FREEDOM OF INFORMATION

Connecticut Freedom of Information Commission · 18-20 Trinity Street, Suite 100 · Hartford, CT 06106
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Zachary Janowski and the
Yankee Institute for Public Policy,
Complainant(s)
against

Legal Compliance Manager, Connecticut Health Insurance Exchange; and Connecticut Health Insurance Exchange,
Respondent(s)

Notice of Meeting

Docket #FIC 2014-501

May 4, 2015

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, Ist floor, Hartford, Connecticut, at **2 p.m. on Wednesday, May 27, 2015.** At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission ***ON OR BEFORE May 15, 2015***. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed ***ON OR BEFORE May 15, 2015.*** **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed ***ON OR BEFORE May 15, 2015***, and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission

W. Paradis

W. Paradis
Acting Clerk of the Commission

Notice to: Zachary Janowski
Virginia A. Lamb, Esq., Kate K. Simone Esq. and Susan Rich-B;ye, Esq.

2015-05-04/FIC# 2014-501/Trans/wrbp/KKR//LFS

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FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Zachary Janowski and the Yankee Institute for Public Policy,

Complainants

against

Docket #FIC 2014-501

Legal Compliance Manager, Connecticut Health Insurance Exchange; and Connecticut Health Insurance Exchange,

Respondents

May 4, 2015

The above-captioned matter was heard as a contested case on March 10, 2015, at which time the complainants 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 June 5, 2014, the complainants requested from the respondents "an un-redacted copy of the contract with Amtex Systems, Inc." (the "contract").

3. It is found that, by email dated June 11, 2014, the respondents acknowledged the request, described in paragraph 2, above, and informed the complainants that they "will begin researching and compiling the information to respond."

4. It is found that, on June 30, 2014, the respondents provided the complainant with a redacted copy of the contract, along with a "redaction justification document."

5. It is found that, by email dated July 2, 2014, the complainants informed the respondents that they disagreed with the justifications for four of the ten redactions in the contract, and requested that the respondents reconsider those redactions. It is found that the respondents did not reply to such email.

6. By email dated and filed July 29, 2014, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by over-redacting the contract, described in paragraph 2, above.

7. Section 1-200(5), G.S., provides:

> "Public records or 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, printed, photostated, photographed or recorded by any other method.

8. Section 1-210(a), G.S., provides in relevant part that:

> 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 (1) inspect such records promptly during regular office or business hours or . . . (3) receive a copy of such records in accordance with section 1-212.

9. 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."

10. It is found that the contract, described in paragraph 2, above, is a public record within the meaning of §§1-200(5) and 1-210(a), G.S.

11. It is found that the respondents redacted the following portions of the contract: (a) the names of "key" personnel; (b) pricing information; (c) invoice dates and amounts; and (d) the name of the cloud infrastructure hosting provider. The respondents claimed, at the hearing in this matter, that the redacted portions are "trade secrets," within the meaning of §1-210(b)(5), G.S., and that therefore, they are exempt from disclosure. The respondents claimed that the name of the cloud infrastructure hosting provider also is exempt pursuant to §1-210(b)(20), G.S. At the hearing in this matter, the complainants withdrew the allegation in the complaint that the name of the cloud infrastructure hosting provider was improperly redacted, and accordingly, such allegation shall not be addressed herein.

12. Section 1-210(b)(5)(A) provides that disclosure is not required of:

> [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…

13. According to its website, the respondent Connecticut Health Insurance Exchange (the "Exchange") was established to satisfy the requirement in the federal Affordable Care Act that states create online health insurance marketplaces. It is found that the Exchange entered into the contract, described in paragraph 2, above, for the purpose of developing a mobile application (the "app") through which an individual, using a mobile device, such as a cell phone, may enroll in a health insurance plan on the Exchange. It is found that, at the time of the hearing in this matter, the Exchange was the only health exchange in the country with an application allowing for enrollment via a mobile device.

14. It is found that the Exchange created a separate entity called Access Health Exchange Solutions ("Solutions"). It is found that Solutions owns the app, and intends to market and ultimately resell the app to other health exchanges.

15. It is found that Amtex entered into the contract with the Exchange with the expectation that, if and when the respondents sell the app to other exchanges, Amtex would provide the resources and technology to develop the app for these exchanges and would receive payment for such services. It is further found that the Exchange entered into the contract with Amtex with the expectation that the sale of the app to other exchanges would generate revenue for the Exchange.

16. The respondents claimed, and it is found, that the "trade secrets" at issue in this matter belong both to the respondents and to Amtex. It is further found that the respondents notified Amtex of the request and the hearing in this case, but that Amtex did not move to intervene in this matter, and no representative from Amtex was present at the hearing. It is found that Amtex offered no evidence to support the claim that the information, described in paragraph 11, above, are "trade secrets" within the meaning of §1-210(b)(5)(A), G.S.

17. With regard to the claim that the names of "key" personnel are "trade secrets," it is found that the respondents redacted the names of those individuals who developed and currently maintain the app for the Exchange. It is found that the respondents expect that if the app is sold to another exchange, these same Amtex employees also would work on the development of that exchange's app. The respondents argued that these individuals are not "generic resources" but rather are individuals with "narrow skill sets that would be difficult, if not impossible, to procure in the market." According to the respondents, if the names of these individuals were disclosed, such individuals could be poached by another company, which company would benefit economically from their skills and knowledge, and, because the employees are not replaceable, the respondents' project would need to be "decommissioned."

18. Under §1-210(b)(5)(A), G.S., the respondents must prove two elements; first, they must prove that the employees' names "derive independent economic value...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." See First Selectman, Town of Trumbull v. Freedom of Information Commission, superior court, judicial district of New Britain, May 16, 2014, Prescott, J. Implicit in this first element is the requirement that the information at issue is not "generally known to" or "readily ascertainable by" those who can obtain economic value from such information. It is found, however, that the respondents offered no evidence that the names are not "generally known to" or not "readily ascertainable by proper means by," competitors or other people who can obtain economic value from such names, and instead, offered only evidence that the names of the employees, and the employees themselves, have economic value. It is found, therefore, the respondents failed to prove that the economic value of such names is derived from not being generally known to or readily ascertainable by people who can obtain economic value therefrom.

19. Even if it were found that the respondents proved the first element, however, the respondents must also prove that the names of "key" personnel have been the subject of reasonable efforts to maintain their secrecy, under the circumstances. Id. It is found that, under the circumstances in this case, in which there are two entities—the respondents and Amtex—with knowledge of the names claimed to be "trade secrets," evidence regarding both the respondents' and Amtex's efforts to maintain the secrecy of such names is required to prove this element. It is found that the only evidence offered by the respondents with regard to the foregoing element was that the unredacted copy of the contract is kept by the respondents in a locked file cabinet. The Commission need not make a determination regarding whether this effort, in and of itself, is "reasonable" to maintain secrecy, because it is found that no evidence was offered regarding the efforts Amtex has made to maintain the secrecy of the names at issue. Accordingly, it is found that the respondents failed to prove that the names of "key" personnel are "trade secrets," and therefore permissibly exempt from disclosure, pursuant to of §1-210(b)(5)(A), G.S.

20. With regard to the information, described in paragraph 11(b) and 11(c), above, the respondents' witness testified, and it is found, that Amtex made a significant upfront financial investment in the Exchange. It is found that neither that investment, nor "the cost of the Exchange employees,"[1] is reflected in the cost/pricing information in the contract. According to the respondents, "it is important to keep the cost/pricing information confidential" because it might be difficult to sell the app to potential buyers at the price the Exchange desires because the buyers, unaware of the actual costs to the Exchange to develop the app, might view that price as too high. The respondents stated that the arguments made in connection with the cost/pricing information (see paragraph 11(b), above), are the same for the invoice information (see paragraph 11(c), above.

21. It is found that, as with the names of the "key" employees, the respondents offered no evidence that the cost/pricing and invoice information in the contract are not "generally known to" or "readily ascertainable by" potential buyers of the app or other individuals who can obtain economic value from such information, and instead, offered only evidence that the

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[1]Presumably, this "cost" refers to salaries and benefits of Exchange employees.

cost/pricing information has economic value. It is found, therefore, the respondents failed to prove that the economic value of the cost/pricing and invoice information is derived from not being generally known to or readily ascertainable by people who can obtain economic value therefrom.

22. Even if it were found that the respondents proved the first element, however, they must also prove that the cost/pricing and invoice information has been the subject of efforts that are reasonable under the circumstances to maintain secrecy. As noted in paragraph 19, above, it is found that, under the circumstances in this case, in which there are two entities—the respondents and Amtex—with knowledge of the cost/pricing information and invoice amounts claimed to be "trade secrets," evidence regarding both the respondents' and Amtex's efforts to maintain the secrecy of such information is required to prove this element. It is found that the only evidence offered by the respondents with regard to the foregoing element was that the unredacted copy of the contract is kept by the respondents in a locked file cabinet. The Commission need not make a determination regarding whether this effort alone is "reasonable" to maintain secrecy, because it is found that no evidence was offered regarding the efforts Amtex has made to maintain the secrecy of the cost/pricing information and invoice amounts. Accordingly, it is found that the respondents failed to prove that the cost/pricing information and invoice amounts are "trade secrets," and therefore permissibly exempt from disclosure pursuant to §1-210(b)(5)(A), G.S.

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

1. The respondents shall, forthwith, provide an unredacted copy of the contract to the complainants, free of charge.

Kathleen K. Ross
as Hearing Officer

FIC 2014-501/hor/kkr/05042015