FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Ann Rubin and Carmody, Torrance, Sandak and Hennessey LLP,

Complainants

against

Executive Director, State of Connecticut, Connecticut Airport Authority; and State of Connecticut, Connecticut Airport Authority,

Respondents

NOTICE OF FINAL DECISION

Docket #FIC 2016-0035

August 26, 2016

TO: Attorneys Ann Rubin and James K. Robertson, Jr., for the complainants; Attorney Paul K. Pernerewski, Jr., for the respondents.

This will serve as notice of the Final Decision of the Freedom of Information Commission in the above matter as provided by §4-183(c), G.S. The Commission adopted the Final Decision in the above-captioned case at its regular meeting of August 24, 2016.

By Order of the Freedom of
Information Commission

Cynthia A. Cannata
Acting Clerk of the Commission

FIC/2016-0035/NFD/cac/8/26/2016

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The above-captioned matter was heard as a contested case on April 7, 2016, and June 10, 2016, at which times the complainants and the respondents appeared, stipulated to certain facts 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 the respondent Connecticut Airport Authority ("CAA") is responsible for operating Bradley International Airport ("Bradley") and five general aviation airports. It is found that CAA is a quasi-public authority with the duty and power to generate economic growth of the airports, particularly by maximizing non-airline revenues at Bradley.

3. In 2015, the Connecticut legislature enacted Special Act 2015-7, which authorizes the Mohegan Tribes of Indians of Connecticut and the Mashantucket Pequot Indian tribe ("MMCT") to engage in negotiations and to enter into a casino development agreement with a municipality.

4. It is found that MMCT consequently issued a Request for Proposals ("RFP") relating to a commercial gaming facility to be located in Connecticut.

5. It is found that on October 27, 2015, the CAA authorized its executive director to submit a proposal in response to the RFP in conjunction with the town of Windsor Locks. It is found that the respondents and the town of Windsor Locks submitted their proposal to MMCT shortly thereafter.

6. It is found that on November 9, 2015, the complainants made a 27-part request for copies of records pertaining, generally, to Special Act 2015-7.

7. It is found that the respondents provided responsive records on December 18, 2015.

8. It is found that on December 21, 2015, the complainants made an additional request for records pertaining to developing a casino at Bradley International Airport or in Windsor Locks.

9. It is found that the respondents withheld records that pertain to their response to the RFP issued by the MMCT, contending that §§1-210(b)(5)(A) and 1-210(b)(24), G.S., exempt such records from mandatory disclosure.

10. By letter filed January 13, 2016, the complainants 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.

11. 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.

12. 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.

13. 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.

14. It is found that 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.

15. The respondents claimed, first, that both their entire response to the RFP issued by MMCT, and all related communications, are exempt pursuant to §1-210(b)(24), G.S., which provides that disclosure is not required of:

> Responses to any request 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 certifies that the public interest in the disclosure of such responses, record or file is outweighed by the public interest in the confidentiality of such responses, record or file[.] (Emphasis added.)

16. Section 1-200(1), G.S., provides in relevant part:

> "Public agency" or "agency" means: (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official[.]

17. It is found that MMCT is a business entity comprised of two federally recognized sovereign Indian tribes. It is found that MMCT is not an executive, administrative, or legislative office of the state or a political subdivision of the state.

18. It is concluded that MMCT is not a public agency within the meaning of §1-200(1), G.S.

19. It is found, therefore, that the respondents' response to the RFP issued by MMCT is not a response to a RFP issued by a public agency.

20. The respondents also contend that their response to the MMCT RFP and related communications are exempt pursuant to the second clause of the first sentence of §1-210(b)(24), G.S; that is, the respondents claim their response is a "record or file made by a public agency in connection with the contract award process." In essence, the respondents claim that the second clause stands alone and may be applied to records connected with *any* contract award process, even where the RFP is not issued by a public agency.

21. It is concluded, however, that the second clause, which is not separated from the first by a comma or other punctuation, must be read as relating back to the first clause. "Under the recognized precepts of English usage and grammar, a comma is usually employed to separate distinct items in a list." (Citation omitted.) Indian Spring Land Co. v. Inland Wetlands and Watercourses Agency of the Town of Greenwich, 322 Conn. 1, 7 (July 5, 2016). It is concluded that had the legislature intended to create a separate exemption for records not connected to an RFP issued by a public agency, it could have included a comma after "issued by a public

agency," which would have set apart as an independent exemption any record or file made by a public agency in connection with *any* contract award process. Id. It is concluded that "*the* contract award process" as used in §1-210(b)(24), G.S., means the contract award process in which an RFP is issued by a public agency.

22. The legislative history of §1-210(b)(24), G.S., does not shed additional light on the legislature's intent in creating the exemption; however, the Office of Legislative Research analyzed the provision as follows: "The act exempts responses to public agency requests for proposals or bid solicitations, and any related record or file created by *the* agency[.]" (Emphasis added.) Office of Legislative Research Analysis, Summary for Public Act 2007-213 §22.

23. It is concluded that the first clause of §1-210(b)(24), G.S., refers only to responses to RFPs issued by a public agency, and the second clause applies only to the records generated by such public agency in connection with the contract award process.

24. It is found that the respondents' proposal to MMCT and related records are not records or files made in connection with the contract award process, within the meaning of §1-210(b)(24), G.S.

25. It is concluded that §1-210(b)(24), G.S., does not exempt from mandatory disclosure any of the records withheld by the respondents.

26. The respondents claim, in the alternative, that §1-210(b)(5)(A), G.S., exempts from mandatory disclosure portions of the RFP response and related records.

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

> 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[.]

28. 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, not on the status or characteristics of the entity creating and maintaining that information." University of Connecticut v. FOI Commission, 303 Conn. 724, 733-734 (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), 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).

29. University of Connecticut v. FOI Commission, supra, 303 Conn. 737, 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.

30. Following the hearing in this matter, the respondents submitted records for in camera inspection. Such records shall be identified as IC-2016-0035-1 through IC-2016-0035-407.

31. Subsequently, on June 30, 2016, the respondents informed the Commission in writing that the CAA had withdrawn from consideration one of the proposed locations for the casino. The respondents stated that they no longer claimed any exemption for records directly related to such proposed location. The Commission takes administrative notice of such letter.

32. On July 8, 2016, the respondents submitted a revised Index to Records Submitted for In Camera Inspection, reflecting the respondents' revised position that certain of the records submitted for in camera inspection are no longer exempt as trade secrets or pursuant to §1-210(b)(24), G.S.

33. According to the revised Index, it is found that of the 407 pages of responsive records, the respondents claimed that fewer than 20 pages contain information wholly or in part exempt as a trade secret.

34. Upon careful review of the in camera records, it is found that the records referenced in paragraph 33, 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 certain of the records contain cost data and certain other records contain detailed information about proposed siting locations for the gaming operation.

35. With respect to the records that contain details about proposed siting locations, it is found that the respondents have made public the general proposed locations. Based on the respondents' witness's testimony and the in camera records, however, it is found that the records that the respondents claim contain trade secrets reveal more than the general location of proposed locations. It is found that such records indicate details of the size and scope of the various proposed facilities as well as the amenities that could be associated with a facility.

36. It is found that the respondents shared their response to the RFP only by necessity with the town of Windsor Locks, which is their municipal partner pursuant to Special Act 2015-7, G.S. It is found that the respondents requested in their cover letter to the First Selectman that the Board of Selectmen of the town of Windsor Locks "hold the proposals confidential, as we consider their contents to be proprietary."

37. It is also found that the respondents required that the engineering firm that they engaged to work on the proposal agree to non-disclosure of any data produced in the

performance of the contract. It is found that the respondents provided only limited staff access to the proposal and associated data.

38. It is found that the information contained in the records referenced in paragraph 33, above, is not generally known to the respondents' competitors in the gaming industry, who can obtain economic value from the disclosure or use of such information. It is also found that some of the information also is not generally known to the respondents' lessees and other entities under the respondents' authority, who could obtain economic value from the disclosure or use of such information.

39. It is found that the respondents have not disclosed such details to the public and do not intend to do so until the completion of the contract award process, when the information would no longer be valuable to the respondents' competitors.

40. It is found that the information contained in the records referenced in paragraph 33, above, derives independent economic value from not being known to such persons or entities who can obtain economic value from their disclosure or use.

41. It is also found that the information is the subject of efforts that are reasonable under the circumstances to maintain secrecy.

42. It is found, therefore, that the records referenced in paragraph 33, above, contain trade secrets within the meaning of §1-210(b)(5), G.S. It is concluded that such records are exempt from mandatory disclosure.

43. It is concluded that the respondents did not violate the FOI Act by not disclosing to the complainants the records referenced in paragraph 33, above.

44. It is concluded that the respondents violated §§1-210(a) and 1-212(a), G.S., by failing to disclose the balance of the records withheld from the complainants.

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 requested records redacted as described in paragraph 33, above.

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

Approved by Order of the Freedom of Information Commission at its regular meeting of August 24, 2016.

Cynthia A. Cannata
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:

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