

Since 1975



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

Database USA LLC,
Complainant(s)
against

Notice of Meeting

Docket #FIC 2015-209

Commissioner, State of Connecticut, Department of
Administrative Services; and State of Connecticut,
Department of Administrative Services; and Infogroup,
Inc.,

Respondent(s)

January 11, 2016

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, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, February 10, 2016**. 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 January 29, 2016**. 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 January 29, 2016**. **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 January 29, 2016**, 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: Hal J. Berloff, Esq., Michael C. Harrington, Esq.,
Jeffrey R. Beckham, Esq., Ari N. Rothman,
Xochitl S. Strohhahn, Esq., Daniel J. Klau, Esq.

2016-01-11/FIC# 2015-209/Trans/wrbp/LFS//VB

An Affirmative Action/Equal Opportunity Employer

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

DatabaseUSA LLC,

Complainant

against

Docket #FIC 2015-209

Commissioner, State of Connecticut,
Department of Administrative Services;
State of Connecticut, Department of
Administrative Services; and Infogroup,
Inc.

Respondents

January 7, 2016

The above-captioned matter was heard as a contested case on August 25 and October 22, 2015, at which times the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. The hearing officer granted Infogroup, Inc.'s unopposed motion to intervene.

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 on January 15 and February 10, 2015, the complainant DatabaseUSA, LLC ("Database") requested records relating to a Request for Proposal ("RFP") in 2013 that the respondents administered on behalf of the Connecticut Department of Labor ("DOL") for a national business database to be used by Connecticut and other states.
3. It is found that the respondents provided responsive records on February 18, 2015, and provided additional records on March 6, 2015.
4. By letter filed March 19, 2015, the complainant appealed to this Commission, alleging that the respondents violated the Freedom of Information ("FOI") Act by failing to provide copies of all of the records they requested. In particular, the complainant challenged the scope of the respondents' search for responsive records, as well as the breadth of redactions to the records that the respondents did provide.
5. 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, ... whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

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.

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

8. It is found that all the records requested by the complainant are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

9. It is found that the complainant Database and the intervenor Infogroup are direct competitors in the business of compiling information databases, which they sell in various forms to public and private entities.

10. It is found that both Database and Infogroup submitted proposals in 2013 in response to the RFP, and the resulting contract was awarded to Infogroup on January 13, 2015. It is found that Connecticut served as the administrator of the contract for the database on behalf of several states' agencies, including Connecticut's DOL.

11. It is found that the respondent Department of Administrative Services ("DAS") serves as procurement authority for executive branch agencies, and in that capacity, assigned a contract specialist to facilitate the RFP process, including gathering the submissions for substantive evaluation by DOL and an evaluation committee. It is found that the evaluation committee was composed of evaluators from each of the participating states, including a private consultant retained by DOL.

12. It is found that the evaluation committee created an evaluation report, which consisted of a scoresheet based on several scoring criteria. It is found that the contract was awarded to Infogroup based on the results indicated in the evaluation report.

13. It is found that shortly after the contract was awarded to Infogroup, Database submitted the first of its two requests to the respondents for records relating to the RFP and the contract with Infogroup.

14. It is found that DAS provided copies of certain records in its custody, including unredacted copies of the contract specialist's emails, an unredacted copy of the evaluation committee's scoring report, and a heavily-redacted copy of Infogroup's submission. It is found that DAS withheld some records in their entirety.

15. It is found that DAS did not redact any cost information.

16. Database claims that the scope of DAS's search was too narrow in that it should have included responsive records maintained by DOL and by evaluators from other states who were members of the evaluation committee.

17. However, "one public agency may not be held responsible for disclosing the public records in the custody of another public agency." Lash, First Selectman of the Town of Greenwich v. FOI Commission, 116 Conn. App. 171, 188 (2009); aff'd in part and reversed in part on other grounds, Lash v. FOI Commission, 300 Conn. 511 (2011).

18. It is found that DAS and DOL are distinct public agencies, and although DAS was the procurement administrator of the RFP on behalf of DOL, DAS has neither custody nor control over the records of DOL or of the evaluators from other member states on the evaluation committee.

19. It is concluded, therefore, that DAS did not violate the FOI Act by not providing records maintained by DOL or public agencies of other states.

20. It is found that at the time of submission of the RFP, Infogroup identified everything it provided to DAS as confidential. It is found that in response to Database's requests for disclosure of records, DAS promptly notified Infogroup of Database's requests and worked with Infogroup to limit the amount of information claimed as confidential, resulting in heavily-redacted copies of records provided to Database. It is found that shortly before the hearing in this matter, Infogroup again examined its proposed redactions, and significantly reduced the amount of information claimed to be confidential and exempt as trade secrets and/or confidential commercial or financial information.

21. Section 1-210(b)(5), G.S., provides that a public agency is not required to disclose:

(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; and

(B) Commercial or financial information given in confidence, not required by statute;

22. 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.” University of Connecticut v. FOI Commission, 303 Conn. 724, 733 (2012). 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). In addition, “to qualify for a trade secret exemption under §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.” (Citation omitted; internal quotation marks omitted.) Director, Dept. of Information Technology of Town of Greenwich v. FOI Commission, 274 Conn. 179, 194 (2005).

23. Database challenges Infogroup’s claim that all of the withheld information constitutes trade secrets or commercial or financial information given in confidence.

24. It is found that both DAS and Infogroup submitted records for in camera inspection. It is found that the redactions are to the following records described publicly as:

- a. Infogroup’s proposal;
- b. Four attachments to the proposal:
 - i. Infogroup’s “Business Update News” September 20, 2013;
 - ii. Infogroup’s “Data Dictionary – U.S. Business Database;”
 - iii. Total Employer Records in Proposer Database;¹ and
 - iv. Seven letters of reference;
- c. Four-page excerpt from the database; and
- d. DOL consultant’s “Data Quantity Evaluation.”

25. It is found that the “Business Update News,” described in paragraph 24.b.i, above, is a report produced monthly by Infogroup that shows the work that Infogroup performed in the past month to source, update, verify, and otherwise improve the business database. It is found that Infogroup considers this information to be highly confidential.

26. It is found that the “Data Dictionary,” described in paragraph 24.b.ii, and 24.c, above, is a 90-page document with five columns on each page, consisting of information about the data elements in Infogroup’s database. It is found that the data dictionary functions as a “roadmap,” a “blueprint,” or “a recipe” for the database, as Infogroup testified, and if disclosed to a competitor, would be extremely valuable as a tool or benchmark with which to evaluate the quality of Infogroup’s database. It is found that the Data Dictionary reveals information about every element in the database. It is found that Infogroup considers the Data Dictionary to be

¹ A redacted copy of this set of records was submitted as Intervenor’s Exhibit 4. An unredacted copy was not submitted for in camera review.

highly confidential and provides the dictionary to clients only pursuant to a confidentiality agreement.

27. It is found that the Total Employer Records in Proposer Database, described in paragraph 24.b.iii, above, is a table, required by the RFP, that shows the total number of employer records, as well as how many data elements Infogroup has for each of those records and what percentage of each element is “filled” or complete. For instance, under the required column name of “contacttitlecode, the table lists various job titles such as “treasurer,” for which Infogroup promises to provide a redacted number of records that reflects a completeness value expressed as a percentage that is redacted. It is found that the information redacted from the table reveals in detail the quantity and quality of Infogroup’s business database. It is found that Infogroup considers the redacted information in the table to be highly confidential.

28. It is found that the Data Quantity Evaluation, described in paragraph 24.d., above, is a one-page report, prepared by the consultant to DOL, showing a side-by-side comparison of the databases of Infogroup and Database as to the RFP’s mandatory and non-mandatory fields, or data criteria. It is found that the report evaluates the quantity, quality, and accuracy of each data field. It is found that the report reveals the strengths and weaknesses of each of the companies. It is found that the Evaluation is maintained by DAS, which submitted it for in camera review. It is found that the report has been not been disclosed to Infogroup or Database, or to the public, based on DAS’s determination that it contains confidential proprietary information about both companies.

29. Upon careful review of the in camera records, it is found that most of the records referenced in paragraph 24, above, contain information that is “of the kind included in the nonexhaustive list contained in §1-210(b)(5)(A), G.S.” Elm City Cheese Co., Inc. v. Federico, supra, 251 Conn. 70. In particular, it is found that some of the redactions to the proposal, and all of the Business News Update, the Data Dictionary, the Data Quantity Evaluation, and the Total Employer Records table contain information that is “of the kind” to be a trade secret.

30. With respect to the remaining elements of the exemption, as set forth in paragraph 21, above, it is found that the quality and quantity of such information is what distinguishes one database company from another. It is found that Infogroup spends millions of dollars to build, maintain, and improve the integrity and comprehensiveness of its databases. It is found that the quality and quantity of Infogroup’s database derives independent economic value from not being known by Infogroup’s competitors.

31. It is found that such information is not generally known to other persons, including Infogroup’s competitor, Database, and is not readily ascertainable by proper means.

32. It is found that Infogroup exerts considerable efforts to keep such information secret, as detailed by substantial evidence of Infogroup’s efforts in the administrative record of this matter.

33. Although Database submitted one of Infogroup’s 2015 sales catalogs as an exhibit to prove that Infogroup has disclosed information about its database, it is found that the database

information described in paragraph 29, above, reveals far greater detail about the strengths, weaknesses, and overall integrity of Infogroup's database. It is found that the catalog contains a sample of data in just one area – a “list count” of the number of actuaries, for example. The complainant has “not shown that the limited information available in the promotional literature contains sufficient technical detail to constitute disclosure of the product's architecture.” Integrated Cash Management Services, Inc. v. Digital Transactions, Inc., 920 F.2d 171, 174 (2d. Cir. 1990).

34. It is found that although some of the database is derived from public sources, much is not, and the strength of the database turns on the integrity and comprehensiveness of its data compiled from a variety of sources. See Lydall, Inc. v. Ruschmeyer, 282 Conn. 209, 239 (2007) (“unique combination” of publicly known components can be trade secret); cf., Director, Dept. of Information Technology of Town of Greenwich v. FOI Commission, supra, 274 Conn. 195 (finding no trade secret where GIS database “*simply* is a convenient compilation of information that is already available to the public.” (Emphasis added.))

35. It is found, moreover, that Infogroup disclosed information to the complainant that it knew to be publicly available, including some database sources.

36. Database claims that Infogroup has not treated the redacted information as a secret because it failed to designate as confidential the same type of information in an RFP submission in 2008 to the state of Iowa, which issued the previous contract for the business database. In addition, Database claims that because Iowa disclosed Infogroup's 2008 RFP submission without any redactions, the information contained in Infogroup's 2013 submission to DAS is no longer secret.

37. It is found that Infogroup was awarded the contract for the business database for the period 2009 to 2014. It is found that Infogroup did not mark as confidential any of the information it submitted to Iowa in response to the RFP.

38. It is found that on September 23, 2013, Database requested a copy of all information from the contract, including the proposals. It is found that on September 25, 2013, Iowa provided unredacted copies of all the records, including the proposal, attachments, and contract.

39. It is found that the 2008 RFP states that the proposer's failure to request confidential treatment of material will be deemed to be a waiver of any right to confidentiality. It is also found, however, that the 2008 contract with Infogroup requires Iowa to notify Infogroup upon receipt of a public records request for any records containing contents of the database in order to allow Infogroup the opportunity to protect disclosure.

40. It is found that Iowa did not notify Infogroup of Database's request in 2013, and that records that were provided to Database without redaction are of the type that are at issue in this matter.

41. It is found, however, based on Infogroup's evidence in this matter, that material differences exist between the specific information and data provided to Iowa in 2008 and that

submitted to DAS in 2013. It is found, based on such evidence, that a competitor could learn much more about Infogroup and its database by comparing the 2008 records with those of 2013, than by just reviewing the 2013 records.

42. It is found that Iowa's disclosure of the 2009 records to Database did not disclose the information that Infogroup seeks to keep secret in this matter, and did not destroy any confidentiality attached to the 2013 records. It is found that Infogroup did not waive its right to claim confidentiality in this matter with respect to the 2013 submission to DAS by failing to mark material as confidential in the 2009 submission to Iowa.

43. Accordingly, it is found that, with respect to the records submitted for in camera review, described in paragraph 24, above, the following are trade secrets within the meaning of §1-210(b)(5)(A), G.S: the redacted information on Proposal pages 5, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, and 22; and all of the database excerpt, the business news update, the data dictionary, the list of total employer records, and the data quantity evaluation.

44. With respect to the seven letters of reference, described in paragraph 24.b.iv, above, Infogroup claims that the determination of which customers it asked to provide a reference and the reference letters themselves are confidential. It is found that such information is customer list information that derives independent economic value from not being known to, and not being readily ascertainable by proper means by Database and other competitors. It is also found that such information is the subject of reasonable efforts to maintain secrecy.

45. It is found, therefore, that Infogroup's decision as to which customers it asked to provide references, and the content of such customers' evaluations constitute a trade secret within the meaning of §1-210(b)(5)(A), G.S.

46. With respect to other redactions to the proposal, §1-210(b)(5)(B), G.S., exempts "commercial or financial information, given in confidence, not required by statute."

47. The parties do not contest, and it is found, that no statute required Infogroup to provide their proposal to the respondents.

48. Connecticut appellate case law has not defined "commercial or financial information, given in confidence" as used in §1-210(b)(5)(B), G.S. However, the similar provision in the federal FOI Act exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S. Code §552 (b)(4). "Although 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*,² are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." Wilson v. FOI Commission, 181 Conn. 324, 333 (1980); Dept of Public Utilities v. FOI Commission, Superior Court, judicial district of New Britain, Docket #CV99-0498510 (Jan. 12, 2001).

² *In pari materia*: "on the same subject; relating to the same matter." Black's Law Dictionary, 8th Ed. (1994).

49. “Commercial” and “financial,” as used in the federal FOI Act, 5 U.S.C. 552, have been given their ordinary meanings. Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1194 (9th Cir. 2011); Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983); James Craven and the Norwich Bulletin v. Governor, State of Connecticut; and State of Connecticut, Office of the Governor, Docket #FIC2011-152, (March 14, 2012).

50. 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 Regulatory Commission, 975 F.2d 871, 878-79 (D.C.Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993).

51. “The exemption does not apply if identical information is otherwise in the public domain.” Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System, 463 F.3d 239, 244 (2d Cir. 2006).

52. 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. Dept. of Public Utilities, supra; Chief of Staff v. CT FOI Commission, Superior Court, judicial district of New Britain, Docket No. 492654 (August 12, 1999). “Whether the circumstances show an implied assurance of confidentiality is ordinarily a question of fact.” Id.; James Craven and the Norwich Bulletin v. Governor, State of Connecticut; and State of Connecticut, Office of the Governor, supra, Docket #FIC2011-152.

53. “To imply” is defined as to indicate by “logical inference, association, or necessary consequence rather than by direct statement.” Webster’s Third New International Dictionary.

54. Two years after the Superior Court decisions referenced in paragraph 52, above, the Connecticut Supreme Court in Lash v. FOI Commission, supra, 300 Conn. 519-520, 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.

55. It is concluded, based on all of the 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 public from any other source or where the information is such that would not customarily be disclosed by the person who provided it.

56. Database claims that Infogroup had no assurance of confidentiality based on the RFP itself. In particular, Database points to the following language in the RFP:

The State shall treat all information submitted by a Proposer as public information unless the Proposer properly requests that specific parts of the Proposal be treated as confidential at the time of submitting the Proposal. . . . Any Proposal submitted which contains specific confidential information must be conspicuously marked as containing confidential information, and each page upon which confidential information appears must be conspicuously marked as containing confidential information. Failure to properly identify specific confidential information shall relieve the State from any responsibility if confidential information is viewed by the public, a competitor, or is in any way accidentally released. Identification of the entire Proposal as confidential may be deemed non-responsive and disqualify the Proposer.”

57. It is found that Infogroup submitted the entire proposal as confidential. (In response to Database’s request, Infogroup ultimately substantially reduced the extent of information that it claimed was confidential. See paragraph 20, above.)

58. The complainant contends that because Infogroup marked each page as confidential, it failed to “properly” mark “specific parts of the proposal” as confidential. Consequently, Database claims, DAS, per the RFP’s terms, could provide no assurance of confidentiality.

59. It is concluded, however, that the RFP requires DAS to disclose only that information that is not specifically identified as confidential. It is concluded that the RFP warns proposers that unless they specify which information they claim is confidential, DAS will not treat it as such. It is found that Infogroup did identify specific information as confidential, and although Infogroup’s request for confidentiality swept broadly, nothing in the RFP requires DAS to disclose information that a proposer marks as confidential, even if the proposer has specifically identified everything as confidential.

60. It is concluded, moreover, that the RFP states that the consequence for identifying the entire proposal as confidential is possible disqualification as a proposer, not mandatory public disclosure. It is concluded that nothing in the RFP limits DAS’s or Infogroup’s right to rely on an appropriate exemption in response to Database’s request for copies of records.

61. In addition, it is found that the contract between Infogroup and DAS states, “the State “will afford due regard to [Infogroup’s] request for the protection of proprietary or confidential information which the State receives...subject to the terms of the Connecticut Freedom of Information Act.”

62. It is found that, of the redacted information not found to be a trade secret, the redacted information on the following pages is not otherwise in the public domain and customarily would not be released to the public by Infogroup: 2, 26, 29, 30, 32, 35, and 36. It is also found that, based on the context in which it was provided, such information was provided under an implied assurance of confidentiality.

63. It is found that such information is commercial or financial information given in confidence within the meaning of §1-210(b)(5)(B), G.S.

64. With respect to the remaining redacted information in the proposal, it is found that Infogroup has failed to prove that the following information is not in the public domain: pages 1, 6, and 25 (duplicate redaction as page 1).

65. Accordingly, it is found that §1-210(b)(5)(A) and (B), G.S., exempt from mandatory disclosure the proposed redactions on the following pages:

- Proposal: pages 5, 8-14, 18-22, 26, 29, 30, 32, 35, and 36;
- Business News Update: all;
- Data Dictionary and database excerpts: all;
- Data Quantity Evaluation: all;
- Letters of Recommendation: all


66. It is concluded that the respondents did not violate §§1-210(a) and 1-212(a), G.S., as alleged, by withholding the records described in paragraph 65, above.

67. It is found that Infogroup and DAS did not prove that the information shielded by the proposed redactions on the following pages is exempt from disclosure: Proposal pages 1, 6, and 25.

68. It is concluded, therefore, that the respondents violated §§1-210(a) and 1-212(a), G.S., as alleged, by withholding the records described in paragraph 67, above, from 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 disclose the information in the proposed redactions on pages 1, 6, and 25 of Infogroup's proposal submitted in response to the RFP.



Lisa Fein Siegel
as Hearing Officer