APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 32237

UNIVERSITY OF CONNECTICUT

v.

FREEDOM OF INFORMATION COMMISSION, ET AL.

BRIEF OF THE PLAINTIFF–APPELLEE
UNIVERSITY OF CONNECTICUT

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TO BE ARGUED BY:

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STATEMENT OF FACTS

On April 15, 2008, the plaintiff University of Connecticut ("University" or "UConn") received a request from defendant Jonathan Pelto seeking electronic copies of: a) payroll databases maintained for University Faculty and Staff; b) databases of retirees from the University (including the database maintained by the Office of Institutional Research); c) databases maintained by the Office of University Events; d) databases used to mail the University's quarterly magazine, "UConn Traditions"; e) databases maintained by Jorgensen Auditorium including subscribers, individual event ticket buyers, and prospects; f) databases maintained by the Center for Continuing Studies to inform people about its programs and course offerings; g) databases maintained by University Athletics, including season ticket and individual game purchasers; h) database of Donors and Friends of the University Library; i) database of Parents; j) database of Alumni; and k) database of Donors and Friends maintained by the UConn Foundation. (Return of Record, Volume ("Record, Vol.") 1, pp. 23-25).

On May 13, 2008, the plaintiff responded that it does not maintain the databases requested for retirees, the Office of University Events, UConn Traditions, Parents and Alumni. With respect to the databases requested from the Jorgensen Auditorium, the Athletics Department, the Center for Continuing Studies, and the University Libraries, the plaintiff responded that these databases were exempt from disclosure under Conn. Gen. Stat. § 1-210(b)(5)(A), which exempts disclosure of trade secrets, including customer lists. (Record, Vol. 1, pp. 29-31).

On May 14, 2008, Mr. Pelto filed a complaint with the defendant Freedom of Information Commission ("FOIC") alleging that the plaintiff violated the Freedom of

Information Act ("FOIA") by denying his request for electronic copies of the databases and by misrepresenting which databases the plaintiff maintains. (Record, Vol. 1, pp. 1-2). On October 6, 2008, the FOIC held a hearing in response to Mr. Pelto's complaint. (Record, Vol. 1, Tr. of Hearing, pp. 43-132). At this hearing, the plaintiff presented the unrebutted testimony of senior administrators from the Jorgensen Auditorium, the Athletics Department, the Center for Continuing Studies, and the University Libraries. This testimony established that the requested databases have independent economic value from not generally being known or available to other persons who could obtain economic value from their disclosure or use, and that these databases have been the subject of ongoing efforts by the University to maintain their confidentiality.

On April 1, 2009, the FOIC hearing officer, Sherman London, issued his proposed decision. Based on the evidence presented at the hearing, Commissioner London determined that the databases requested from Jorgensen Auditorium and the Division of Athletics were exempt from disclosure as trade secret/customer list materials, but that the databases maintained by the Center for Continuing Studies and the University Libraries were not exempt as trade secrets or customer lists. (Record, Vol., 1, Proposed Final Decision, pp. 153-166).

On April 22, 2009, the Commission rejected Commissioner London's conclusions in the proposed decision that the customer list exemption applied to the databases requested from the Jorgensen Auditorium and Division of Athletics. (Record, Vol. 2, Tr. Of April 22, 2009 FOIC Meeting, pp. 238-239). However, rather than rule that state agencies, as a matter of law, are not entitled to rely on the trade secret/customer list exemption, the Commission Chairman, Andrew O'Keefe, who was not present at and did not participate in

the evidentiary hearing, directed the FOIC staff to rewrite the proposed decision to conclude that the University had not met its evidentiary burden of proof regarding the customer list exemption for these two databases. (Record, Vol. 2, Tr. of April 22, 2009 FOIC Meeting, pp. 237-240). The University's objections to the Chairman's instructions to the staff were unavailing.

The FOIC staff rewrote the proposed decision as directed. On May 13, 2009, the FOIC approved the revised proposed decision and issued its final Memorandum of Decision in Docket No. FIC 2008-341. The decision ruled that the databases requested from the Jorgenson Auditorium, the Division of Athletics, the Center for Continuing Studies, and the University Libraries were not exempt from disclosure under the FOIA. The decision did allow the University to redact information pertaining to the University Libraries' donors who had requested anonymity. (Record, Vol. 2, Final Decision, pp. 299-312).

On June 29, 2009, the plaintiff appealed the FOIC decision on the grounds that the decision's findings, conclusions, and inferences violate constitutional or statutory provisions, are affected by other error of law, are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and are arbitrary or capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion. Specifically, the plaintiff contended the defendant FOIC misconstrued and misapplied the meaning of Conn. Gen. Stat. § 1-210(b)(5)(A) and ignored or misconstrued the evidence presented at the hearing.

On April 21, 2010, after hearing argument and reviewing the evidence in the record, the Superior Court (Vacchelli, J.) upheld the University's appeal of the FOIC decision. (Memorandum of Decision, p. 1; Appendix of the Defendant FOIC ("Def. App."), p. A14).

The Court first ruled that the ordinary deference given to the FOIC was not appropriate in this case because the question of whether the databases are trade secrets exempt under FOIA is a question of law that has not previously been determined by the courts. (Memorandum of Decision, pp. 2-3; Def. App., pp. A15–A16). Judge Vacchelli held that, contrary to the FOIC's decision, government agencies can create trade secrets under state law. (Memorandum of Decision, pp. 11-15; Def. App., pp. A24–A28). The Court concluded that the evidence in the administrative record demonstrated that the University had proven that the customer lists sought by Mr. Pelto are in fact trade secrets under the law, and therefore, the University was not required to disclose them. (Memorandum of Decision, pp. 17-24; Def. App., pp. A30–A37). Finally, the Court ruled that, with respect to the databases for Athletics, Jorgensen, and the Center for Continuing Education, the plaintiff had proved that it had kept these secret, but with respect to the donor database for the University Libraries, additional information was needed as to whether the list of donors was available elsewhere. (Memorandum of Decision, pp. 17-24; Def. App., pp. A30–A37). Accordingly, the Court remanded that issue to the FOIC for additional fact-finding. (Memorandum of Decision, pp. 24-25; Def. App., pp. A37–A38).

On May 10, 2010, the FOIC appealed Judge Vacchelli's decision.

ARGUMENT

I. The University May Create and Maintain Trade Secrets, including Customer Lists, and Protect Them from Disclosure Under the Freedom of Information Act.

A. Standard of Review

The question of whether the University may create and maintain trade secrets turns on the interpretation of FOIA and the Trade Secrets Act. The interpretation of statutes presents a question of law. It is for the courts, and not for administrative agencies, to expound and apply governing principles of law. Connecticut Humane Society v. Freedom of Information Commission, 218 Conn. 757, 761-62, 591 A.2d 395 (1991); Domestic Violence Services of Greater New Haven, Inc. v. Freedom of Information Commission, 47 Conn. App. 466, 470-71, 704 A.2d 827 (1998). Ordinarily, the court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. However, as the Connecticut Supreme Court has stated, such deference given to administrative agencies does not apply when an issue of law has not previously been determined by the courts:

> [C]ases that present pure questions of law...invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion... Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny...the agency is not entitled to special deference...It is for the courts, and not administrative agencies, to expound and apply governing principles of law.

Association of Not-for Profit Providers for the Aging v. Department of Social Services, 244 Conn. 378, 389, 709 A.2d 1116 (1998).

Here, all of the parties agree that the courts have not previously ruled whether the records of a public agency can be treated as the agency's own trade secrets, rather than the trade secrets of private entities submitted to or filed with the agency. As a result, the deference which might ordinarily be given to a FOIC decision is not applicable in this case.

B. The Plain Language of Connecticut's Uniform Trade Secrets Act Recognizes that Government Entities Can Create and Maintain Trade Secrets and/or Customer Lists

The law governing trade secrets in Connecticut is statutory. The Connecticut Trade Secrets Act, Conn. Gen. Stat. §§ 33-50 through 35-58, inclusive, protects trade secrets of "persons" and provides penalties and injunctive relief for misappropriation of a "person's" trade secrets. The General Assembly expressly included government entities within the scope of this act, which defines the term "person" to include government and governmental subdivisions and agencies. Conn. Gen. Stat. § 35-51 (c) provides that "person" means "a natural person, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity." The statute's use of the term "person" in the Act demonstrates that the legislature intended and understood that governmental entities can create and maintain trade secrets.

Conn. Gen. Stat. § 35-57 specifically provides that the Uniform Trade Secrets Act does not affect the duty of a state agency to disclose information pursuant to Conn. Gen. Stat. § 1-210. Conn. Gen. Stat. § 35-51 (d) provides as follows:

> **Notwithstanding the provision of sections 1-210**, 31-40j to 31-40p, inclusive, and subsection (c) of section 12-62, "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, process, drawing, cost data or **customer list** that: (1) Derives independent economic value, actual or potential, from not being general known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(emphasis added). Obviously, if a public agency could not even create a trade secret, including a customer list, it would not be required to disclose one under FOIA.

Moreover, the definition of "trade secret" is the same under both FOIA and the Uniform Trade Secrets Act. The definition of "trade secret" in the Connecticut's Uniform Trade Secrets Act, initially established in 1983, was used to revise the definition of "trade secret" in FOIA in 2000. As part of those changes to FOIA in Public Act 2000-136, the General Assembly expanded the definition of "trade secrets" to its current formulation. Previously, FOIA had defined a "trade secret" as "...an unpatented, secret, commercially valuable plan, appliance, formula, or process used to make, prepare, compound, treat, or process confidential trade commodities." The FOIC itself appears to have endorsed the idea that governmental entities can and do generate and protect trade secrets. As the Superior Court noted in this instance, the FOIC actually had testified before the legislature in 2000 that the trade secret exemption under FOIA was too narrow and that it should be broadened to incorporate the more generally recognized definition of trade secret in Conn. Gen. Stat. § 35-51d (Memorandum of Decision, pp. 14-15; Def. App., A27-A28).

The FOIC now argues that the plaintiff University cannot have a trade secret customer list because the University is not engaged in a trade and it has no customers. However, this argument runs directly counter to the plain text of the Uniform Trade Secrets

Act, which includes public agencies within the definition of "person" and specifically defines "trade secret" to include "customer lists."

In determining what a statute requires, the court follows the plain language of that statute, if that language is unambiguous. "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Conn. Gen. Stat. § 1-2z. As the Superior Court ruled in this case, the statutory language is unambiguous. (Memorandum of Decision, p. 14; Def. App., p. A27). On its face, the Trade Secrets Act clearly provides that public agencies may create trade secrets and, possibly, protect them from disclosure under FOIA.

The conclusion that public agencies may create and maintain trade secrets is consistent with the Supreme Court's opinion in Director, Department of Information Technology v. Freedom of Information Commission, 274 Conn. 179, 194 (Conn. 2005). In that case, the Supreme Court determined that the plaintiff, the Town of Greenwich, had failed to show that requested GIS data was exempt from disclosure as trade secrets. The Court agreed with the lower court that the requested data was already readily available to the public, and therefore could not qualify as a trade secret under the statute. Id. Although the ruling ultimately upheld disclosure, this case implicitly supports the proposition that public entities do at times create and maintain trade secrets; otherwise there would have been no need for the court to engage in the analysis as to whether the Town had met its burden of proof under the Freedom of Information Act.

In its brief, the defendant FOIC relies on another Superior Court decision in McKesson Health Solutions, LLC v. Starkowski, 2007 Conn. Super. LEXIS 1890, in an attempt to distinguish Judge Vacchelli's decision in the instant case and to suggest that the University can protect its interests via seeking injunctions against disclosure in court. (Defendant's Brief, pp. 16-17; Def. App., A39-A45). However, McKesson is clearly distinguishable from the pertinent facts and applicable law in this case because McKesson did not involve trade secrets created and maintained by a public agency. Instead, McKesson centered around a clinical care-management software tool that was produced by a private entity, McKesson Health Solutions, which licensed its software tool to another private entity, WellCare of Connecticut, which subsequently disclosed the software to the Connecticut Department of Social Services ("DSS"). (Def. App., p. A42). When DSS agreed to disclose the information about the software tool in response to a FOIA request upon advice from the Attorney General's office, McKesson had no choice but to go to court to seek an injunction under the Connecticut Uniform Trade Secrets Act. (Def. App., p. A42).

The instant case is clearly distinguishable from McKesson. Unlike McKesson, the University, not a private company, is the entity which has created and maintained the requested databases. Moreover, the University was advised by the Attorney General's office that it did not need to disclose the requested databases because these databases qualified for a trade secret customer list exemption under FOIA. Finally, the University did not need to seek an injunction under the Connecticut Uniform Trade Secrets Act because it had decided not to disclose the information and therefore the FOIC was the appropriate forum to address such issues.

Finally, as further evidence that the University may create and maintain a trade secret, the General Assembly has constructed a statutory framework for the University that specifically provides for the development, discovery, invention, ownership and dissemination of new ideas, services and products through a variety of research and development initiatives. Conn. Gen. Stat. §§ 10a-110 through 10a-100g, inclusive, cover a wide range of research and development activities, including the discovery of formulas, patterns, devices, methods and technologies. Conn. Gen. Stat. § 10a-110b specifically entitles the University to own or to participate in the ownership of inventions under various conditions. The FOIC's position that the University cannot create and maintain trade secrets directly contradicts this statutory framework.

In conclusion, the Superior Court in this instance correctly concluded that the plain meaning of the statute and relevant case law thus establish that the General Assembly has explicitly recognized that government entities may in fact create trade secrets, including customer lists, and may withhold such trade secrets from disclosure under FOIA. Both FOIA and the Uniform Trade Secrets Act define trade secrets broadly enough to permit possession of trade secrets by all types of persons and legal entities, including governmental agencies. (Memorandum of Decision, pp. 14-15; Def. App., A27-A28).

C. The Superior Court's Decision is Consistent with Decisions of Courts in Other States

Conn. Gen. Stat. § 35-58 provides that Connecticut's Uniform Trade Secrets Act shall be applied and construed to effectuate its general purpose of making uniform the law with respect to the other states that have enacted such legislation. In this case, the Superior Court concluded that public agencies may create and maintain trade secrets is

also consistent with decisions of the courts of other states. (Memorandum of Decision, p. 15; Def. App., p. A28). The courts in other states that have adopted the uniform act, such as Florida, Ohio, and Washington, have held that public agencies may assert the trade secret privilege in the event that disclosure of their documents would result in the agency suffering a competitive disadvantage.

In Florida, the state Appellate Court rejected the use of discovery to obtain information related to the state's lottery games on the grounds that these games were operated "as much as possible in the manner of an entrepreneurial business enterprise." Florida Dep't of Lottery v. Dittler Bros., Inc., 586 So.2d 1128, 1131 (App. Ct. Fla. 1991). The Florida Appellate Court concluded, "[w]e have no difficulty in agreeing that the agency was entitled to and did properly assert a trade secret privilege." Id.

In Ohio, in a case also arising in the higher education context, the state Supreme Court found that Ohio State University's possession of a one-page list of the names of the top patient-volume physicians at a private medical center was a trade secret because the University was in the process of acquiring the medical center. State ex rel. Besser v. Ohio State University, 732 NE.2d 373, 380-381 (Ohio 2000). The Court determined that disclosure of that page would permit the University's competitors to determine which physicians produced the most revenue, and that competitors could target those physicians in order to increase their revenues to the detriment of the University. The Court found the page comparable to a customer list. Id.

Similarly, in the state of Washington, the state Supreme Court considered whether information in a university researcher's unfunded grant proposal about the use of animals in scientific research had to be disclosed under the state's public records law. Progressive

Animal Welfare Soc'y v. University of Washington, 884 P.2d 592, 598 (Wash.1994). Noting that there was potential for unfunded biomedical grant proposals to create trade secrets under Washington's trade secret law, the Washington court found that the state's public records law was an improper means to acquire knowledge of a trade secret. Id. at 603.

In conclusion, the Superior Court properly reviewed the cases in other states to ensure that Connecticut law was being construed in a manner consistent with law in other states that had adopted the Uniform Trade Secrets Act. The Superior Court correctly ruled that other states that have addressed the issue have found that public agencies can create and maintain protected trade secrets. (Memorandum of Decision, p. 15; Def. App., p. A28).

II. The Databases Withheld by the University are Trade Secrets Under the Freedom of Information Act.

A. Standard of Review

It is well established that the scope of judicial review under the Uniform Administrative Procedures Act ("UAPA") is restricted. Cadlerock Properties v. Commissioner, 253 Conn. 661, 668 (2000); Perkins v. Freedom of Information Commission, 228 Conn. 158, 164 (1993). The scope of permissible review is governed by Conn. Gen. Stat. § 4-183(j). Pursuant to Conn. Gen. Stat. § 4-183(j), the court shall affirm the decision of the agency unless:

> the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In short, the court's ultimate duty is to determine, in view of all of the evidence, whether the agency acted unreasonably, arbitrarily, illegally or in abuse of its discretion. Dogner v. Alander, 237 Conn. 272, 280-281, 676 A. 2d 865 (1996).

In this case, the FOIC's decision was unreasonable, arbitrary, illegal and an abuse of its discretion because it ignored the unrebutted testimony of University administrators that the customer lists requested by Mr. Pelto possess significant economic value to the University and that the University has protected the lists from disclosure. The arbitrariness of the FOIC's decision was manifested in a procedural maneuver whereby the FOIC Chairman blatantly changed the basis of the proposed decision from a ruling of law subject to plenary review to a ruling supposedly on insufficient evidence. These errors of fact and law clearly constitute reversible error based on the standards under Conn. Gen. Stat. § 4-183(j).

B. The Databases Withheld by the University Meet the Two Elements Defining Trade Secrets

As previously stated, under Conn. Gen. Stat. § 1-210(b)(5), FOIA includes "customer lists" as one of the specific examples of items which fall under the exemption for "trade secrets." In order for a customer list to be exempt under FOIA, a public agency must satisfy two criteria, namely:

> (1) the customer lists 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
>
> (2) the customer lists are the subject of efforts that are reasonable under the circumstances to maintain secrecy.

Although each of the four databases requested operates in a different competitive environment, the unrebutted evidence in the record overwhelmingly demonstrates that

these databases are customer lists that have actual and potential economic value from not being disclosed to other persons and that the University has made significant efforts to maintain their confidentiality.

1. Mr. Pelto Would Obtain Economic Value From Disclosure of the Plaintiff's Databases

The University was required to demonstrate that other persons could obtain economic value from the disclosure or use of the databases. The evidence in the record clearly demonstrates that the University met its burden of proof on this point.

Mr. Pelto admitted at the hearing that he is the president of a public relations and grassroots lobbying firm that contracts with a wide range of paying customers, including private companies such as the Mohegan Tribal Nation, various industry groups, and a variety of non-profit organizations. (Record, Vol. 1, Test. of Jonathan Pelto, pp. 51-56). Based on the evidence of record, these clients compete directly with the University for customers in the areas of athletic and cultural events and local projects such as library construction. (Record, Vol. 1, Test. of Jonathan Pelto, pp. 51-56). Although Mr. Pelto has argued that he was requesting these databases in order to create an advocacy group to support the University, he specifically acknowledged that he could obtain economic value from their disclosure or use. (Record, Vol. 1, Test. of Jonathan Pelto, pp. 52-54). In fact, Mr. Pelto's client base, especially in the area of athletics and cultural events, directly competes with the University for ticket subscribers, sales and performers.

While the plaintiff is not questioning or relying on Mr. Pelto's motives in requesting the customer lists in this matter, the University is concerned about the opportunity for another entity or individual, including Mr. Pelto, to obtain economic value from the lists'

disclosure or use. Mr. Pelto's client base and business demonstrate that the University derives independent economic value, actual or potential, from its customer lists not being generally known to and readily ascertainable by others who can obtain economic value from their disclosure or use.

2. Jorgensen Auditorium derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database.

Mr. Pelto requested the database maintained by the Jorgensen Auditorium, including subscribers, individual event ticket buyers and prospects. The Superior Court correctly concluded that the evidence in the record demonstrates that the Jorgensen Auditiorium derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database. (Memorandum of Decision, pp. 19-21; Def. App., pp. A32-A34).

At the hearing, Rodney Rock, Executive Director of the Jorgensen Center for Performing Arts ("the Jorgensen"), testified that this database had independent economic value and that he had maintained the confidentiality of the lists despite repeated requests over the years for the release of the database. According to Mr. Rock, the Jorgensen offers a wide range of performers, including contemporary popular entertainment, family programming, world music, classical and contemporary dance and classical music. (Record, Vol. 1, Test. of Rodney Rock, p. 76). Mr. Rock testified that the Jorgensen maintains the database in its box office, which includes individuals who purchase multiple tickets to multiple events, year after year, as well as single ticket buyers who may purchase tickets periodically. (Record, Vol. 1, Test. of Rodney Rock, p. 77). Mr. Rock emphasized

that this database of subscribers and individual ticket buyers is one of Jorgensen's major assets, and it has both actual and potential economic value to the Jorgensen. (Record, Vol. 1, Test. of Rodney Rock, p. 78).

At the hearing, Mr. Rock further testified that the arts market in Connecticut is "incredibly competitive." (Record, Vol. 1, Test. of Rodney Rock, p. 78). As examples, he noted that the Jorgensen competes with the two major casinos (Mohegan Sun and Foxwoods), several for-profit ventures, five civic centers throughout the state, and as many as eight other venues (including the Bushnell Auditorium and the Goodspeed) roughly the size of the Jorgensen Auditorium, all competing for the same artists and for the same audiences. (Record, Vol. 1, Test. of Rodney Rock, pp. 79-80). Mr. Rock also testified that there were at least five other small college-based venues in the state presenting the same artists as the Jorgensen. (Record, Vol. 1, Test. of Rodney Rock, p. 79). In addition, Mr. Rock testified that activities such as the Connecticut Opera, the Hartford Symphony, the New Haven Symphony and Hartford Stage all provide ongoing competition within the state for a limited number of customers. (Record, Vol. 1, Test. of Rodney Rock, p. 79). Because of the Jorgensen's proximity to Boston and New York City, the two major markets outside of Connecticut, Mr. Rock testified it was even more important to retain the customers the Jorgensen had already served. (Record, Vol. 1, Test. of Rodney Rock, p. 79).

The importance of the Jorgensen's database becomes even more apparent when the physical plant of the facility is considered. According to Mr. Rock, the Jorgensen Auditorium was built in 1955 as a concert hall, not a performing arts center. (Record, Vol. 1, Test. of Rodney Rock, p. 80). As a result, the Jorgensen Auditorium does not have "fly

space" or "wing space". (Record, Vol. 1, Test. of Rodney Rock, p. 80). Because the Jorgensen has limited physical advantages in terms of staging and seating, Mr. Rock testified it is even more difficult to compete with the casinos or the other performing arts center for attractions. (Record, Vol. 1, Test. of Rodney Rock, p. 80). In addition, Mr. Rock stressed that one of his ongoing challenges is to deal with the perception that the Jorgensen is located far out in the eastern part of the state, but despite this, it is worth the trip. (Record, Vol. 1, Test. of Rodney Rock, p. 79). Given all of these challenges, Mr. Rock emphasized that the Jorgensen database is one of his few competitive advantages in attracting and retaining a share of the arts market to his facility. (Record, Vol. 1, Test. of Rodney Rock, p. 80). As a result, the Jorgensen's database clearly has independent economic value, both actual and potential. He testified that this was particularly true in difficult economic times when people can afford to go out to only a limited number of cultural performances. (Record, Vol. 1, Test. of Rodney Rock, p. 79).

Mr. Rock described in detail Jorgensen's efforts to maintain the secrecy of the Jorgensen database. He emphasized that he has never shared the entire Jorgensen database with anyone outside of the University during the twelve years he has served as the Jorgensen's director. (Record, Vol. 1, Test. of Rodney Rock, p. 81). Mr. Rock further testified that although on rare occasions he may share a limited portion of his database with another nonprofit arts organization, he only does so when he receives similar mailing list information from that organization that is economically beneficial to the Jorgensen. (Record, Vol. 1, Test. of Rodney Rock, p. 81). However, Mr. Rock emphasized that he has turned away many such requests from other arts organizations and cited as an example an instance when the Connecticut Opera requested the Jorgenson's list at a time when the

Jorgenson was presenting an opera at the University on the same schedule. (Record, Vol. 1, Test. of Rodney Rock, p. 81).

Based on this unrebutted testimony, the Superior Court correctly ruled that the University met its burden of proving that the Jorgensen qualified for a trade secret customer list exemption under FOIA. (Memorandum of Decision, p. 21; Def. App., p. A34).

3. University Athletics derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database.

Mr. Pelto also requested full access to the database maintained by the University's Division of Athletics, including season ticket purchasers and individual game purchasers. The Superior Court correctly ruled that evidence in the record demonstrated that the Division of Athletics derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database. (Memorandum of Decision, pp. 17-19; Def. App., pp. A30-A32).

At the hearing, the University presented the direct testimony of Paul McCarthy, Senior Associate Director of Athletics. As the person responsible for operation and administration of the Athletics Department, Mr. McCarthy indicated that Division of Athletics does not maintain a database of individual game purchasers but that these purchases are processed through a third party, TicketMaster. (Record, Vol. 1, Test. of Paul McCarthy, p. 60). In terms of season ticket purchasers, Mr. McCarthy acknowledged that the Division of Athletics does maintain such a database. (Record, Vol. 1, Test. of Paul McCarthy, p. 60). However, as described below, Mr. McCarthy testified that the University's Division of Athletics withholds this database from disclosure because of the competitive relationship which the University has with other colleges and universities in the region for donors and

ticket sales. (Record, Vol. 1, Test. of Paul McCarthy, pp. 61, 72). He explained that this competition for limited dollars for donors and ticket sales was even more difficult in tough economic times. (Record, Vol. 1, Test. of Paul McCarthy, pp. 62, 72).

Mr. McCarthy also emphasized that the University's sports teams are competing directly with professional men's and women's sports teams in Connecticut; New York, and Boston for tickets sales. (Record, Vol. 1, Test. of Paul McCarthy, pp. 72, 75). Mr. McCarthy cited the Connecticut Sun women's professional basketball team, which plays its home games at the Mohegan Sun Arena, as a major example of the competition for the University's women basketball team in terms of public attention and ticket sales within Connecticut. (Record, Vol. 1, Test. of Paul McCarthy, pp. 62-63, 72). Mr. McCarthy also noted the women's basketball teams at other universities, such as Central Connecticut State University and the University of Hartford. (Record, Vol. 1, Test. of Paul McCarthy, p. 72). In addition, Mr. McCarthy emphasized that the Athletics Department competed for customers against several minor league teams in the state, such as the Connecticut Defenders, the New Britain Rock Cats and the Hartford Wolfpack, and that such customers have limited discretionary income. (Record, Vol. 1, Test. of Paul McCarthy, pp. 62, 72).

Mr. McCarthy testified in detail as to why the University's database has independent economic value, both actual and potential, particularly in tough economic times. (Record, Vol. 1, Test. of Paul McCarthy, pp. 61-62). Mr. McCarthy emphasized that the Division of Athletics recognizes the challenges people face with limited available discretionary income. (Record, Vol. 1, Test. of Paul McCarthy, p. 62). Mr. McCarthy also indicated that this database is used to target donors for the development of major new athletic facilities. (Record, Vol. 1, Test. of Paul McCarthy, pp. 62-64).

Finally, Mr. McCarthy testified that the Division of Athletics had never provided its database to anyone outside the University, despite numerous requests by various competitors and vendors. (Record, Vol. 1, Test. of Paul McCarthy, pp. 63-64, 74).

Based on this unrebutted testimony, the Superior Court correctly concluded that the University had met its burden of proving that that the Division of Athletics qualifies for a trade secret customer list exemption under FOIA for the requested database. (Memorandum of Decision, p. 19; Def. App., p. A32).

4. The Center for Continuing Studies derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database.

Mr. Pelto also requested the database maintained by the Center for Continuing Studies ("Center"), including its communications informing people of its programs and course offerings. The Superior Court correctly concluded that the evidence in the record demonstrates that the University's Center for Continuing Studies derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database. (Memorandum of Decision, pp. 21-23, Def. App., A34-A36).

At the hearing, the University presented the direct testimony of Dr. Susan Nesbitt, the Center's Executive Director. Dr. Nesbitt testified that the Center maintains a database in order to inform people about its programs and course offerings. (Record, Vol. 1, Test. of Susan Nesbitt, pp. 86-87). She indicated that the Center offers a wide range of degree programs, non-credit programs, certificates, general interest courses, professional development/career enhancement opportunities and specialized fine arts programs. (Record, Vol. 1, Test. of Susan Nesbitt, pp. 85-86). Dr. Nesbitt emphasized that although

the Center is part of the University, the Center is a self-supporting unit and relies almost exclusively on the fees paid by people taking its courses. (Record, Vol. 1, Test. of Susan Nesbitt, p. 88). Because the Center essentially operates as an entrepreneur within the University, Dr. Nesbitt emphasized that the Center's major asset is its database of current and potential customers. (Record, Vol. 1, Test. of Susan Nesbitt, pp. 88-89).

Dr. Nesbitt stressed that this environment is highly competitive, especially in this tough economic climate, noting that all other colleges and universities in the state also administer continuing studies programs. (Record, Vol. 1, Test. of Susan Nesbitt, p. 88). The Center even faces aggressive competition from institutions outside of Connecticut, such as the University of Phoenix, which operates similar on-line courses. (Record, Vol. 1, Test. of Susan Nesbitt, p. 88). Since all of these institutions are trying to attract the same group of customers to take courses at their institutions, Dr. Nesbitt testified that the Center's database certainly has independent economic value, both actual and potential. (Record, Vol. 1, Test. of Susan Nesbitt, pp. 88-89).

In addition, Dr. Nesbitt testified that she is not aware of any other request for the Center's database. She also indicated that the database has never been disclosed to anyone outside the University, and that the Center has always sought to maintain the confidentiality of this database. (Record, Vol. 1, Test. of Susan Nesbitt, pp. 89-90).

Based on this unrebutted testimony, the Superior Court correctly ruled that the University met its burden of proving to the FOIC that the Center for Continuing Studies qualifies for a trade secret customer list exemption under FOIA for the requested database. (Memorandum of Decision, p. 23; Def. App., p. A36).

5. The University Libraries derives independent economic value from its database and has undertaken reasonable efforts to maintain the secrecy of its database.

Mr. Pelto also requested the database of the University Libraries, including "donors and friends." The Superior Court ruled that the University demonstrated that the University Libraries derived independent economic value from its database, but additional information was needed to determine if the information sought was readily available from other sources. (Memorandum of Decision, pp. 23-25; Def. App., pp. A36-38).

At the hearing, the University presented the direct testimony of Brinley Franklin, the Vice Provost for University of Connecticut Libraries ("University Libraries"). Mr. Franklin testified that the University Libraries maintain a database of donors and friends of the UConn Libraries. (Record, Vol. 1, Test. of Brinley Franklin, p. 95). According to Mr. Franklin, this database is used to raise funds for a variety of projects, including facility renovations, cultural events, and lecture series. (Record, Vol. 1, Test. of Brinley Franklin, pp. 95-96). Mr. Franklin noted that it is difficult to compete with other cultural organizations for scarce donation dollars, especially in difficult economic times. (Record, Vol. 1, Test. of Brinley Franklin, p. 96). Moreover, the University Libraries compete against other university libraries as well as the public libraries in the 169 cities and towns throughout the state. (Record, Vol. 1, Test. of Brinley Franklin, p. 96). Mr. Franklin testified that this database represents his major asset in terms of contacting and cultivating current and potential donors. (Record, Vol. 1, Test. of Brinley Franklin, p. 95). As such, he indicated that the database has independent economic value, actual and potential, to the University Libraries. (Record, Vol. 1, Test. of Brinley Franklin, p. 95). Finally, in terms of the confidentiality of the requested database, Mr. Franklin specifically testified that the University Libraries have

never shared any portion of its database with anyone outside the University. (Record, Vol. 1, Test. of Brinley Franklin, pp. 96-97).

Based on this unrebutted testimony, the Superior Court correctly found that the University Libraries derives independent economic value from the requested database not being generally known to other persons who could obtain economic value from its disclosure or use. (Memorandum of Decision, p. 24; Def. App., p. A37). However, Judge Vacchelli concluded that this matter should be remanded to the FOIC for additional information to determine whether the list of donors was available elsewhere. (Memorandum of Decision, pp.24-25; Def. App., pp. A37-A38). Despite the Superior Court's decision, the University maintains that, based on the unrebutted testimony in the record, it has made reasonable efforts to maintain the secrecy of its database and therefore that the plaintiff has met its burden of proof before the FOIC as to this database.

III. THE FOIC ACTED ARBITRARILY AND CAPRICIOUSLY IN ISSUING A FINAL DECISION THAT IGNORED THE EVIDENCE IN THE RECORD.

As previously noted, the FOIC hearing officer, Commissioner Sherman London, had determined that the databases requested from the Jorgenson and the Division of Athletics were exempt from disclosure as trade secret/customer list materials based on the evidence presented at the hearing. He also concluded that the databases maintained by the Center for Continuing Studies and the University Libraries were not exempt as a trade secret or customer list. Proposed Decision dated April 1, 2009. (Record, Vol. 1, Proposed Final Decision, pp. 153-166).

On April 22, 2009, the FOIC decided to reject Commissioner London's conclusions in the proposed decision that the customer list exemption applied to the databases

requested from the Jorgensen and the Division of Athletics. (Record, Vol. 2, Tr. of April 22, 2009 FOIC Meeting, pp. 238-239). However, to avoid what would have amounted to a ruling that this exemption, as a matter of law, is simply not available for data or information developed by state agencies themselves (as opposed to the commercially valuable information of third parties held by state agencies), the Commission Chairman, who was not present at and did not participate in the evidentiary hearing, directed the FOIC staff to rewrite the proposed decision to conclude that the University had not met its evidentiary burden of proof regarding the customer list exemption for those two databases (Record, Vol. 2, Transcript of April 22, 2009 FOIC Meeting, pp. 237-240). By directing that the decision be recast as one based upon insufficiency of the evidence rather than statutory construction, the Chairman no doubt hoped to insulate what amounted to a legal conclusion from appellate review. While the University objected to this procedural ploy, the objections were unavailing.

Prior to directing the rewrite of the proposed decision, the Chairman requested Commissioner London, who served as the hearing officer in this case, to describe the evidence in the record of the hearing concerning his finding that the databases at the Jorgensen and Athletics qualified as customer lists under the definition of trade secrets. Commissioner London summarized the relevant evidence this way:

> ...The question of trade secrets – Jorgensen runs shows. The Athletics Department runs – you can call them shows in their way too. And both of them have lists of potential customers, whether they be customers for a whole season or customers for individual performances. And releasing the names of those people to the public or to outsiders is destroying their customer list.
>
> It's making their customer list available to anyone who seeks it, and it's no longer a – I don't want to say a private matter, but an economic matter. Customer lists are economic – have economic value. You can't go to Shubert Theater and ask for a list of all the people who attend performances or buy tickets to Shubert's and

that's a ...private entity. It doesn't compare to a public university, but it's the same issue.

If – if this is made available, then Shubert's, the Goodspeed Opera and who knows – and – and the casinos – who knows who else – can go and ask for these lists and write to the customers and solicit them – their business. So it destroys the privacy of the customer list.

Commissioner London elaborated further, noting that:

...And not only Shubert's, but Fairfield University and some of the other private universities run performances and have teams involved in athletics that they would like to approach the – the capabilities of UConn and would like to attract UConn customers to. And they could – I could see some of them perhaps sending a letter saying, you can't get tickets to UConn basketball games, but we can assure you of pretty good seats to our basketball games, and why don't you give us a try? Enough said, I hope.

(Record, Vol. 2, Statement by Commissioner Sherman London, Tr. of April 22, 2009 FOIC Meeting, p. 233).

The Chairman then asked the staff attorney who attended the hearing with Commissioner London and who assisted him in writing the proposed decision the same question. The staff attorney stated as follows:

I thought the facts supported the exemption for E and H – E and G, pardon me, the Athletics Department. I thought that there was a lot of evidence put in supporting the argument that there was economic value to that list and – but for disclosure of that list no one would have access to it.

I mean, they were engaged in trade. If they sell tickets, they use a vendor, Ticketmaster, to sell some of those tickets. So I thought they were – there was strong arguments in favor of the exemptions.

(Record, Vol. 2, Statement of Staff Attorney Gregory Daniels, Tr. of April 22, 2009 FOIC Meeting, p. 235). In light of these direct statements by the two FOIC officials who actually attended the evidentiary hearing, heard the testimony, and drafted the proposed decision, it was arbitrary and capricious for the FOIC to issue a decision stating that the University had failed to meet its burden of proof with respect to the applicability of the exemption.

Despite the substantial and unrebutted evidence in the record, and the statements made by Commissioner London and the staff attorney who actually listened to the testimony of the University witnesses at the hearing, the Chairman insisted on overturning the proposed decision. (Record, Vol. 2, Tr. of April 22, 2009 FOIC Meeting, pp. 237-240). However, rather than reject the initial proposed decision based on his readily apparent view that public agencies cannot create trade secrets on their own, the Chairman directed the FOIC staff to write a revised decision wherein it would be "found" that the University had failed to prove or sustain its burden of proof. (Record, Vol. 2, Tr. of April 22, 2009 FOIC Meeting, pp. 246-248). Having directed a rewriting of the decision, the Chairman then ordered that the revised decision should then be given to the parties and the Commissioners for consideration. (Record, Vol. 2, Tr. of April 22, 2009 FOIC Meeting, p. 240). At this juncture, Commissioner London, clearly uncomfortable with this procedural turn of events, stressed that he did not want to sign a reversal of what he originally supported. (Record, Vol. 2, Tr. of April 22, 2009 FOIC Meeting, p. 244). It is indeed telling that the one Commissioner who actually heard the evidence voted not to endorse the Chairman's procedural tactic.

Because the FOIC's action ran directly counter to the evidence of record, the plaintiff incurred the expense of having the hearing transcribed while the decision was being revised by the FOIC staff. The plaintiff then submitted a complete transcript of the entire hearing to each of the Commissioners so that the evidence in the record could be fully discussed at the May 13, 2009 FOIC meeting at which the rewritten draft was to be considered. (Record, Vol. 2, Respondent's Brief on Revised Proposed Decision, p. 263). Prior to this meeting, the FOIC provided the parties with notice that each party would be

allowed to offer oral argument of up to ten minutes regarding the revised proposed decision. (Record, Vol. 2, Transmittal of Revised Proposed Final Decision, p. 250.)

Despite this notice, and prior assurance by the FOIC Executive Director at the prior FOIC meeting, the Chairman refused to allow the plaintiff to argue the evidence in the record or the legal effect of the revised decision. Despite repeated efforts by the plaintiff to comment on the revised decision, the Chairman made it clear that he had already made up his mind, and essentially declined to consider the matter any further. Although the plaintiff had provided each Commission member with a copy of the full transcript of the hearing, which had not been available at the previous FOIC meeting, the Chairman refused to allow any discussion of this evidentiary record. The Chairman even went so far as to inform the plaintiff that it was unlikely that the plaintiff would have the ten minutes to present its arguments, which the FOIC notice had promised. In keeping with his efforts to prevent the plaintiff from creating a record for this appeal, the Chairman continually interrupted the plaintiff's statements and refused to allow any argument about the revised decision. (Record, Vol. 2, Tr. of May 13, 2009 FOIC Meeting. pp. 269-297). A plain reading of the transcript of this Commission meeting reflects the Chairman's largely successful attempts to squelch any meaningful discussion or consideration of the rewritten decision in light of the actual evidence of record.

Following these exchanges between the plaintiff and the Chairman, the Commission voted to adopt the revised decision. Commissioner London stated that although he was voting for the revised decision, he was doing so to "...let the courts decide." He further stated, "[b]ut I am still of the opinion that the basic issue is one that we covered <u>properly</u> in

the first report." (Record, Vol. 2, Statement by Sherman London, Tr. of May 13, 2009 FOIC Meeting, p. 296) (emphasis added).

The plaintiff respectfully submits that, based on the forgoing, the final decision of the FOIC in this matter has been made upon unlawful procedure, was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, and was arbitrary and capricious and characterized by an abuse of discretion.

CONCLUSION

For all the foregoing reasons, the plaintiff respectfully requests that this Court to affirm Judge Vacchelli's decision, and enter such further orders as justice may require.

Respectfully submitted,

PLAINTIFF UNIVERSITY OF CONNECTICUT

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ATTORNEY GENERAL

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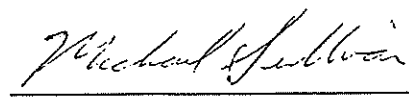
BY: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of the Plaintiff-Appellee University of Connecticut* was mailed, first class postage prepaid, this 16th day of February, 2011 to the following trial judge, counsel of record and pro se party:

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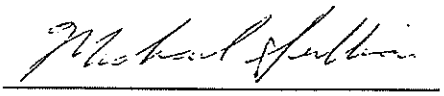
CERTIFICATION OF COMPLIANCE

In accordance with the provisions of the Connecticut Rules of Appellate Procedure 67-2 (2010), I hereby certify that the foregoing document entitled *Brief of the Plaintiff-Appellee University of Connecticut* complies with the rules under which it is being filed.



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