Fiecp 2009-024
FIC 2008-341

NO. HHB CV 09- 4021320 S	:	SUPERIOR COURT
UNIVERSITY OF CONNECTICUT	:	JUDICIAL DISTRICT
V.	:	OF NEW BRITAIN
FREEDOM OF INFORMATION COMMISSION, ET AL.	:	APRIL 21, 2010

c: Comm
EUT
Comrs.
Attys
TAH
RMH
H. Hammitt

MEMORANDUM OF DECISION

Can the University of Connecticut (UConn) create a trade secret customer list, exempt from disclosure under § 1-210(b)(5)(A) of the Freedom of Information Act; and do the lists of supporters and potential supporters created by University Athletics, Jorgensen Auditorium, Center for Continuing Education and University Libraries in issue in this case qualify for exemption under the Act? For the following reasons, this court decides that the answers to those questions should be, "Yes" in most part. Accordingly, UConn's appeal from the contrary decision of the Freedom of Information Commission (FOIC) is sustained. The matter is remanded to the FOIC for further proceedings consistent with this decision.

I

Appeals from the decisions of the Freedom of Information Commission are available pursuant to the Uniform Administrative Procedure Act (UAPA). General Statutes § 1-206(d). In a UAPA appeal, it is not the function of the court to retry the case. The facts before the court are ordinarily confined to those that were in the record of proceedings before the agency. General Statutes § 4-183(i). The court cannot substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, and it is required to affirm the decision of the

agency unless the court finds that substantial rights of the person appealing have been prejudiced under certain well-defined criteria. General Statutes § 4-183(j). "An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole." (Citations omitted; internal quotation marks omitted.) Rocque v. Freedom of Information Commission, 255 Conn. 651, 659, 774 A.2d 957 (2001). Where the main issue turns not so much on the agency's findings of fact, but on its interpretation of the legal requirements under the pertinent statutes and regulations, deference to the agency's interpretation generally is also merited. "[C]ourts should accord great deference to the construction given the statute [and regulation] by the agency charged with its enforcement. [W]here the governmental agency's time-tested interpretation is reasonable, it should be accorded great weight by the courts." (Internal quotation marks omitted; citations omitted) Anderson v. Ludgin, 175 Conn. 545, 555-56, 400 A.2d 712 (1978); accord, Longley v. State Employees Retirement Comm., 284 Conn. 149, 162-67, 931 A.2d 890 (2007). However, where an agency's determination of a question of law has not previously been subject to judicial scrutiny, is not so time-tested, and where the case presents a pure question of law, no deference is due. See, e.g., Autotote Enterprises, Inc. v. State, Div. of Special Revenue, 278 Conn. 150, 154, 898 A.2d 141 (2006); Williams v. Freedom of Information Commission, 108 Conn. App. 471, 478, 948 A.2d 1058 (2008); Plastic Distributors, Inc. v. Burns, 5 Conn. App. 219, 225, 497

A.2d 1005 (1985) citing Wilson v. Freedom of Information Commission, 181 Conn. 324, 342-43, 435 A.2d 353 (1980). The parties are in agreement in this case that the issues of law are novel. Accordingly, no deference to the FOIC's interpretation of the law in this case is due.

II

The record in this case reveals the following: By complaint filed with the FOIC dated May 13, 2008, Jonathan Pelto complained that he wrote to UConn on behalf of a group of alumni and friends trying to start a UConn advocacy organization called Friends of UConn. He was seeking lists of names and addresses of existing and potential UConn supporters, i.e., alumni, donors and friends, parents of UConn Students, faculty, staff and retirees, as well as lists of people who interact with the University on a regular basis, such as season ticket holders and individuals who have purchased tickets for sports or cultural events. He sought the information in electronic data format. He noted that similar lists are used by UConn Advocates, an organization set up by the official UConn Foundation[1] and others to communicate in support of UConn. He was seeking the same type of information for his alternative booster organization. He also owns a public relations company doing work for an Indian casino, non-

[1] The FOIC found, and it is undisputed, that lists in the possession of the UConn Foundation cannot be ordered disclosed to Pelto by the FOIC because the enabling statute governing the foundation provides that such lists "shall not be deemed to be public records and shall not be subject to disclosure pursuant to the provisions of section 1-210." FOIC Decision, para 16 citing General Statutes § 4-37f(9).

profit organizations, and political leaders, developing mailing databases for those clients, but he denied wanting the lists in issue in this case for any of his business clients.

Specifically, Pelto requested lists of names and addresses of persons from a variety of sources within the UConn community in 13 categories. Some of the information was provided voluntarily, some of the information did not exist; some requests were withdrawn by Pelto; and the FOIC found, after hearing, that others were not required to be disclosed. Four categories of lists that the FOIC ordered to be disclosed remain in dispute in the instant case. The contested lists consist of the following: (1) University Athletics, names and addresses of season ticket purchasers; (2) Jorgensen Auditorium, names and addresses of subscribers, individual ticket event buyers and prospects; (3) Center for Continuing Studies, names and addresses of persons who made inquiries to the center about their programs, not including students or information protected from disclosure by the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; and (4) University Libraries, names and addresses of donors and friends of the University Libraries, not including anonymous donors. UConn contends that the FOIC erred in requiring it to disclose those lists to Pelto.

On these issues, the FOIC ruled as follows:

> 32. With respect to the databases ... [in contest] the respondent [UConn] claimed that such records are customer lists and therefore exempt from mandatory disclosure as trade secrets ... The respondent also contended that such 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" like the complainant [Pelto] who "can obtain economic value from" the disclosure or use of the respondent's customer list. Additionally, the respondent contended that it has taken reasonable efforts under the circumstances to maintain the secrecy of [the] databases ...

33. During oral argument at the April 22, 2009 Commission meeting, the respondent stated that in order to prevail on its trade secrets claim, it must prove that the databases at issue herein are customer lists within the meaning of [General Statutes] § 1-210(b)(5)(A).

34. The complainant contended that the Commission must first determine whether the respondent as a public agency can claim such database are exempt as customer lists within the meaning of § 1-210(b)(5)(A), G.S. The complainant also contended that such a claim by the respondent is an unreasonable and inappropriate interpretation of the statute and should not be permitted. The complainant further contended that if the respondent is permitted to prevail on such a claim, it would mean that "virtually any list of people who are 'deemed' customers or potential customers by a public entity could be kept private." The complainant additionally contended that the Commission must determine whether it is even appropriate for the respondent to raise the complainant's private business dealings as a motive for wanting the requested records.

35. Section 1-210(b)(5)(A), G.S., exempts from disclosure:
"Trade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, drawings, cost data, or customer lists 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 its disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy..."

36. With respect to whether a public agency can claim the trade secrets exemption the Supreme Court has stated that in order "to qualify for an exemption within the meaning of § 1-210(b)(5)(A), the requested records must constitute a trade secret within the meaning of the Act." See Director, Department of Information Technology v. Freedom of

Information Commission, 274 Conn. 179, 194 (Conn. 2005) (affirming the trial court's decision that the plaintiff, Town of Greenwich, failed to meet it burden of proof to show that the requested GIS data were exempt as trade secrets within the meaning of § 1-210(b)(5)(A), G.S. In addition, the Commission takes administrative notice of the final decision in the contested case Rick Green and The Hartford Courant v. Connecticut Lottery Corporation, Docket # FIC 2002-061 (holding that the Connecticut Lottery Corporation's claim of trade secret exemption did not apply on other grounds).

37. The Commission has not previously explicitly ruled whether § 1-210(b)(5)(A), G.S., applies to records that a public agency asserts are its own trade secrets, rather than the trade secrets of private entities submitted to or filed with the agency.

38. Black's Law Dictionary (8th Ed. 2004) defines "trade" in relevant part as: The business of buying and selling or bartering goods or services … A transaction or swap … A business or industry occupation; a craft or profession.

39. The Commission takes administrative notice of the fact that public agencies are engaged in governance, not trade.

40. The Commission also takes administrative notice of the fact that the principal function of the University of Connecticut is not trade, but rather education, a traditional governmental function.

41. As to the records described in paragraph 3e [Jorgensen Auditorium subscribers, individual event ticket buyers and prospects], it is found that UConn's Jorgensen Center for the Performing Arts (hereinafter "Jorgensen") conducts a myriad of entertainment events including opera, dance, classical music, concerts, and various performances. It is also found that the Jorgensen database contains personal purchasing information about subscribers, individual event ticket buyers and prospects that would be of economic value to entities such as Foxwoods Casino, Mohegan Sun Casino, Bushnell Theater, Goodspeed Theater, and other entertainment venues in the greater New England area.

42. It is found that the Jorgensen rarely shares the database described in paragraph 3e, above, with persons outside of the Jorgensen. The Jorgensen's director testified that on a few occasions he has shared limited portions of the database with particular nonprofit arts organizations in

exchange for similar information that would have economic value. The director also testified that he has also denied requests from other organizations to share similar database information.

43. With respect to the records described in paragraph 3g [University Athletics season ticket and individual game ticket purchasers], above, it is found that a database kept and maintained by the University of Connecticut's Athletics Department exists containing, among other things, names of season ticket purchasers. It is also found that the associate director of such department testified that the respondent does not keep or maintain a database containing individual ticket purchasers since such tickets are processed through Ticket Master, a private ticket sales and distribution company.

44. It is found that the season ticket purchaser database is maintained in such a way as to avoid its disclosure, particularly to entities in the business of providing athletics events or entertainment throughout Connecticut.

45. It is also found that there have been various requests for the season ticket purchasers database and the respondent has always made reasonable efforts to protect such information by denying disclosure of such database.

46. It is further found that the respondent keeps and maintains a database containing season ticket purchasers, but no such database exists for "individual game purchasers" as described in paragraph 3g, above.

47. It is found, however, that unlike a private business entity engaged in "trade" where profits are closely linked to such entities' existence and economic advantage, the cultural and athletic activities of the University of Connecticut are incidental to its primary governmental function of education. It is also found that the University of Connecticut is largely subsidized by public funding, unlike a private business engaged in trade that depends on earned income for continued existence.

48. It is therefore found, under the specific facts and circumstances of this case, that the respondent failed to prove that it is engaged in "trade" in connection with the following two areas that are incidental to its educational mission: (1) the marketing and selling of tickets to events at Jorgenson Auditorium; (2) the marketing and selling of tickets for university athletic events.

49. It is therefore concluded that the lists of subscribers, individual event ticket buyers and prospects contained in the database described in

paragraph 3e, above, are not "customer lists" within the meaning of § 1-210(b)(5)(A), G.S. It is further concluded that the lists of purchasers contained in the season ticket purchasers database described in paragraph 3g, above, are not "customer lists" within the meaning of § 1-210(b)(5)(A), G.S.

50. Consequently, it is also concluded that the databases described in paragraphs 3e and 3g above do not constitute "trade secrets" within the meaning of § 1-210(b)(5)(A), G.S., and are not exempt from mandatory disclosure.

51. It is therefore concluded that the respondent violated the FOI Act, as alleged in the complaint, with respect to the records described in paragraphs 3e and 3g above.

52. With respect to the database described in paragraph 3h [University Library donors and friends], above, it is found that a database kept and maintained by the library exists containing information about thousands of individuals who have donated to the library, who are listed by virtue of positions they hold, and who have a professional relationship with the chief administrator.

53. It is found that the library uses the donations for a variety of different projects and programs such as renovations to the library, lecture series, and visiting scholars. It is also found that the list has economic value to the library since there is a fair amount of competition among Connecticut universities, high schools and town libraries for donations to engage in different projects and programs.

54. It is found there has been no previous request for the database described in paragraph 3h, above. It is also found that the library has not disclosed such database to any entity outside of the University of Connecticut. It is further found that the library has taken reasonable efforts to maintain the secrecy of such database.

55. However, the Commission is not persuaded by the respondent's argument that the database described in paragraph 3h, above, constitutes "customer lists" within the meaning of § 1- 210(b)(5)(A), G.S.

56. It is well established that the FOI Act carries a presumption of disclosure of public records, and any exception to the general rule of openness must be narrowly construed.

57. It is found that, while there is an important purpose served by a public university in creating and supporting its facilities and programs through the solicitation and receipt of donations, there is an important public interest in knowing the source of such donations. It is also found that it is important to know the connection between donors, their donations, and their final use by a public agency. However, it is customary in all charitable organizations to withhold the names of anonymous donors.

58. It is further found that the respondent failed to prove how donor lists of persons who provide monetary donations to the library constitute "customer lists" within the meaning of § 1- 210(b)(5)(A), G.S. While the patronage of such donors often provides financial assistance to the programs and projects of the library, the Commission is not persuaded that the library is engaged in a trade with such donors who make monetary donations. Accordingly, it is found that the acceptance of such donations is not "in the nature of a trade secret." See Town and Country House & Home Services, Inc. v. Evans, 150 Conn. 314, 317-320 (1963) (ordering a new trial where a former employee violated his duty to his former employer by soliciting such employer's list of customers during his employ).

59. It is therefore concluded that the lists of donors contained in the database described in paragraph 3h, above, are not "customer lists" within the meaning of § 1- 210(b)(5)(A), G.S.

60. Consequently, it is concluded that the database described in paragraph 3h, above, does not constitute "trade secrets" within the meaning of § 1-210(b)(5)(A), G.S., and is not exempt from mandatory disclosure.

61. It is concluded that the respondent violated the FOI Act, as alleged in the complaint, with respect to the records described in paragraph 3h, above.

62. While it is concluded that the database described in paragraph 3h, above, does not constitute "trade secrets" within the meaning of § 1-210(b)(5)(A), G.S., under the discreet circumstances presented, the Commission, as a matter of discretion, declines to order disclosure of information in such database of donors who requested anonymity in exchange for their donations to the library.

63. With respect to the records described in paragraph 28 [Center for Continuing Studies, names and addresses of persons who made inquiries to the center about their programs, not including students or information

protected from disclosure by the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g], as to the respondent's trade secrets contention, the center's director testified that continuing studies is a "highly competitive" and "entrepreneurial business." The center's director also testified that the center provides a significant economic return back to UConn which is derived from fees charged for additional educational activities that are not part of funding by the state. The center's director further testified that the center is a self-supporting unit of UConn that pays all of its expenses including the salaries of its employees except for one and one-half salary.

64. In addition, the center's director testified that the center competes with all of the universities in Connecticut for continuing education students. The center's director also testified that she is unaware of any request for the database described in paragraph 3f [Center of Continuing Studies mailing lists], above, or that such database has ever been disclosed to anyone from outside of UConn. The center's director further testified that such database is the center's economic livelihood since it is used to secure the registration and associated fees of persons who have indicated a particular interest in the center's courses and events.

65. It is found that the center vies for the business of an indeterminable number of actual and potential course and event registrants. It is also found that such registrants give the respondent an opportunity to obtain an economic advantage over competitors who do not know and cannot ascertain through regular business channels the identify or the personal information of persons contained in the database in paragraph 3f, above.

66. However, the Commission is not persuaded by the respondent's argument that the portion of the database described in paragraph 28 above, which is a subset of paragraph 3f, above, constitutes "customer lists" within the meaning of § 1- 210(b)(5)(A), G.S. The Commission concludes that the provision of education is not a trade, and therefore the trade secrets exemption does not apply to the persons of the database described in paragraph 28, above.

67. It is concluded that the respondent violated § 1- 210(b)(5)(A), G.S., when it denied the complainant's request with respect to information stored in the database described in paragraph 28, above.

FOIC Decision, pp. 7-12.

UConn appeals from that decision.

III

A preliminary matter to be decided is whether UConn is aggrieved by the decision of the FOIC. Aggrievement is a jurisdictional prerequisite to any administrative appeal, and the court must find whether a plaintiff is aggrieved before it can proceed to the merits of the case. See General Statutes § 4-183(a). With respect to FOIC appeals, it has been held that when the FOIC finds that a governmental agency violated the Freedom of Information Act, the agency is aggrieved for purposes of appeal because failure to comply with the FOIC order can result in criminal and civil sanctions. See State Library v. Freedom of Information Commission, 240 Conn. 824, 834, 694 A.2d 1235 (1997); Davis v. Freedom of Information Commission, 47 Conn.Sup. 309, 312 790 A.2d 1188 (2001), aff'd., 259 Conn. 45, 787 A.2d 530 (2002).

In the instant case, the FOIC found that UConn violated the Freedom of Information Act. Therefore, the court finds that UConn is aggrieved.

IV

As to the merits, the first issue is whether a public agency can create and maintain a trade secret customer list – ever. The court concludes that the answer is, "Yes."

Trade secrets, including customer lists, are a type of intellectual property that owners may possess to the exclusion of others. At common law, it has been held that "[a] trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be the formula for a chemical compound ... or a list of customers." (Citations omitted; internal quotation marks omitted.) Town & Country House & Home Service, Inc. v. Evans, 150 Conn. 314, 318, 189 A.2d 390 (1963). The FOIC in the instant case ruled that a public agency cannot hold a trade secret or customer list because it is not engage in a trade or business. FOIC Decision, supra, paras. 38, 39. It argues on appeal that Connecticut law does not expressly confer the right to create and maintain trade secrets on public agencies, and that such a right, if created by the court, would be anathema to the entire overreaching legislative policy of the FOI Act, which embodies "a strong legislative policy in favor of the open conduct of government and free public access to government records." Wilson v. Freedom of Information Commission, 818 Conn. 324, 328, 435 A.2d 353 (1980).

Trade secret law in Connecticut today is governed by statute. Connecticut has adopted a modified version of the Uniform Trade Secret Act. General Statutes § 35-50 et seq. The FOI Act also contains a statutory definition of "trade secret." General Statutes § 1-210(b)(5)(A). The Connecticut Uniform Trade Secrets Act provides, in pertinent part, as follows:

> Notwithstanding the provisions 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 generally 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.

General Statutes § 35-51 (d)

The Uniform Act further provides:

> This chapter does not affect: ... (3) the duty of any person or state or municipal agency to disclose information pursuant to section 1-210, sections 31-40j to 31-40p, inclusive, or subsection (c) of section 12-62, or wherever expressly provided by law.

General Statues § 35-57(b)

The FOI Act provides, in pertinent part:

> Nothing in the Freedom of Information Act shall be construed to require disclosure of:
>
> ***
>
> Trade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods techniques, processes, drawing, 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 ...

General Statutes § 1-210(b)(5)(A)

In deciding 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 statues. 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." General Statues § 1-2z.

In the instant case, with respect to the issue at hand, the language is unambiguous. Both statues define trade secrets broadly enough to permit possession by all types of persons and legal organizations. The Connecticut Uniform Trade Secrets Act specifically defines "persons" to whom the act is applicable as including "government, governmental subdivision or agency, or any other legal ... entity." General Statues § 35-51(c). The Connecticut Uniform Trade Secrets Act specifically provides that any disclosure required by the FOI Act takes precedence over any conflicting protection afforded by the Uniform Act. General Statues § 35-57(b)(3); McKesson Health Solutions, LLC v. Starkowski, Superior Court, judicial district of Hartford, Docket No. CV 07-4029449 (July 31, 2007, Bentivegna, J.) Consequently, the definition of "trade secret" in the FOI Act controls in this case. In examining the FOI Act it is clear that the Act does not define trade secrets in any way more restrictive than the Uniform Act. In fact, the FOI Act definition of "trade secret" was expanded in 2000 to match the scope of the Uniform Act. See

Public Acts 2000, No. 00-136, § 2; Remarks of Eric Turner, Conn. Joint Standing Committee Hearings, Government Administration and Elections, Pt. 2, 2000 Sess., p. 422. Nothing in the FOI Act definition of "trade secret" suggests that a public agency cannot create or maintain a trade secret customer list. Consequently, public agencies can create and maintain trade secret customer lists. Of course, not every public agency engages in activity that would cause the creation or maintenance of a trade secrete customer list. However, that practicality does not eliminate the possibility.

Other states that have addressed the issue have found that public agencies can create and maintain protected trade secrets under the terms of the pertinent statutes. See, e.g., State ex rel. Perra v. Cincinnati Public Schools, 123 Ohio St.3d 410, 916 N.E.2d 1049 (2009); State ex rel. Physicians Committee for Responsible Medicine v. Board of Trustees of Ohio State University, 108 Ohio St.3d 288, 843 N.E.2d 174 (2006); State ex rel. Besser v. Ohio State University, 87 Ohio St.3d 535, 721 N.E.2d 1044(2000); State ex rel. Dayton Newspapers v. Dayton Board of Education, 140 Ohio App. 3d 243, 747 N.E.2d 255 (2000); Progressive Animal Welfare Society v. Univ. of Washington, 125 Wash.2d 243, 884 P.2d 592 (1994); Scientific Games, Inc. v. Dittler Bros., Inc., 586 So.2d 1128 (Fla.App. 1991). This court rules likewise with respect to the Connecticut FOI Act.

V

Having concluded that public agencies can create and maintain trade secrets, including customer lists, the next issue is whether the lists created and maintained by UConn in this case qualify for protection. In this case, the FOIC ruled that the lists must be disclosed. UConn argues that they are exempt under the trade secrets exception of General Statutes § 1-210(b)(5)(A). The general rule under the FOI Act is disclosure with the exceptions to this rule being narrowly construed. The burden of establishing the applicability of an exemption clearly rests upon the party claiming the exemption. New Haven v. Freedom of Information Commission, 205 Conn. 767, 775, 535 A.2d 1297 (1988). With regard to the facts, it is not the function of the trial court on judicial review to retry the case or to substitute its judgment for that of the administrative remedy. The court's ultimate duty is only to decide whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. The facts are a matter of record established by the evidence presented during the proceedings before the agency. An agency's factual determination must be sustained if it is reasonably supported by substantial evidence in the record taken as a whole. Fromer v. Freedom of Information Commission, 90 Conn.App. 101, 104, 875 A.2d 590 (2005). With these rules in mind, the specific lists are discussed seriatim:

A

The first list involves the University Athletics department, specifically the names and addresses of season ticket purchasers to athletic events like UConn basketball games, football games, and other sports. On this point, it was the burden of UConn to prove that this constituted information, including customer lists, that 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 that the list is the subject of efforts that are reasonable under the circumstances to maintain secrecy. General Statutes § 1-210(b)(5)(A).

On these points, UConn presented the testimony of Paul McCarthy, Senior Associate Director of Athletics. He testified that the Division of Athletics does maintain a database of the names and addresses of season ticket purchasers. The FOI ruled that this cannot be considered trade secret customer list because UConn is not in the business of providing athletic events for profit. The events are merely incidental to its primary governmental function of education, and UConn does not depend on the income earned from sports ticket sales to exist. FOI Decision, paras. 47, 48. While that is true, the fact that UConn is not exclusively a for-profit, private sector sports company does not exclude it from creating or maintaining a trade secret customer list. See Section IV, supra. A "customer" is one who buys goods or services. The American

Heritage Dictionary of the English Language (4th Ed., 2000). That can include customers of a governmental entity that sells things. See, e.g. Light v. City of Danville, 168 Va. 181, 202-03, 190 S.E. 276 (1937) (sale of electricity by a municipality). The boundary line between government and private sector activity is not always so clear as to preclude the recognition of some overlap in some instances. See Developments in the Law – State Action and the Public/Private Distinction, 123 Harv. L.Rev. 1248, 1250 (2010). In short, the court concludes that persons who buy season tickets from the UConn Athletics Division are customers for purposes of the trade secret customer list analysis.

UConn also established the other elements of the statute making its Athletics Division list eligible for trade secret customer list treatment. The testimony established that UConn Athletics is in competition with a variety of intercollegiate athletic departments, Indian tribal sports enterprises[2], and professional sports teams in Connecticut, and throughout the region, for fans willing to buy tickets for such entertainment. It has a marketing department to sell itself to those persons and corporate sponsors in an effort to sell tickets and raise income. It has spent much time and effort in developing its list of customers whom they have persuaded to choose

[2] UConn argues that Pelto has business activities in developing and selling mailing lists for his clients, including local Indian tribal enterprises, and that this proves the commercial value of the lists. The point should not be confused with the fact that Pelto's motivation is irrelevant as to his right to information from the government. His motivation is irrelevant "because the act vindicates the public's right to know, rather than the rights of an individual." (Citation omitted.) Chief of Police v. Freedom of Information Commission, 252 Conn. 377, 387, 746 A.2d 1264 (2000).

UConn with their limited, discretionary entertainment dollars. If its list must be disclosed to anyone under the FOI Act, then that would adversely affect its sales by giving its competitors opportunity to pull away those regular ticket buyers it worked so hard to develop. UConn also established that it has taken reasonable efforts to maintain the secrecy of the list. It has denied requests for disclosure in the past and has never provided the entire list to anyone outside of the University. Accordingly, UConn has established that it qualifies for a trade secret customer list exemption under the FOI Act on this point. The appeal is sustained on this point.

B

The second list involves Jorgensen Auditorium, specifically the names and addresses of subscribers, individual ticket event buyers and prospective purchases of tickets for the types of performing arts events put on at the Auditorium, such as contemporary and classical music and dance performances.

On these points, UConn presented the testimony of Rodney Rock, Executive Director of the University of Connecticut Jorgensen Center for the Performing Arts. Rock testified that the Auditorium created and maintains a list of subscribers, individuals who purchase multiple tickets to multiple events during the year, year after year, and also single ticket buyers who may purchase tickets periodically. As with University Athletics, the FOIC ruled that this cannot be considered trade secret customer list because UConn is not in the business of providing cultural

events for profit. The events are merely incidental to its primary governmental function of education, and UConn does not depend on the income earned from concert and performance ticket sales to exist. While that is true, for the same reasons explained in Sections IV and V(A), supra, the fact that UConn is not a for-profit, private sector concert/performance hall does not exclude it from creating or maintaining a trade secret customer list. Thus, persons who buy tickets at Jorgensen Auditorium are customers for purposes of trade secret customer list analysis. The customer list trade secret protection also covers prospects developed by or on behalf of the owner. See Holiday Food Co. v. Munroe, 37 Conn.Sup. 546, 549, 426 A.2d 814 (App. Sess., 1981).

UConn also established the other elements of the statute making its Jorgensen lists eligible for trade secret customer list treatment. The testimony established that Jorgensen Auditorium is in competition with a variety of for-profit theaters, civic centers and other community based performing venues competing for the same artists and audiences. It competes with other colleges, operas, symphonies, performance halls, Indian tribal enterprises and arts groups in the state and region for artists and ticket buyers. It has spent years amassing a list of about 80,000 names of present and past ticket buyers. Being forced to disclose its list would be an economic detriment as it extracts a quid-pro-quo for its list, i.e., it has shared a portion of its list in exchange for a portion of another group's list so long as sharing did not draw away from

its audience. It has secured its list by not otherwise sharing its list outside the University, and it has denied requests for its list in the past. Accordingly, UConn has established that it qualifies for a trade secret customer list exemption under the FOI Act on this point. The appeal is sustained on this point.

C

The third list involves Center for Continuing Studies, specifically the names and addresses of persons who made inquiries to the center about their programs, not including students or other information protected from disclosure by the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

On these points, UConn presented the testimony of Susan Nesbitt, Director of the Center for Continuing Studies. She testified that the Center offers a variety of educational programs, some for credit toward a degree and some non-credit, all for a fee. It also runs a Community School for the Arts and an English as a Second Language program. They have a degree program, a masters program, non-credit educational activities and continuing education-type programs for working professionals. It created and maintains a list of names and addresses of persons to whom it mails information about its programs. The names are of students and former students and others. The list in contention is composed of non-students who have contacted the program and made inquiry about its offerings, or persons known to have a specific interest in a

topic. When it generates enough interest and enough registrations, the Center runs a program. The Center is self-supporting in that it pays its own expenses, overhead and maintenance, with the exception of one and one-half salaries, and it returns significant revenue to the University. In this way, its list is necessary for its existence and disclosure would permit its competitors to draw away future registrants.

The FOIC ruled that the Center cannot qualify for trade secret customer list protection because "the provision of education is not a trade." FOIC Decision, para. 66. However, as noted earlier, the trade secret protection is not restricted classic trades, such as carpentry and masonry. The definition is much broader. See General Statutes § 1-210(b)(5)(A). When a statute provides a definition, the courts are bound to follow that definition. Bell Atlantic NYNEX Mobile, Inc. v. Comm'r of Revenue Services, 273 Conn. 240, 257, 869 A.2d 611 (2005). The definition in the FOI Act is broad enough to include government, and the exemption applies when government engages in activities that create qualifying intellectual property, as explained in Secs. IV and V(A), supra. Moreover, the testimony concerning the Center showed that it is certainly selling its classes in a mission to earn money for the University as an entrepreneurial unit, competing against other such public and private continuing education programs. The function of the Center for Continuing Education is to

compete commercially in the educational marketplace selling programs to prospective registrants, not to render a free service to the public.

Considering the above, UConn established that the Center's list of potential purchasers of its programs has independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who can obtain economic value from their disclosure or use, as required by General Statutes § 1-210(b)(5)(A). It also established that it takes reasonable efforts to maintain the secrecy of the list. The witness testified that, to her knowledge, the UConn has never provided its database to anyone outside the university. She said it is not even distributed around the building. Accordingly, the appeal is sustained on this point.

D

The final list involves the University Libraries division, specifically the names and addresses of donors and friends of the University Libraries, not including anonymous donors. On this point, UConn presented the testimony of Brinley Franklin, Vice Provost for University Libraries. He is the chief administrator for the university library system, and he is responsible for, inter alia, fund raising. He confirmed that his division created and maintains a list of friends and donors of the library. This consists of five to ten thousand names, consisting of officials, librarians who work at other libraries at a variety of towns, schools, colleges and cultural institutions, and other donors.

The FOIC ruled that this list cannot be a trade secret because the university libraries are not engaged in a trade. FOIC Decision, para. 58. As explained several times above, the fact that this case involves a public educational facility does not preclude trade secret analysis. Secs. IV and V(A) supra. The court agrees with the FOIC, however, that customer list characterization does not fit here. Donors are not customers. They are not purchasing any goods or services. Nevertheless, the definition of trade secrets includes any qualifying "information." General Statutes § 1-210(b)(5)(A). Thus, the fact that this list is not a list of customers, but a list of donors, is not per se disqualifying. See, e.g., American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407(11th Cir. 1998) (issue of fact whether blood donor list protected); Recovery Express, Inc. v. Warren County Fraternal Order of Police, Inc., 2007 WL 2746549 (S.D. Ohio, 2007) (issue of fact whether financial donor cards are protected). Accordingly, the FOIC erred in disallowing the exemption for the reasons given.

Nevertheless, there remain issues of fact and law that have not yet been resolved in this case with respect to this list. An essential element of any trade secret is that it has value as "not being generally known to, and not being readily ascertainable by proper means by, other persons..." General Statutes § 1-210(b)(5)(A). If persons could collect the same information from information readily available to the public, then the records fail to meet the "threshold test" for trade secrets. Director, Dept. of Information Technology v. Freedom of Information, 274 Conn. 179, 195, 874 A.2d 785 (2005) (GIS data is mere convenient electronic compilation of public records of many town departments already available to the public, therefore not

exempt from disclosure). In the instant case, it seems that the names and addresses of other librarians and officials working in the state could be easily collected from records already available to the public. See, e.g. Cardiocall v. Serling, 492 F.Supp.2d 139, 149-50 (E.D.N.Y 2007) (list of cardiologists readily available); but see Abba Rubber Co. v. Seaquist, 286 Cal.Rptr. 518, 235 Cal.App. 3d 1, 20 (1991) (list winnowed down from larger publicly available list is protected). It was unclear from the record whether the other donors were similarly identified from publicly available lists. The FOIC did not make specific findings on this point to permit judicial review. Where important, potentially dispositive issues have not yet been addressed by the administrative agency, it is appropriate for the court to remand the matter for further decision making before engaging in judicial review. See, e.g., Groton Police Department v. Freedom of Information Commission, 104 Conn.App. 150, 153, 931 A.2d 989 (2007). A remand is appropriate in the instant case on these points, and on any other related points that might be raised on remand.

VI

For all of the foregoing reasons, the plaintiff UConn's appeal is sustained, and the matter is remanded to the FOIC for further proceedings consistent with this decision.

Vacchelli, J.

Robert F. Vacchelli
Judge, Superior Court