SUPREME COURT
STATE OF CONNECTICUT

S.C. 17262

DIRECTOR, DEPARTMENT OF INFORMATION TECHNOLOGY, TOWN OF GREENWICH,

Plaintiff-Appellant,
v.

FREEDOM OF INFORMATION COMMISSION and STEPHEN WHITAKER,

Defendants-Appellees.

BRIEF AND APPENDIX OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS SOCIETY OF ENVIRONMENTAL JOURNALISTS INVESTIGATIVE REPORTERS AND EDITORS, INC.

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SUMMARY OF ARGUMENT

Publicly funded computerized Geographic Information System (GIS) records, and the maps generated from GIS systems data, have become a basic tool for government study and decision-making in fields such as environmental policy, public safety, and health. The public also requires access to GIS records and maps relied upon by government officials in order to conduct its own study and to monitor, criticize, and, as warranted, challenge decisions based upon that data. Journalists represented by *amici* play a key watchdog role in this process. They must be able to access original computerized GIS data and maps used by official decision-makers and disseminate them to the public. Thus, *amici* have a vital interest in ensuring that the government places no improper restrictions on the public's right to obtain those records.

GIS data and maps are, without question, public records. The Connecticut Freedom of Information (FOI) law guarantees all requesters access to nonexempt public records in whatever format they choose. In the current proceeding, the Town of Greenwich ("Greenwich") has claimed that computerized GIS records should be exempt from this clear mandate of Connecticut FOI law. Greenwich alleges–without specific or convincing evidence–that public access to these records would hurt town security, trade secrets, and information technology systems security.

Amici agree with the Connecticut Freedom of Information Commission (FOIC) that none of these exemptions are applicable. Moreover, Greenwich's circular argumentation fails to support its refusal to permit access to GIS records in electronic form. And it is irrelevant

that some requesters may intend commercial gain through access to GIS records. The General Assembly has plainly indicated that this is an impermissible consideration under § 1-211 (a) and courts and commentators have rejected commercial use as a basis for denial of access to records. Finally, the public's right of access requires that electronic records be produced in usable electronic form, if that is the format requested.

BRIEF STATEMENT OF FACTS

Stephen Whitaker submitted an FOI request to Greenwich for electronic access to a copy of its computerized GIS records on December 4, 2001. Generally, GIS records consist of aerial photos and maps overlaid with geographically referenced statistical data.

Greenwich denied the request for an electronic copy of GIS records, claiming various FOI exemptions, but it sent Mr. Whitaker an order form whereby he could order the same maps, one lot at a time, in paper form. Mr. Whitaker filed a complaint with the FOIC which ordered access in electronic format. Greenwich appealed to the Superior Court of Connecticut, which also ordered electronic access. Greenwich appealed again, this time to the Connecticut Appellate Court. This Court took jurisdiction of the case on September 20, 2004.

ARGUMENT

A. The News Media Has an Interest in Electronic GIS Records.

As described in their motion to file this brief, *amici* have a longstanding interest in issues pertaining to electronic access to public records. The issue involved in this case, access to computerized GIS records, is of particular importance because of the government's

widespread use of timesaving GIS data and maps.

Computerized GIS records are powerful tools relied upon by individuals and institutions in both the public and private sectors. State and local governments make frequent use of this technology. Public health officials overlay health statistics onto GIS maps to identify irregular concentrations of disease. City planners do the same with accident data to identify dangerous intersections or stretches of road. Tax officials use GIS maps in assessing property values. Decisions on important matters of public policy are strongly influenced by use of publicly funded GIS records.

Computerized GIS records help journalists act as government watchdogs. For example, in 2001, reporters for the *Austin American-Statesman* used computerized GIS records to analyze poor pipeline safety conditions nationwide. See Amici's Appendix, pp. A1-A14. The story spurred the government to update pipeline safety regulations. Its authors won multiple journalism awards and improved the public's safety.

Across the country, journalists have used GIS to show the ripple effects of poverty (The Hartford Courant), incidence of high-level leads in drinking water (The Washington Post), inefficient placement of fire stations (The [Cleveland] Plain Dealer), racial segregation in schools (The Dallas Morning News), instances in which water preservation zones were moved to accommodate developers (The [Newark] Star-Ledger), locations of homicides (The Dallas Morning News), voting patterns (The [Newark] Star-Ledger), geographic dispersion of a high school's alumni (The [Cleveland] Plain Dealer), and the addresses of markets that sell single cans of beer to go (The Washington Post). See Amici's Appendix, pp. A15-A27. Use of GIS

information gathered by government agencies increases reporters' abilities to cover the news. Use of GIS data can obviate snail's pace plotting of data by hand when government officials can call up sophisticated maps with a few computer key strokes.

Blocking off the public's ability to use electronic public records is antithetical to the FOI law and indeed, to any FOI law. As the New Mexico Supreme Court ruled 33 years ago, "The right to inspect public records should carry with it the benefits arising from improved methods and techniques of recording and utilizing information contained in those records." Ortiz v. Jaramillo, 483 P.2d 500 (N.M. 1971).

B. Connecticut FOI Law Guarantees Access to Computerized GIS Data and Maps in Electronic Format.

Connecticut FOI law recognizes the importance of access to computerized public records and guarantees the public's right to elect electronic FOI disclosure. In 1991, the Connecticut General Assembly enacted a statute permitting FOI requesters to access nonexempt computerized records in whatever form they choose, including computer diskette. C.G.S. § 1-211(a).

Section § 1-211(a) clearly states that once a record is determined to be nonexempt, a FOI requester can choose the production format. A FOI requester's choice of format cannot be a consideration in determining whether records are exempt. Indeed, a purpose of the statute was to render obsolete the distinction between electronic and paper records. As Connecticut Attorney General Richard Blumenthal told the Connecticut Government Administration and Elections Committee in a hearing before the passage of § 1-211, "access

to public information on computers… should be as easy as… access to information in our file cabinets." Conn. Joint Standing Committee Hearings, Government Administration and Elections, 1991 Session, p. 2.

Moreover, § 1-211(a) was enacted for the purpose of overruling a July 1990 state appellate court decision that had held that FOI requesters may not dictate the format of FOI-produced records. Chapin v. Freedom of Information Commission, 577 A.2d 300, 302-3 (Conn. App. Ct. 1990). The General Assembly's Office of Legislative Research explicitly noted Chapin in its background analysis of the bill that became § 1-211. Office of Legislative Research, Connecticut General Assembly, Amended SB863 analysis, Background.

Connecticut is not alone in mandating unfettered access to public records in electronic format. Other states, applying their own open records laws, have ruled that requesters have the right to receive records in electronic form. For example, in Szikszay v. Buelow, 436 N.Y.S.2d 558 (N.Y. Sup. Ct. 1981), a county denied access to computer records of its property tax assessments, but granted paper copies of the records. Given the paper availability of the records, the court rejected this denial, holding "The form of the records... [does] not alter their public character... It is therefore improper for [the government] to deny [the FOI request] for copies of the [records] in computer tape format." See also Babigian v. Evans, 427 N.Y.S.2d 688, 691 (N.Y. Sup. Ct. 1980), *aff'd*, 97 A.D.2d 992 (N.Y.App. Div. 1983); New York Public Interest Research Group v. Cohen, 729 N.Y.S. 2d 379 (N.Y. Sup. Ct. 2001) ("It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a

record.").

C. The Computerized Data is a NonExempt Public Record as Defined by State Law.

The parties do not dispute that computerized GIS data are public records. C.G.S. § 1-200(5). The format in which the data are recorded is irrelevant; the statute specifically states that a public record may be "handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method." Id. Connecticut is joined by every other state, plus the District of Columbia, in including computerized records in the definition of public records either through statutory language or judicial interpretation. See Anneliese May, Access to Electronic Records: A Summary of Current Trends, at http://www.ncsl.org/programs/lis/nalit/accesspub.htm (National Conference of State Legislatures Web site, last visited November 8, 2004).

The issue in this case is simple and its resolution under Connecticut law is remarkably clear. In dispute is whether computerized GIS data comprise an *exempt* public record, freeing Greenwich from statutory disclosure obligations. None of the justifications that Greenwich offers for exemption are supported by proof.

Release of computerized GIS records poses no safety risk to any person or government facility, as contemplated by FOI exemption § 1-210(B)(19). Greenwich claims that its security would be diminished by release of computerized GIS records. Yet it presents *no specific evidence* to show how the release will threaten town security. For example,

Greenwich Police Chief Peter Robbins baldly asserted that GIS disclosure would endanger radio communications, bridges, and water sources, but provided no evidence to back up these assertions. Chief Robbins did not bother to explain how this would occur.

An amorphous anxiety that a public record which Greenwich does not hesitate to make available in paper form could somehow become a terror threat when provided in electronic form does not satisfy the statutory security exemption. The Vermont Supreme Court flatly rejected a similar exemption claim in the recent case of Herald Ass'n Inc. v. Dean, 816 A.2d 469, 477 (Vt. 2002), where the government thought that the vague threat of political assassination—analogous to this case's vague threat of terrorist attack—justified an FOI security exemption for the disclosure of a public official's schedule. That court wrote, "Assuming the security exemption applies at all, defendants bear the burden of showing that [it] applies through a specific factual record," not through conclusory pleadings or claims. The Vermont Supreme Court recognized that if it were to endorse unsubstantiated exemptions, it would effectively eviscerate FOI law.

Here, too, the exemption claimed by Greenwich, if sustained despite the lack of evidence, would allow state and local agencies to deny virtually all access to public records. Given the overriding importance of operating government in the sunshine of public scrutiny, and the failure of Greenwich to show any facts in its favor, the Court should reject the exemption claim.

Greenwich also argues that the trade secret exemption shields GIS records from FOI disclosure requirements. To constitute a trade secret, a public record must: (1) derive

independent economic value… from not being known to…persons who can obtain economic value from its disclosure or use, and (2) be the subject of efforts that are reasonable under the circumstances to maintain secrecy. C.G.S. § 1-210(B)(5)(A).

Greenwich presents a manifestly circular argument that fails to meet the first prong of the trade secret exemption. It states that computerized GIS records "intrinsically derive independent economic value from not being known to… persons such as Mr. Whitaker who can obtain independent economic value from its disclosure or use." The only reason that computerized GIS records are not known to Connecticut citizens such as Mr. Whitaker is that Greenwich refuses to permit electronic access to them as required by state FOI law. The refusal itself creates the condition Greenwich claims justifies the refusal in the first place. Moreover, the argument makes no sense because government is not a "trade." Greenwich is not like a manufacturer which obtains an economic advantage by using a secret process or formula not known to competitors. This is particularly true because, as noted above, Greenwich does disclose the data in paper form.

Greenwich's logic also fails on reasonableness, the second prong of the trade secret test. Greenwich asserts that it is trying "to thwart criminal or terrorist activities." Because Greenwich's initial invocation of the town security exemption must fail, as discussed above, Greenwich's claim that town security is a "reasonable" excuse for invoking the trade secret exemption must also fail.

Nor is Greenwich's alternative argument – that the Court should keep public records "out of the hands of entrepreneurs such as Mr. Whitaker" – reasonable. The FOI law does not

permit discrimination against requesters based on their intended use of public records.

The legislative history of § 1-211 shows that the Connecticut Government Administration and Elections Committee considered testimony from the then-Executive Director of the Connecticut Office of Information and Technology Daniel Colarusso, who explicitly urged that the law provide less favorable treatment for commercial FOI requests. See Conn. Joint Standing Committee Hearings, Government Administration and Elections, 1991 Session, p. 5. The Connecticut General Assembly did not adopt this requested provision. It is thus clear that Connecticut FOI law does not allow discrimination against commercial requesters.

Again, courts outside of Connecticut agree that commercial motivated requesters may not be denied access to records based upon their motivation. See Brownstone Publishers, Inc. v. New York City Dep't of Finance, 540 N.Y.S. 2d 796, 797 (N.Y. App. Div. 1989) (permitting information services and publishing company to have access to statistical and factual records concerning the transfers of real property in New York City, in order to create an "on-line remote data base [which] will be made available on a subscription basis to appraisers, attorneys, and real estate brokers."); Brownstone Publishers, Inc. v. New York City Dep't of Buildings, 550 N.Y.S. 2d 564 (N.Y. Sup. Ct. 1990), *aff'd*, 560 N.Y.S. 2d 642 (N.Y. App. Div. 1990) (FOI law "does not apply any differently to requests motivated by commercial interests than it does in any other circumstances."); State ex rel. Davis v. McMillan, 38 So. 666 (Fla. 1905) (holding that publisher of title abstracts has right to access agency records, and is "engaged in a lawful and highly useful enterprise."). See also H. Peritt, Should Local

Governments Sell Local Spatial Databases Through State Monopolies?, 35 Jurimetrics Journal 449, 455 (Summer 1995) ("When a commercial publisher disseminates public information, it is serving a purpose–the very purpose that is the central justification for FOIAs.").

Finally, Greenwich speculates that providing electronic copies of GIS records threatens the "integrity" of its Information Technology System as contemplated by § 1-210(B)(20). It cites to Boris Hutorin, Greenwich's Director of Information Technology, who testified before the Connecticut FOIC during its consideration of this case. When asked whether electronic access to computerized GIS records could help hackers to infiltrate Greenwich's computer network, Hutorin answered affirmatively: "[The Greenwich network] has some security measures like a firewall, but… every firewall existing in the market is breakable…"

Amici agree that there are no impenetrable firewalls but Director Hutorin's testimony has no relevance to this case. If merely stating this fact were sufficient to support a claim for exemption by reason of information technology security, every FOI request for electronic documents could be denied on that basis. This is clearly contrary to Connecticut's mandate for public records, including computerized records, to be made available in any format. C.G.S. § 1-211(a).

CONCLUSION

It is in the public interest for journalists to have unrestricted access to computerized public records in order to report effectively on matters of public interest. Indeed, the state's General Assembly enacted § 1-211(a) that eliminates format-based distinctions in FOI

disclosure.

Now, Greenwich urges this Court to reintroduce format-based distinctions in contravention of clear legislative language and intent to the contrary. *Amici* respectfully request that this Court decline Greenwich's invitation to revive discredited law, and order that Stephen Whitaker be granted copies of the computerized GIS records in electronic form, as he has elected pursuant to § 1-211(a).

Respectfully submitted,

By _____

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CERTIFICATION

I certify that the foregoing document complies with Practice Book § 67-2.

_____
Daniel J. Klau

CERTIFICATION OF SERVICE

I hereby certify that on this 9th day of November, 2004, a copy of the foregoing document was mailed first-class, postage prepaid, to the following counsel of record:

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APPENDIX

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