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James Torlai,
Complainant(s)
against

Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection,
Respondent(s)

Notice of Meeting

Docket #FIC 2014-867

August 14, 2015

Transmittal of Proposed Final Decision

In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, lst floor, Hartford, Connecticut, at **2 p.m. on Wednesday, September 9, 2015.** At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission ***ON OR BEFORE August 28, 2015.*** Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed ***ON OR BEFORE August 28, 2015.*** **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed ***ON OR BEFORE August 28, 2015,*** and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of Information Commission

W. Paradis
Acting Clerk of the Commission

Notice to: James Torlai
James W. Caley, Esq.

08-14-2015/FIC# 2014-867/Trans/wrbp/VDH//CAL

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In The Matter of a Complaint by | Report of Hearing Officer

James Torlai,

Complainant

against | Docket #FIC 2014-867

Commissioner, State of Connecticut, Department of Emergency Services and Public Protection; and State of Connecticut, Department of Emergency Services and Public Protection,

Respondents | August 14, 2015

The above-captioned matter was heard as a contested case on July 13, 2015 and July 30, 2015, at which times the complainant and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. For purposes of the July 30, 2015 hearing, this matter was consolidated with Docket #FIC 2015-204; James Torlai v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, Division of State Police; and State of Connecticut, Department of Emergency Services and Public Protection, Division of State Police.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.

2. It is found that, by letter dated October 8, 2014, the complainant sent the following request to the Department of Emergency Services and Public Protection ("DESPP"):

> I am requesting a copy of the database that you referenced in an email. I am asking that you provide the entire database on a CD ROM in either a standard database format such as used by Microsoft Access or as a comma delimitated ASCII text file. Please provide a copy of the database at it existed on or after October 1, 2014.

3. It is found that, by letter dated October 10, 2014, the respondents acknowledged the request referred to in paragraph 2, above.

4. It is found that, by letter dated October 14, 2014, the respondents reiterated what they had previously informed the complainant, stating as follows: "please note that in connection with [your request] you were advised that the database you requested is proprietary and as such cannot be released pursuant to Connecticut General Statutes Section 1-210(b)(5)(A)." In addition, it is found that the respondents extended the following offer to the complainant: "If you wish, we can provide you with a custom search of all arrests made for a specific month that are grouped by Troop. This search provides statute numbers and would enable you to perform the search yourself to ensure all DUI arrests are included."

5. It is found that, by letter dated October 24, 2014, the complainant responded to the respondents' October 14, 2014 correspondence, indicating, in relevant part, as follows:

> This letter concerns . . . your refusal to provide the public record [sic] contained in a database. Your claim that the entire database is 'proprietary' seems preposterous. . . . Just to be perfectly clear, I am asking for the entire database and every public records stored in the database. I don't understand how or why you can offer to provide 'a custom search of all arrests made for a specific month that are grouped by Troop,' but not simply provide all of the records. However, I accept your offer. Please provide the results of a custom search or searches for all arrests made by all troops for every month.[1]

6. It is found that, by letter dated November 17, 2014, the respondents again corresponded with the complainant, this time responding to his October 24, 2014 letter. It is found that the respondents informed the complainant that the records contained within the database are available for release. However, it is found that the respondents further informed the complainant that they had contacted the private company who created the software for the database and requested its permission to copy and release the database to the complainant, but that the company had objected to such action. It is further found that, attached to their November 17th correspondence, the respondents provided the complainant with one page of a sample search. With regard to the sample search, it is found that that respondents informed the complainant, as follows: "I am including a one-page sample of a custom search that was conducted for July arrests, sorted by troop. This is all of the arrests, so it is a 49-page document. A search can also be conducted to just identify CGS 14-227a[2] arrests, which I think will be sufficient for your purposes. . . . I would recommend that we narrow the search parameters as much as possible (DUI v. all arrests) and that you advise whether you want this

[1] At the July 13, 2015 contested case hearing, the complainant testified that he wanted the records concerning all of the arrests contained in the database to be provided to him in a format that he could manipulate.

[2] Section 14-227a, G.S., is the section of Connecticut's statutory law that deals with operating a motor vehicle while under the influence of liquor or drugs or while having an elevated blood alcohol level.

search state wide, or just for specific troops."

7. By letter dated November 23, 2014 and filed November 26, 2014, the complainant appealed to the Commission, alleging that the respondents violated the Freedom of Information Act ("FOI Act") by denying him a copy of the requested database.

8. Section 1-200(5), G.S., provides:

> "Public records or files" means any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.

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

> Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212 . . . .

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

11. At the contested case hearings, the respondents contended that the requested database is exempt from disclosure pursuant to the pursuant to §1-210(b)(5)(A), G.S., and the Federal Copyright Act of 1976, 17 U.S.C. § 101 et seq. (the "Copyright Act"). The respondents further contended that they had explained to the complainant on several occasions that they could not disclose this database to him and had offered him several options for obtaining the records contained in the database—either in hardcopy or on a CD. Yet, despite their efforts, the respondents contended that the complainant not only filed the instant appeal, he also had made six separate requests for this same database and, with respect one of those requests, had filed a separate appeal with this Commission. The respondents contended that the complainant's serial filing of requests for the same database, during the time when a case regarding such record had been docketed with this Commission, is evidence of harassment. In this regard, the respondents requested that the Commission consider whether the complainant has abused the FOI process. The respondents, however,

did not request the imposition of a civil penalty against the complainant.

12. At the start of the July 13, 2015 contested case hearing, the complainant testified that he knew that the respondents could not give him a copy of the requested database. The complainant contended, however, that he was not harassing the respondents because, while he had made several requests for the database, he had only filed two complaints about this matter with the Commission. He further contended that the respondents should not have engaged in a relationship with a vendor, whereby they maintain a database containing public information, but yet are unable to disclose such record to the public.

13. Section 1-210(b)(5)(A), G.S., provides that nothing in the FOI Act shall require the 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, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy;

14. In addition, the Copyright Act is a federal law for purposes of the federal law exemption contained in 1-210(a), G.S. See Pictometry Inter'l Corp. v. FOIC, 307 Conn. 648, 673-74 (2013). 17 U.S.C. § 106 mandates that "the owner of copyright under this title has the exclusive rights. . . (1) to reproduce the copyrighted work in copies [and]. . . (3) to distribute copies of the copyrighted work to the public by sale. . . or by rental, lease, or lending," or to authorize these activities.

15. It is found that NexGen Solutions ("NexGen") is a private company that supplies public safety software to first responders, such as police officers and fire fighters. It is further found that NexGen created a Law Enforcement Administration System ("LEAS") database to chart and track first responders' calls for service.

16. It is found that NexGen received federal copyright protection for the software associated with its LEAS database on or around January 24, 2002. It is further found that NexGen's copyright protection expires in 2096.

17. It is found that, by way of a Master Software License Agreement (the "Licensing Agreement") entered into between the former Department of Information Technology

(DOIT)[3] and NexGen on June 9, 2014, the respondents became authorized to use the LEAS database.

18. It is found that NexGen's Licensing Agreement, under the section entitled "Patent, Copyright, License and Propriety Rights," includes the following provision:

> . . . A Department shall maintain the confidentiality of any such Product consistent with its privileged nature, and shall not divulge this Product or make it available to any third party. . . .

19. It is found that DOIT agreed to the provision set forth in paragraph 18, above. It is further found that the contractual provisions in the Licensing Agreement continue to control the relationship between NexGen and the Connecticut state agencies authorized to use the LEAS database, including the respondents.

20. It is found that the respondents use the LEAS database as a way to chart and track calls for service, including matters that involve calls for help or for administrative assistance, and calls that involve criminal incidents leading to arrests. It is found that the call records in the LEAS database date back to 2006. It is further found that, at the time of the contested case hearings, the LEAS database contained approximately 1,200,000 case incident reports (which reports comprise only one field of information in a system with multiple other fields, including fields for "call for service case numbers," dates, times, charges, badge numbers, agencies involved, and nature of the calls). Finally, it is found that, at the current time, approximately 800,000 calls for service are added to the database every year.

21. With regard to potentially exempt information contained in the database, it is found that any record extracted from the LEAS database would have to be reviewed manually prior to disclosure. It is further found that the LEAS database is not disposition updated—that is to say that any record or report of an arrest contained within the LEAS database would have to be followed up on by using a distinct database in order to determine whether criminal charges input into the LEAE database were ultimately nolled or dismissed, or whether a defendant was found not guilty.

22. It is found that, subsequent to the complainant's request for a copy of the LEAS database, the respondents contacted NexGen for permission to copy and disclose the database (including the software necessary to access the database) to the complainant. It is found that NexGen responded to such request as follows:

> . . . The owner of a copyright holds exclusive right to the reproduction and distribution of her or her work. Therefore, it is illegal to duplicate or distribute software of [sic] its documentation without the permission of the

[3] With the enactment of Public Act 11-51, the Department of Information Technology was consolidated into the Department of Administrative Services, and renamed the Bureau of Enterprise Systems and Technology.

> copyright owner. . . . Releasing NexGen's screenshots are a violation of authorial integrity, including . . . trade secret design process information. Providing screenshots of our application would compromise our competitive edge in the industry as well as diminish the extensive engineering hours and development into the core of our application. NexGen also owns the rights to the database schema and design and the agency that is licensed to use the LEAS system does not have the permission to distribute copies of the database schema and design. The database design is proprietary in its use of table structure, key relationships and indexes and therefore a trade secret of NexGen.

23. It is found that the software, including the schema, tables and fields contained within the software, as well as the way in which these systems function and interact, is owned by NexGen. It is found that NexGen has dedicated twenty-three years to the development of the LEAS database software, at a significant financial cost. It is further found that, in an effort to keep the design of its software out of the hands of its competitors, NexGen permits the use of its software pursuant to a detailed, twenty-three page Licensing Agreement. Finally, it is found that NexGen has protected its hard work and financial investment by obtaining copyright protection for the product it created.

24. While the complainant, has requested "a copy of the database," see ¶ 2, above, it is found that without the software that runs the database, the complainant would not be able to access the information contained in the database.

25. With respect to the LEAS database, particularly the software necessary to access the database, it is found that such record contains information that derives independent economic value by not being generally known to, and not being readily ascertainable by proper mean by, other persons who can obtain economic value from its disclosure or use, within the meaning of §1-210(b)(5), G.S. It is further found that NexGen has undertaken reasonable efforts to maintain the secrecy of the software that runs the LEAS database, within the meaning of §1-210(b)(5), G.S.

26. Consequently, it is concluded that the software necessary to run the LEAS database constitutes a "trade secret," within the meaning of §1-210(b)(5), G.S., and, therefore, is exempt from mandatory disclosure. Accordingly, it is concluded that the respondents did not violate the FOI Act by withholding a copy of the LEAS database from the complainant.

27. It is also concluded that the Copyright Act prohibits the respondents, pursuant to the terms of the Licensing Agreement, (see ¶ 18, above), from reproducing the software necessary to access the LEAS database. See Pictometry, 307 Conn. at 675 ("the licensing agreement does not interfere with the public's rights under the act because copyrighted records are *exempt* under the federal exemption from the copying provisions of the act that conflict with federal copyright law, which the licensing agreement embodies) (emphasis in

original).

28. With regard to the complainant's contention that the respondents entered into an agreement with a vendor[4] that violates the public's right to public records, it is found that the respondents have never denied that the data contained in the LEAS database is owned by the State of Connecticut and is thus a public record. It is found that the respondents have offered the complainant several methods of obtaining copies of the data, but the complainant has insisted on obtaining a copy of the entire database. It is found that the respondents have always been willing to conduct custom searches delineated by the complainant--such as all arrests in the month of July 2014, which they did conduct for the complainant as sample search--extract the relevant information from the LEAS database, and then save the results of searches to a CD in a PDF format.

29. In addition, NexGen offered at the contested case hearing to write a program for the complainant, whereby the complainant would delineate the parameters of the search, and NexGen would export the corresponding data from the LEAS database and save the data in a different underlying electronic platform. The resulting records could then be reviewed by the respondents prior to disclosure. Of course, the complainant would have to pay NexGen for the writing such a program, as well as any required formatting. See §1-212(b)(2), G.S. However, it is found that the complainant remained steadfast in his insistence that he wanted a copy of the entire database. It is found that NexGen estimated that, in order to write a program to separate its software from the data, and to transfer the data into an alternative electronic platform, it would cost somewhere in the vicinity of $600,000 to $700,000.

30. With regard to the respondents' contention that the complainant has abused the FOIA process, §1-206 (b)(2), G.S., provides, in relevant part, as follows:

> If the commission finds that a person has taken an appeal under this subsection frivolously, without reasonable grounds and solely for the purpose of harassing the agency from which the appeal has been taken, after such person has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against that person a civil penalty of not less than twenty dollars nor more than one thousand dollars. . . .

31. It is found that, in connection with a previous and unrelated FOI request, and by email dated "August 8," the respondents informed the complainant that they had overlooked a record that was responsive to one of his requests for records, stating, in relevant part, as follows: "This [record] was not identified in the search of the database [that we performed] because it was not properly coded when it was entered into the system. . . . The coding issue only came to my attention recently. . . . If you find [another situation like this] . . . , it is a

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[4] To be clear, the Department of Emergency Services did not enter into the Licensing Agreement in question with NexGen. The former Department of Information Technology is the state agency signatory on the agreement.

simple matter for us to provide the record if you just tell us about it. . . ." It is found that the record, which had been overlooked, was provided by the respondents to the complainant.

32. In response to the August 8th email, referred to in paragraph 31, above, it is found that the complainant issued a request, dated September 4, 2014, to the respondents for a copy of the entire LEAS database. (The "First Request"). It is found that the complainant requested that the respondents provide him with "the complete database," that they "not remove any records from the database," and if they believed that any record was exempt from disclosure, that they "remove only that particular information, not the entire record." It is found that, in connection with this First Request, the complainant informed the respondents, as follows: "I will be requesting updated copies of this database on a monthly basis."

33. It is found that, by letter dated October 8, 2014, the complainant again requested a copy of "the entire database on a CD ROM." (The Second Request"). It is found that the difference between the First Request and the Second Request is that the First Request sought a copy of the database as it existed on or after September 1, 2014, while the Second Request sought a copy of the database as it existed on or after October 1, 2014.

34. In addition, it is further found that, subsequent to the filing an appeal concerning the Second Request, which is the subject of the instant matter, the complainant would go on to request a copy of the database from the respondents four more times. It is found that, with regard to one of the subsequent requests, the complainant filed an appeal with the Commission, which appeal has been designated as Docket #FIC 2015-204; James Torlai v. Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, Division of State Police; and State of Connecticut, Department of Emergency Services and Public Protection, Division of State Police.

35. Based on the complainant's testimony throughout the contested case hearings, it seems as though the complainant understood that he was not entitled to receive a copy of the database and the software that would make the database accessible.[5] Furthermore, it seems as though the complainant understood that the nature of this request was massive.[6]

36. However, the complainant was able to articulate why he filed both the instant appeal and the appeal designated as Docket #2015-204. The complainant testified that he filed this instant appeal because he wanted the database. In addition, he filed an appeal in Docket #FIC 2015-204 because he was pursuing his request for an updated version of the database, which would include the records pertaining to new calls for service. Accordingly by inference, it is found that the complainant was testing what he believed to be true—that is,

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[5] At the start of the July 13, 2015 contested case hearing, the complainant testified as follows: "I want to just stipulate that, if part of this database, and probably some of it is, is--somebody wrote it and is selling it and it has value, then I'm not entitled to it."

[6] In this regard, at the start of the July 13, 2015 contested case hearing, the complainant testified as follows: "it is not practical to review every report. . . somebody would have to sit down—maybe more than one person—with a million records and try to figure out what can be disclosed and what cannot be disclosed."

that respondents would not be able to give him a copy of this database—by filing these appeals.

37. While the Commission accepts this explanation, the complainant is cautioned that his behavior with regard to these respondents is peppered with indications of harassment. Specifically, while it may be within the zone of reasonableness to request a record and to request an updated version of the same record, and ultimately to challenge an agency's non-disclosure determinations with this Commission, it is much more difficult to find such actions reasonable if, while the complainant is testing his belief and the agency's non-disclosure determinations, the complainant simultaneously barrages the same agency with multiple requests for the same record.

38. Nonetheless, it is concluded that the complainant did not file these particular appeals, "frivolously, without reasonable grounds and solely for the purpose of harassing" the respondents, within the meaning of §1-206(b)(2), G.S.

39. It is further concluded that the respondents did not violate any provision of the FOI Act.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is dismissed.

Valicia Dee Harmon

Valicia Dee Harmon
as Hearing Officer