretary of State expressly declined to authorize disclosure at that time, choosing instead to maintain the confidentiality of such records considering the ongoing nature of the RFP process.

20. Accordingly, it is concluded that the requested RFP records described in paragraph 3.b, above, were exempt from disclosure in their entirety pursuant to the provisions of §1-210(b)(24), G.S., at the time of the complainant's request.

21. It is therefore concluded that the respondents did not violate the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to disclose such records to the complainant.

The Request for the KnowInk Records

22. In response to the complainant's request for the KnowInk records, the respondents provided copies of the following records:

- (a) a spreadsheet listing invoice amounts paid by the respondents to KnowInk; and
- (b) a contract between the respondents and KnowInk in which the schedule of services that KnowInk was to provide to the state, along with dollar amounts, was redacted in full (the "Schedule B").

23. The respondents contended that the Schedule B is exempt from disclosure pursuant to §1-210(b)(5)(A), G.S. (trade secrets exemption); and §1-210(b)(5)(B), G.S. (exemption for commercial/financial information given in confidence).

24. Pursuant to an order of the hearing officer, on August 12, 2024, the respondents submitted an unredacted copy of the contract to the Commission for in camera inspection. Such contract records shall be identified as IC-2024-0165-1 through IC-2024-0165-97. It is found that, while the respondents submitted 97 pages to the Commission for in camera inspection, only the last two pages of the contract (that is, IC-2024-0165-96 and IC-2024-0165-97), which comprised the Schedule B, were withheld in their entirety from the complainant. The respondents included the pages of the contract that did not contain redactions with the in camera submission so that the totality of the records could be read in context.

25. With regard to the respondents' first claim of exemption, §1-210(b)(5)(A), G.S., provides that disclosure is not required of the following:

[t]rade 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....

26. The definition of “trade secret” in §1-210(b)(5)(A), G.S., “on its face, focuses exclusively on the nature and accessibility of the information.” Univ. of Connecticut v. Freedom of Info. Comm’n, 303 Conn. 724, 733 (2012) (“UConn”). The information claimed to be a trade secret must “be of the kind included in the nonexhaustive list contained in the statute.” Elm City Cheese Co., Inc. v. Federico, 251 Conn. 59, 70 (1999) (“Elm City Cheese”). “In order to qualify for a trade secret exemption of §1-210(b)(5)(A)[, G.S.], 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.” Director, Dep’t of Info. Tech. of Town of Greenwich v. Freedom of Info. Comm’n, 274 Conn. 179, 194 (2005).

27. In UConn, 303 Conn. at 737, the Connecticut Supreme Court established that a public agency, such as the respondents, may hold a trade secret for purposes of claiming the relevant exemption in response to a request for disclosure of public records. Id. at 737.

28. However, the Supreme Court has also recognized that “the ‘independent economic value’ requirement ... has been interpreted as a codification of the common-law requirement that a trade secret must give its owner a competitive advantage.”² Elm City Cheese, 251 Conn. at 88 n.27. See also Robert S. Weiss & Assocs., Inc. v. Wiederlight, 208 Conn. 525, 538 (1988) (“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.”); Allco Renewable Energy Ltd. v. Freedom of Info. Comm’n, 205 Conn. App. 144, 158-59 (2021) (“[I]n accordance with the holding of UConn, to address the nature of the information at issue, the analysis must consider the competitive nature of the industry involved”) (Quotation marks omitted.)

29. In this case, it is found that the respondents entered into a contract with KnowInk to obtain a voter registration system consisting of the following components: voter registration, election management, and election night reporting modules.

² The Commission notes that Elm City Cheese involved the definition of “trade secrets” under the Connecticut Uniform Trade Secrets Act (“CUTSA”), §35-51(d), G.S. However, as the Supreme Court noted in UConn, 303 Conn. at 735-36, “[t]he definition of a trade secret under §1-210(b)(5)(A) mirrors the definition under [CUTSA],” and “it makes no sense to construe the scope of the two acts differently.”

30. It is found that, after receiving the request for records set forth in paragraph 4.b, above, the respondents counsel spoke with KnowInk's employees about such request and she thereafter redacted the Schedule B from the contract based upon her belief that such information "derives economic value from not being known," and because KnowInk expressed its desire to keep the information confidential. The respondents' witness contended that if the cost schedule contained in the Schedule B were to be disclosed, it would pull value away from the vendor to potential competitors.

31. Upon careful in camera inspection, it is found that the Schedule B is the price schedule for thirty-six itemized services contained in the respondents' contract with KnowInk. Specifically, it is found that the Schedule B contains a description of the specific services that KnowInk will be providing to the respondents, the estimated number of days that such services will be performed, the cost of the itemized services, and the total cost of the overall contract. While such information might be valuable to a competitor seeking to do business with the respondents, potential value, in and of itself, does not convert an invoice describing services to be performed and the corresponding prices for such services, without any evidence as to the competitive nature of the subject industry, into a trade secret.³ See ¶ 28, above.

32. Based on the limited nature of the testimony presented at the contested case hearing, it is found that the respondents failed to prove that the information contained in the Schedule B (i) derives 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) is the subject of efforts that are reasonable under the circumstances to maintain secrecy, within the meaning of §1-210(b)(5)(A), G.S.

33. It is therefore concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to provide a copy of the Schedule B to the complainant.

34. With regard to the respondents' second claim of exemption, §1-210(b)(5)(B), G.S., provides that disclosure is not required of "[c]ommercial or financial information given in confidence, not required by statute."

35. This Commission and the courts have concluded that §1-210(b)(5)(B), G.S., consists of three elements, which must all be proven for the exemption to apply: (1) commercial or financial information; (2) given in confidence; and (3) not required by statute. See, e.g. Craven, et al. v. Governor, State of Connecticut, et al., Docket #FIC 2011-152 (Mar. 14, 2012); McCoy v. Freedom of Info. Comm'n, No. HHB-CV-21-6069278, 2022 WL 3712638, at *4 (Conn. Super. Ct. Aug. 26, 2022)

³ The Commission notes that KnowInk did not move to intervene in this matter, and no representative from KnowInk was present at the contested case hearing. It is further found that KnowInk offered no evidence to support the claim that the Schedule B is KnowInk's "trade secret" within the meaning of §1-210(b)(5)(A), G.S.

36. The Connecticut Supreme Court has recognized that, “[a]lthough our Freedom of Information Act does not derive from any model act or the federal Freedom of Information Act, other similar acts, because they are in pari materia,⁴ are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved.” Wilson v. Freedom of Info. Comm’n, 181 Conn. 324, 333 (1980).

37. “Commercial” and “financial,” as used in the federal FOI Act, 5 U.S.C. 552, have been given their ordinary meanings. See Watkins v. U.S. Bureau of Customs & Border Prot., 643 F.3d 1189, 1194 (9th Cir. 2011); Pub. Citizen Health Rsch. Grp. v. Food & Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983).

38. Under a standard first articulated by the federal District of Columbia Circuit Court, commercial or financial information voluntarily provided to the government may be withheld from disclosure under Exemption 4 of the federal FOI Act if it “would customarily not be released to the public by the person from whom it was obtained.” Critical Mass Energy Project v. Nuclear Regul. Comm’n, 975 F.2d 871, 878-79 (D.C.Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993).

39. “The exemption does not apply if identical information is otherwise in the public domain.” Inner City Press/Cmt’y. on the Move v. Bd. of Governors of the Fed. Rsrv. Sys., 463 F.3d 239, 244 (2d Cir. 2006).

40. Two Connecticut Superior Court decisions have ruled that commercial information “given in confidence” is exempt pursuant to §1-210(b)(5)(B), G.S., if given under an express or implied assurance of confidentiality. See Dept. of Pub. Utilities of City of Norwich v. Freedom of Info. Comm’n, 55 Conn. App. 527, 531-32 (1999); Chief of Staff v. Connecticut Freedom of Info. Comm’n, No. CV 980492654S, 1999 WL 643373, at *3 (Conn. Super. Ct. Aug. 12, 1999) (“Whether the circumstances show an implied assurance of confidentiality is ordinarily a question of fact.”).

41. Two years after the Superior Court decisions referenced in paragraph 40, above, the Connecticut Supreme Court in Lash v. Freedom of Info. Comm’n, 300 Conn. 511, 519-520 (2011), construed the term “made in confidence” as part of a four-part test to determine whether the attorney-client privilege applied to records requested pursuant to the FOI Act. The test requires, inter alia, that “communications must be made in confidence.” The Court concluded that a communication made in confidence is one that is intended to be a confidential communication, based on the context in which it is made, including indicia such as the content of the communication and whether any other party ever had access to the document at issue.

42. It is concluded, based upon the findings and conclusions in paragraphs 35 through 41, above, that “given in confidence” within the meaning of §1-210(b)(5)(B), G.S., requires an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the

⁴ In pari materia: “on the same subject; relating to the same matter.” Black’s Law Dictionary, 8th Ed. (1994).

public from any other source, or where the information is such that would not customarily be disclosed by the person who provided it.

43. Further, with respect to the phrase “required by statute,” it is found that such term is not defined in the FOI Act. However, in the construction of statutes, words and phrases must be construed according to the commonly approved usage. See §1-1(a), G.S., (entitled “Words and phrases. Construction of statutes.”).

44. The term “require” is defined, in relevant part, as: “to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)....” Webster’s Third New International Dictionary, Unabridged (1993), and “to direct, order, demand, instruct, command, claim, compel, request, need, exact.” Black’s Law Dictionary 1172 (5th Ed., 1979). See also Lewis v. Connecticut Gaming Policy Bd., 224 Conn. 693, 706 (1993) (holding that the phrase “required by statute” “in §4-166(2) [, G.S.], if construed to its commonly approved usage, can only mean that before a proceeding qualifies as a contested case, an agency must be obligated by an act promulgated by the legislature to determine the legal rights, duties or privileges of a party.”); Freedom of Info. Comm’n Advisory Opinion #69 (the FOI Commission opined that “in the absence of any express legal authority that would enable assessors to compel disclosure of the information at issue...such information, when given to assessors, is ‘not required by statute’”); Freedom of Info. Comm’n Advisory Opinion #82 (the Commission opined that “statutes [did] not require the submission of the cost of acquisition data at issue. Rather, they merely authorize[d] the Secretary of OPM to prescribe forms, or mandate documentation, that may require such data.”).

45. With regard to the first element, it is found that, upon careful in camera inspection, the Schedule B does contain “commercial information” within the meaning of §1-210(b)(5)(B), G.S. Specifically, it is found that the Schedule B and the contract to which it pertains establish and describe a commercial relationship between the parties. It is further found that the Schedule B contains specific financial information relating to the income-producing aspect of KnowInk’s business with the state, namely the line-item amounts that KnowInk has charged to the state for the provision of voter registration services.

46. With regard to the second element, it is found that the respondents did not provide any evidence from which it can be found that the information contained in the Schedule B was given in confidence. In this regard, it is found that the agreement itself does not contain a confidentiality provision prohibiting disclosure of the Schedule B. It is further found that simply because KnowInk expressed its desire to keep the Schedule B confidential *after* it provided the schedule to the respondents and *after* the complainant made a request for such records, see ¶ 30, above, such facts do not establish that KnowInk intended that the Schedule B be considered confidential when it originally provided the records to the respondents. It is therefore found that the respondents failed to prove that the information contained in the Schedule B was “given in confidence” within the meaning of §1-210(b)(5)(B), G.S.

47. With regard to the third element, it is found that the respondents did not provide any evidence from which it can be found that the information contained in the Schedule B was “not required by statute” within the meaning of §1-210(b)(5)(B), G.S.

48. It is therefore found that the respondents failed to prove that the Schedule B is exempt from disclosure pursuant to §1-210(b)(5)(B), G.S.

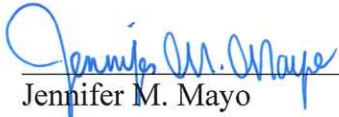
49. It is therefore concluded that the respondents violated the disclosure provisions of §§1-210(a) and 1-212(a), G.S., when they declined to provide a copy of IC-2024-0165-96 and IC-2024-0165-97 to the complainant.

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 a copy of IC-2024-0165-96 and IC-2024-0165-97 to the complainant, free of charge.

2. Henceforth, the respondents shall strictly comply with the disclosure provisions of §§1-210(a) and 1-212(a), G.S.

Approved by Order of the Freedom of Information Commission at its regular meeting of March 12, 2025.



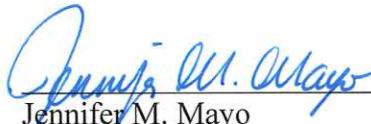
Jennifer M. Mayo
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

JENNIFER DAMON, 348 Lakeview Drive, Fairfield, CT 06825

SECRETARY OF THE STATE, STATE OF CONNECTICUT, OFFICE OF THE SECRETARY OF THE STATE; AND STATE OF CONNECTICUT, OFFICE OF THE SECRETARY OF THE STATE, c/o Maura Arnold, Secretary of the State's Office, 165 Capitol Ave, Hartford, CT 06106 and Assistant Attorney General Blake T. Sullivan, Office of the Attorney General, 165 Capital Avenue, Hartford, CT 06105



Jennifer M. Mayo
Acting Clerk of the Commission