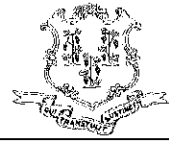




# FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106  
Toll free (CT only): (866)374-3617 Tel: (860)566-5682 Fax: (860)566-6474 • www.state.ct.us/foi/ • email: foi@po.state.ct.us

Zachary Janowski and the  
Yankee Institute for Public Policy,  
Complainant(s)  
against

Notice of Meeting

Docket #FIC 2014-501

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

June 26, 2015

## Transmittal of Proposed Final Decision Dated June 26, 2015

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 dated June 26, 2015, 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, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, July 8, 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 July 3, 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 July 3, 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 July 3, 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  
Acting Clerk of the Commission

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

2015-06-26/FIC# 2014-501/Trans/wrbp/KKR/LFS

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Second 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

June 26, 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. Thereafter, a Report of Hearing Officer, dated May 4, 2015, was issued to the parties and was considered, but not adopted, by the Commission at its regular meeting of May 27, 2015. The Commission voted to amend that report,<sup>1</sup> but also voted to remand the matter back to the hearing officer for the purpose of permitting the respondents to offer additional evidence in support of their claim that certain cost information is a trade secret, and therefore exempt from disclosure. A second hearing was held on June 11, 2015, at which time the complainants and the respondents appeared and presented additional testimony regarding such claim.<sup>2</sup>

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”).

---

<sup>1</sup> Such amendments are reflected in this Second Report of Hearing Officer in paragraph 16 of the findings and in paragraphs 1 and 2 of the order.

<sup>2</sup> At the June 11<sup>th</sup> hearing in this matter, the hearing officer ordered the respondents to provide to the Commission, on or before the close of business on June 12, 2015, a copy of the non-disclosure agreements required to be signed by employees of Amtex and the Exchange. Such copies were received on June 12, 2015, and have been marked as Respondents’ Exhibit 1 (After-filed) and 2 (After-filed).

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 complainants with a redacted copy of the contract, along with a “redaction justification document.”<sup>3</sup>

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,<sup>4</sup> 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.”

---

<sup>3</sup> Such document, marked as Complainants’ Exhibit B, identifies a total of ten redactions, numbered 1 through 10.

<sup>4</sup> The complainants disagreed with redactions 7 through 10, which redactions are described in paragraph 11, below. Redactions 1 through 6, which the complainants did not contest, and are therefore not at issue herein, pertain generally to the methods, techniques and approach used in developing the software for the mobile app.

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 (item number 7 on Complainants’ Exhibit B); (b) the total contract amount (item number 8 on Complainants’ Exhibit B); (c) invoice dates and amounts; i.e., the breakdown of the total contract amount into installments payable on certain dates (item number 9 on Complainants’ Exhibit B); and (d) the name of the cloud infrastructure hosting provider (item number 10 on Complainants’ Exhibit B). 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), G.S., 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. The definition of “trade secret” in §1-210(b)(5)(A), G.S., mirrors the definition in the Connecticut Uniform Trade Secrets Act (“CUTSA”).<sup>5</sup> See §35-51(d), G.S.

14. In addition to the two enumerated requirements set forth in the definition of “trade secret,” the information claimed to be a trade secret must also “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).

15. 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

---

<sup>5</sup> CUTSA creates a cause of action for misappropriation of trade secrets.

hearing in this matter, the Exchange was the only health exchange in the country with an application allowing for enrollment via a mobile device.

16. It is found that the Exchange owns the app, and intends to market and ultimately resell the app to other health exchanges.

17. 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.

18. The Exchange's associate general counsel testified that the claimed trade secrets at issue in this matter belong both to the respondents and to Amtex. It is found that the respondents notified Amtex of the request and the March 10, 2015 hearing in this case, but that Amtex did not move to intervene in this matter, and no representative from Amtex was present at the March 10, 2015 hearing. It is found that Amtex offered no evidence to support the claim that the information, described in paragraph 11(a), above, is a "trade secret" within the meaning of §1-210(b)(5)(A), G.S.

19. 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 could benefit economically from the individuals' skills and knowledge, and, because the individuals are not replaceable, the respondents' project would need to be "decommissioned."

20. Preliminarily, the Commission notes that the information described by the respondents as "the names of key personnel," does not fall into any category of information listed in the statute, nor is it clear that such information is "of the kind" included in the statute's nonexhaustive list. However, based upon the findings and conclusions set forth in paragraphs 21 through 23, below, the Commission need not decide this question.

21. Even assuming, however, that the names of "key" personnel may be considered to be "of the kind" included in the nonexhaustive list, the respondents must also prove that the 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, docket no. CV13-6021690S, 2014 WL 2853979 at \*4-5 (superior court, Judicial District of New Britain, May 16, 2014). Implicit in this first prong of the statute is the requirement that the information at issue is not "generally known to" or "readily ascertainable

by proper means” 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 employees themselves have economic value. It is found, therefore, that 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.

22. Even if it were found that the respondents proved the first prong of the definition, however, the respondents must also prove that the names of “key” personnel have been the subject of reasonable efforts under the circumstances to maintain their secrecy. *Id.*; see also *Wentworth, DeAngelis & Kaufman, Inc. v. Nims*, docket no. CV13-6042633S, 2014 WL 1013479 at \*3, (superior court, Judicial District of Hartford, February 14, 2014) (“reasonable efforts to preserve the secrecy of the alleged trade secret are an essential element of a trade secret claim”). It is concluded 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 prong. It is found that the only evidence offered by the respondents with regard to this prong was that the unredacted copy of the contract is kept by the respondents in a locked file cabinet and that the only electronic version is maintained by the Exchange’s associate general counsel. The Commission need not make a determination regarding whether these efforts, in and of themselves, are “reasonable” under the circumstances 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.

23. Based upon the foregoing, it is concluded that the respondents failed to prove that the names of “key” personnel are trade secrets, and accordingly, that they violated §§1-210(a) and 1-212(a), G.S., by withholding such information from the complainants.

24. At the June 11, 2015 hearing in this matter, a representative of Amtex appeared and provided testimony regarding the Exchange’s claim that the total contract and invoice amounts, described in paragraphs 11(b) and 11(c), above, are “trade secrets.”

25. It is found that Amtex made a significant upfront financial investment in the Exchange. In other words, the total contract amount paid by the Exchange to Amtex for development of the app is lower than what the Exchange would otherwise have paid, absent the arrangement with Amtex, described in paragraph 17, above. The respondents’ witnesses testified, and it is found, that it is important to keep the “cost 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. It is found, based upon this testimony, that a future buyer could use this information to negotiate a lower contract price for development of the app, and thereby obtain economic value. Although the respondents also testified that it is important that potential competitors not have access to this information, they did not present testimony or other evidence to support this claim.

26. Based upon the findings, described in paragraphs 15, 16, 17, and 25, above, it is found that the total contract and invoice amounts is information that may have economic value to potential buyers. What is less clear, however, is whether such information is secret. The Commission need not reach a conclusion regarding whether the respondents proved the first prong of the definition of “trade secret,” i.e., whether such information derives its economic value from not being generally known to individuals outside of the Exchange and Amtex, and not being readily ascertainable by proper means by those who can obtain such economic value, because, even assuming that the information is secret, it is concluded, for the reasons set forth in paragraphs that follow, that the respondents have not made efforts that are reasonable under the circumstances to maintain the secrecy of the total contract and invoice amounts. Also, based upon this conclusion, the Commission need not decide whether the contract and invoice amounts are “cost information,” or information “of the kind” included in the nonexhaustive list in §1-210(b)(5)(A), G.S.

27. With regard to the second prong of the definition, i.e., whether the respondents have made efforts that are reasonable under the circumstances to maintain the secrecy of the total contract and invoice amounts, it is found that both Amtex and the Exchange each maintain an unredacted copy of the contract containing such information. Both Amtex and the Exchange keep such unredacted copy in a locked filing cabinet, and only one or two individuals at Amtex and one person at the Exchange have access to each such copy. It is found that there is only one unredacted electronic copy of the contract, and that the Exchange’s associate general counsel maintains such electronic copy on her computer.

28. It is found that every employee of Amtex is required to sign an employment agreement that states that the employee has a duty of loyalty to the company and that the employee is in a position of trust in performing the duties required by the agreement. The agreement also contains a confidentiality provision that details the nature and type of information the company deems confidential, including business information, such as sales, accounting and financial information, sales reports and price lists. The agreement further provides that “during your employment...and at all times thereafter, you will not directly or indirectly use or disclose any Confidential Matter except for the sole benefit and with the consent of the Company.” In addition, the agreement requires that upon conclusion of employment with the Company, employees must promptly return to the Company all documents, notes, memoranda, equipment, material and information, including computer generated and stored material concerning the Company or its clients, customers or employees. The agreement also contains non-compete and non-solicitation provisions.

29. It is found that the Exchange requires employees to sign a form acknowledging that they have received a copy of the employee handbook, and that they “read and understand the material covered.” It is found that the employee handbook contains a confidentiality provision, which identifies as confidential or proprietary, and prohibits disclosure of: “the names and applications of individuals and employers seeking coverage; individual health care information, or information obtained from other state agencies or subject to confidentiality agreements.” Although the provision’s description of what is confidential includes the phrase “including but not limited to,” it is found that the items listed are of a similar nature and pertain to patient health information. It is found that the confidentiality provision does not specifically identify

the contract and invoice amounts specifically, or financial or technical information generally, as confidential or trade secrets.

30. “The question of whether, in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry.” Elm City Cheese, supra at 80, citing Nationwide Mutual Ins. Co. v. Stenger, 695 F. Supp. 688, 691 (D. Conn. 1988). “What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another.” *Id.*

31. Although the Exchange and Amtex have undertaken some steps to keep the contract and invoice amounts secret, it is found that the Exchange has not shown that it has made efforts that are reasonable under the circumstances of this case to maintain the secrecy of such information. As found in paragraph 29, above, the confidentiality provision does not inform employees that the contract and invoice amounts specifically, or even financial information generally, is considered by the Exchange to be confidential or a trade secret. See BTS, USA, Inc. v. Executive Perspectives, LLC, docket no. CV116010685, 2014 WL 6804545 at \*5 (superior court, Judicial District of Waterbury, October 16, 2014) (employment contract, which contained a lengthy description of information deemed “confidential” did not include the name of vendors as subject to its nondisclosure provisions, and therefore employer failed to prove that the vendor names were a “trade secret”).

32. The Commission notes that the claim that the total contract amount is entitled to protection as a trade secret (as opposed to certain itemized or unit costs more commonly understood to be trade secrets), runs counter to the well-established notion that citizens have a right to know where and how much money public agencies spend. Thus, it would seemingly have been even more important for the Exchange, a public agency for purposes of the FOI Act, to have specifically identified as confidential the contract and invoice amounts specifically, or financial or similar information generally, and to have included a directive to employees that such information not be disclosed.

33. Although one Exchange employee who works in the accounts payable department, and who therefore is aware of the invoice amounts, testified that she was told that all financial information is confidential, no evidence was offered regarding whether, or how many, other employees, or former employees, of the Exchange and Amtex have knowledge of the total contract and invoice amounts, and whether all such employees were informed that this information is considered confidential or a trade secret by the Exchange and Amtex.

34. Under Connecticut law, even in the absence of a confidentiality agreement, an employee is prohibited from using knowledge acquired during his or her employment to his or her own advantage and to the employer’s disadvantage both during and after his or her employment. See Allen Manufacturing Co. v. Loika, 145 Conn. 508, 514 (1958). However, even under the common law, the employee must have been informed or been aware of the fact that the information claimed to be a trade secret is confidential. *Id.*

35. Moreover, evidence that an employer took affirmative steps to protect the information claimed to be a trade secret by requiring employees to sign a confidentiality



agreement specifically identifying such information as confidential or a trade secret, is a strong indication that the employer regards that information to be confidential. See Orthofix, Inc. v. Hunter, 55 F. Supp.3d 1005, 1013-1014 (2014); New England Insurance Agency v. Miller, docket no. CV 89-0285030S, 1991 WL 65766 at \*6 (superior court, Judicial District of New Haven, April 16, 1991).

36. It is concluded that because the Exchange, at a minimum, did not require all employees to sign a confidentiality agreement that (a) clearly states that the contract and invoice amounts specifically, or financial information generally, is information considered by the Exchange to be confidential or a trade secret and (b) prohibits employees from disclosing such information; and did not offer evidence that all employees were otherwise informed that the information is considered confidential by the Exchange and directed not to disclose it, the information is not the subject of efforts that are reasonable under the facts and circumstances of this case to maintain the information's secrecy.

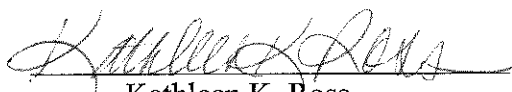
37. Moreover, it is noted that the Exchange did not offer evidence that they: marked the unredacted versions of the contract "confidential," ensured that the computer on which the electronic version of the contract is maintained is password protected, or periodically reminded employees that the Exchange considers financial information confidential or a trade secret that should not be disclosed. See Aetna, Inc. v. Fluegel, docket no. CV 074033345S, 2008 WL 544504 at \*4 (superior court, Judicial District of Hartford, February 7, 2008)

38. With regard to the invoice dates, it is found that the respondents offered no evidence to support, and therefore failed to prove, their claim that such information is a trade secret.

39. Accordingly, it is concluded that the information, described in paragraphs 11(b) and (c), above, is not a "trade secret" and that the respondents violated the FOI Act by withholding such information from the complainants.

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 a copy of the contract to the complainants, free of charge.
2. In complying with paragraph 1 of the order, above, the respondents may redact only the information identified in Complainants' Exhibit B as item numbers 1 through 6, and 10.



Kathleen K. Ross  
as Hearing Officer