



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 11, 2018

PUBLIC ACCESS OPINION 18-008
(Request for Review 2018 PAC 52443)

FREEDOM OF INFORMATION ACT:
Improper Denial of a Request for Records
as an Unduly Burdensome Repeated Request;
Financial Terms Related to a Public Body's
Use of Public Funds Are Not Exempt under
Section 7(1)(g) of FOIA

Dr. Judy King
945 West George Street, Suite 218
Chicago, Illinois 60657

Ms. Deborah J. Fortier
Assistant General Counsel
Office of the General Counsel
Cook County Health & Hospitals System
1900 West Polk Street, Suite 104
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Dear Dr. King and Ms. Fortier:

This is a binding opinion issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons discussed below, this office concludes that the Cook County Health & Hospitals System (CCHHS) violated the requirements of FOIA by improperly withholding an amendment to an agreement for mental health services showing the fixed monthly amount that CCHHS pays for each recipient of services.

BACKGROUND

On March 28, 2018, Dr. Judy King submitted a FOIA request to CCHHS seeking:

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[A] copy of the First Amendment to the Cook County Health and Hospitals System CountyCare Participating Community Mental Health Center Provider Ancillary Agreement between CCHHS-CountyCare and the Community Counseling Centers of Chicago (C4), executed or signed by CEO J.J. Shannon on May 15, 2015, that shows the C4 monthly capitated rate per member per month that CCHHS-CountyCare agreed to pay C4.^[1]

On March 29, 2018, the County denied that request as an unduly burdensome repeated request pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)), stating:

In your new request, dated March 28, 2018, you are requesting the same contract document that you previously requested in a FOIA request to CCHHS you submitted on May 22, 2015. CCHHS timely responded to that request on June 1, 2015 and provided you with the responsive document, with redactions. In addition, CCHHS has previously responded to the Office of the Illinois Attorney General Request for Review-2015 PAC 35697 regarding the CCHHS response to your prior request for this same document. Your new March 28, 2018 request is a repeated request for this same document and it is therefore denied pursuant to Section 3 (g) of the FOIA (5 ILCS 140).^[2]

In the prior Request for Review, 2015 PAC 35697,³ this office determined that in response to Dr. King's May 22, 2015, FOIA request, CCHHS had improperly redacted the per member per month capitation rate (PMPM capitation rate) from the same amendment to the agreement pursuant to section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2014)). On March 30, 2018, Dr. King submitted this Request for Review contesting CCHHS's denial of her second request.⁴ She argued:

¹E-mail from Judy King to Deborah Fortier (March 28, 2018).

²E-mail from Deborah J. Fortier, Assistant General Counsel, Office of the General Counsel, Cook County Health & Hospitals System, to [Judy] King (March 29, 2018).

³Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, issued March 9, 2018.

⁴Letter from Judy King to Public Access Counselor (March 30, 2018).

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When CCHHS provided a copy of the same named document in 2015, CCHHS redacted the important numerical figures from the document essentially denying a portion of the document. These redactions were determined improper by the Public Access Bureau. As such, the present request is for records improperly and partially denied previously. See 2015 PAC 35697.^[5]

On April 6, 2018, this office forwarded a copy of the Request for Review to CCHHS and asked it to "provide this office with a detailed explanation for the assertion that [CCHHS] previously properly responded to the same request in light of Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697."⁶ CCHHS did not respond. On May 3, 2018, this office sent a second letter to CCHHS seeking the same information.⁷ On May 21, 2018, CCHHS submitted its response that stated, among other things, that "this response and attachment are submitted for PAC review only, and not for public release[.]"⁸

Although CCHHS submitted its response under a claim of confidentiality, FOIA requires that this office provide the requester with an opportunity to respond.⁹ For that reason, on June 7, 2018, this office notified Dr. King that CCHHS submitted its answer under a claim of confidentiality and asked if she wished to reply.¹⁰ On that same date, she replied that she did not

⁵Letter from Judy King to Public Access Counselor (March 30, 2018).

⁶Letter from Marie Hollister, Assistant Attorney General, Public Access Bureau, to Deborah J. Fortier, Assistant General Counsel, Office of the General Counsel, Cook County Health & Hospitals System (April 6, 2018), at 2.

⁷Letter from Marie Hollister, Assistant Attorney General, Public Access Bureau, to Deborah J. Fortier, Assistant General Counsel, Office of the General Counsel, Cook County Health & Hospitals System (May 3, 2018).

⁸E-mail from Deborah J. Fortier, Assistant General Counsel, Office of the General Counsel, Cook County Health & Hospitals System, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (May 21, 2018).

⁹See 5 ILCS 140/9.5(d) (West 2016) ("The Public Access Counselor shall forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy.").

¹⁰E-mail from Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Attorney General – State of Illinois, to J King (June 7, 2018).

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understand how CCHHS's entire response could be confidential.¹¹ On June 28, 2018, Dr. King sent an e-mail to this office and CCHHS with her written reply attached.¹²

The Public Access Bureau properly extended the time within which to issue a binding opinion on May 23, 2018, by 30 business days, to July 11, 2018.¹³

ANALYSIS

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2016). FOIA requires that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 5 ILCS 140/3(a) (West 2016). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

The issue here involves the portion of the records containing the capitation rate. "Capitation" is defined as: "A method of paying a healthcare provider based on the number of members in a health-benefit plan that the provider contracts to treat. • The health plan's sponsor agrees to pay a fixed amount per person each period, regardless of what services are provided." Black's Law Dictionary (10th ed. 2014), *available at* Westlaw BLACKS. As further explained in guidance issued by the American College of Physicians:

Capitation is a fixed amount of money per patient per unit of time paid in advance to the physician for the delivery of health care services. The actual amount of money paid is determined by the ranges of services that are provided, the number of patients involved, and the period of time during which the services are provided. Capitation rates are developed using local costs and average utilization

¹¹E-mail from jk to Marie Hollister (June 7, 2018).

¹²Letter from Judy King to Assistant Attorney General Marie Hollister (June 27, 2018).

¹³Letter from Marie Hollister, Assistant Attorney General, Public Access Bureau, to Judy King and Deborah J. Fortier, Assistant General Counsel, Office of the General Counsel, Cook County Health & Hospitals System (May 23, 2018).

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of services and therefore can vary from one region of the country to another.^[14]

Section 3(g) of FOIA

Section 3(g) of FOIA addresses requests that may be considered unduly burdensome and states, in pertinent part:

Repeated requests from the same person for the same records that are unchanged or identical to records *previously provided or properly denied* under this Act shall be deemed unduly burdensome under this provision. (Emphasis added.)

Under the plain language of section 3(g) of FOIA, a public body may deny a FOIA request as an unduly burdensome repeated request only if it has previously provided the requester with all of the nonexempt responsive records or properly denied the same FOIA request by the same requester in accordance with FOIA. Thus, when a requester contests the denial of a request as an unduly burdensome repeated request, it is necessary to look back to the original request and the response to that request to determine whether the public body previously provided the requester with *all* of the nonexempt responsive records pursuant to FOIA or *properly denied* the prior request from the same requester for the same records pursuant to FOIA. Ill. Att'y Gen. Pub. Acc. Op. No. 18-007, issued June 26, 2018, at 5; *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 11-003, issued April 1, 2011, at 6 (concluding that a public body could not treat a FOIA request as an unduly burdensome repeated request because it did not establish that it had properly denied the requester's previous FOIA requests for the same records).

Because CCHHS designated as confidential its entire answer to this request for review, this office is not at liberty to reveal the substance of CCHHS's response in this binding

¹⁴Patrick C. Alguire, *Understanding Capitation*, American College of Physicians, <https://www.acponline.org/about-acp/about-internal-medicine/career-paths/residency-career-counseling/guidance/understanding-capitation> (last visited June 12, 2018).

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opinion.¹⁵ Nonetheless, it is undisputed that CCHHS redacted the records provided in response to Dr. King's May 22, 2015,¹⁶ request for a copy of the same contract amendment which shows the same PMPM capitation rate that it denied in its entirety in its response to her March 28, 2018, FOIA request. Thus, CCHHS did not previously provide Dr. King with the capitation rate she seeks. Therefore, under the plain language of section 3(g), CCHHS may deny Dr. King's March 28, 2018, request as an unduly burdensome repeated request only if it had *properly* denied the capitation rate in response to her May 22, 2015, request.

As noted above, however, in Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, this office determined that CCHHS had improperly redacted the capitation rate in response to Dr. King's May 22, 2015, FOIA request and requested that CCHHS disclose the capitation rate to Dr. King.¹⁷ CCHHS did not do so. Because CCHHS neither previously provided Dr. King with the capitation rate nor, as explained below, properly denied her previous request for that information, CCHHS improperly denied her March 28, 2018, request pursuant to section 3(g) of FOIA.

Section 7(1)(g) of FOIA

Section 7(1)(g) of FOIA exempts from disclosure certain commercial or financial information found in the files of a public body and provides, in pertinent part:

Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that disclosure of the trade secrets or commercial or financial

¹⁵Section 9.5(c) of FOIA provides, in part: "[t]o the extent that records or documents produced by a public body contain information that is claimed to be exempt from disclosure under Section 7 of this Act, the Public Access Counselor shall not further disclose that information." With respect to a public body's answer to the allegations in a request for review, section 9.5(d) provides that the Public Access Counselor shall forward a copy of the answer to the requester "with any alleged confidential information to which the request pertains redacted from the copy." The plain language of the statute indicates that these sections were intended to protect those portions of the records that are claimed to be exempt under section 7, and to allow public bodies to present arguments that an exemption should apply without revealing the substance of the information claimed to be exempt from disclosure. To the extent a public body's answer makes procedural arguments or does not reveal information that the public body is seeking to withhold under section 7 of FOIA, section 9.5(c) does not authorize a public body to submit those portions of its answer under a claim of confidentiality. Because a determination regarding the scope of section 9.5(c) is not necessary for the resolution of this Request for Review, however, this office will not disclose any aspect of CCHHS's May 21, 2018, response in this matter.

¹⁶FOIA request from Judy King to [Deborah] Fortier (May 22, 2015).

¹⁷Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, issued March 9, 2018, at 7.

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information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested.

In order to be exempt from disclosure under section 7(1)(g):

[T]he document must contain (1) a trade secret, commercial, or financial information, (2) that was obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are either (a) proprietary, (b) privileged, or (c) confidential, and (3) that disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business. *Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶27, 78 N.E.3d 446, 455 (2017).

Although CCHHS designated its response in this matter as confidential, its July 16, 2015, response to this office in 2015 PAC 35697 was not. In its previous response, CCHHS explained as background that CountyCare, which it launched as a demonstration project, became a Medicaid managed care plan in 2014 and is now one of the largest Medicaid health plans in the region.¹⁸ CCHHS also explained that one of the healthcare providers participating in CountyCare is a company called C4. CCHHS argued that it redacted the PMPM capitation rate because C4 claimed it to be proprietary in a letter to CCHHS; CCHHS provided this office with a copy of that letter from C4, which it asked this office to keep confidential.¹⁹ CCHHS argued:

In order to bring needed health services to this large patient population, CountyCare must be able to contract with the qualified healthcare providers who are the makeup of the CountyCare provider network and who provide these necessary health services. In order to attract and contract with excellent providers, such as C4, at excellent rates, CountyCare must be able to ensure confidentiality of proprietary provider information, and assure

¹⁸Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

¹⁹Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

providers that they will not suffer financial harm in the competitive marketplace by contracting with CountyCare.^[20]

CCHHS further argued that section 7(1)(g) exempts the PMPM capitation rate from disclosure because the rate "is a rate only; it is not an obligation or expenditure of public funds."²¹ CCHHS asserted that C4 furnished the negotiated rate under a claim that it is proprietary financial information and that its disclosure "would cause C4 to suffer financial and competitive harm in its future negotiations with other managed care plans and customers in the healthcare marketplace."²² Citing section 2(d) of the Illinois Trade Secrets Act (765 ILCS 1065/2(d) (West 2014)), CCHHS also argued that the PMPM capitation rate is conceptually similar to unit pricing and thus qualifies as a trade secret.²³ Further, CCHHS argued that because Medicaid providers such as C4 are required to enter into agreements with up to 17 different health plans, "[i]f a provider's negotiated rates were public in the marketplace, the provider would clearly be at a disadvantage in its negotiations with other payers [meaning health plans other than CountyCare], and those payers would gain economic value from knowledge of the provider's negotiated rates."²⁴

In her reply in 2015 PAC 35697,²⁵ Dr. King stated that the PMPM capitation rate reflects an obligation for the expenditure of public funds, citing article VIII, section 1(c) of the

²⁰Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

²¹Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

²²Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

²³Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

²⁴Letter from Deborah J. Fortier, Assistant General Counsel, CCHHS Office of the General Counsel, to Shari L. West, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (July 16, 2015).

²⁵Letter from Judy King to Valerie Calhoun, Assistant Attorney General, Illinois Public Access Bureau (July 12, 2017), at [1].

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Illinois Constitution of 1970²⁶ and section 2.5 of FOIA.²⁷ Dr. King noted that the text of the provision at issue expressly refers to the PMPM capitation rate as "compensation" that CountyCare "will pay" to C4.²⁸ "As sole compensation for the defined Scope of Service for the members identified in Section 3 Population Covered of this First Amendment, CountyCare will pay C4 a monthly capitated rate of [redacted] per member per month (PMPM)."²⁹ Additionally, Dr. King cited binding opinions in which the Attorney General concluded that the financial terms of a public body's contracts were not exempt from disclosure pursuant to section 7(1)(g) (Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, issued June 30, 2014, at 8; Ill. Att'y Gen. Pub. Acc. Op. No. 17-003, issued May 26, 2017, at 8), and argued that CCHHS had not provided evidence that disclosing the PMPM capitation rate would cause C4 competitive harm. She stated that "[i]n 2015, C4 was enrolled in all available Medicaid plans in Cook County[,]" and that in "April 2015, C4's website indicated that it accepted or had contracts with 17 health insurance plans."³⁰ She argued that "[r]evealing the rate would not reveal a trade secret. C4 could still negotiate a different or the same capitation rate with a new health plan or change the combination of factors and services to determine a new rate."³¹

In its earlier letter concerning this issue, Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, this office discussed Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, a binding opinion in which this office examined whether the Illinois Department of the Lottery (Department) violated FOIA by redacting the financial terms from its contracts.³² The FOIA request in that matter sought the

²⁶Article VIII, section 1(c) of the Illinois Constitution of 1970 provides that "[r]eports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law."

²⁷Section 2.5 of FOIA (5 ILCS 140/2.5 (West 2016)) correspondingly provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public."

²⁸Letter from Judy King to Valerie Calhoun, Assistant Attorney General, Illinois Public Access Bureau (July 12, 2017), at [3].

²⁹First Amendment to the Cook County Health and Hospitals System CountyCare Participating Community Mental Health Center Provider Ancillary Agreement between Community Counseling Centers of Chicago and County of Cook through its Cook County Health & Hospitals System, Item 5 (May 15, 2015).

³⁰Letter from Judy King to Valerie Calhoun, Assistant Attorney General, Illinois Public Access Bureau (July 12, 2017), at [8].

³¹Letter from Judy King to Valerie Calhoun, Assistant Attorney General, Illinois Public Access Bureau (July 12, 2017), at [9].

³²Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, at 1.

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pricing structure and hourly rates in the Department's marketing contracts, and the Department redacted that information pursuant to section 7(1)(g).³³ The Attorney General determined that the cost of advertising services was directly related to the use of public funds and therefore was subject to disclosure.³⁴ In light of section 2.5 of FOIA, the Attorney General concluded that the Department had not sustained its burden of demonstrating that the financial terms of the contracts were exempt from disclosure pursuant to section 7(1)(g).³⁵

This office's letter addressing Dr. King's previous FOIA request also cited Ill. Att'y Gen. Pub. Acc. Op. No. 14-016, issued December 2, 2014. In that binding opinion, the Attorney General analyzed whether the Metropolitan Pier and Exposition Authority violated FOIA by redacting the financial terms of its lease agreements pursuant to section 7(1)(g).³⁶ The Attorney General stated:

[S]ection 7(1)(g) might, for example, be applicable to the disclosure of financial information obtained from a private entity by a public body acting in a regulatory or investigatory capacity. * * *. The scope of section 7(1)(g) does not appear to encompass commercial or financial information relating to the public body's own business transactions.^[37]

The Attorney General went on to conclude that because the requested financial information clearly related to the receipt of public funds, section 2.5 of FOIA required disclosure.³⁸

Based on the reasoning in these binding opinions, in Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, this office determined that CCHHS improperly redacted PMPM capitation rates pursuant to section 7(1)(g). The determination emphasized that those rates directly related to the use of public funds by CCHHS pursuant to its agreement with C4 and, therefore, were expressly subject to disclosure under article VIII, section 1(c) of the Illinois Constitution of 1970 and section 2.5 of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, at 6.

³³Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, at 2.

³⁴Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, at 2.

³⁵Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, at 8-9.

³⁶Ill. Att'y Gen. Pub. Acc. Op. No. 14-016, at 2.

³⁷Ill. Att'y Gen. Pub. Acc. Op. No. 14-016, at 6.

³⁸Ill. Att'y Gen. Pub. Acc. Op. No. 14-016, at 8.

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In this matter, CCHHS did not provide any additional information that would warrant a contrary conclusion. CCHHS neither demonstrated that disclosure of the PMPM capitation rate would cause competitive harm nor that the requirements of section 2.5 of FOIA are inapplicable under these circumstances.³⁹ Although the redacted rate is not exactly the sum paid by CCHHS, it is the basis for how much CCHHS pays C4 based on the size of the covered population. Unlike an instance in which a public body obtains financial information from a business in a regulatory or investigatory capacity, the redacted PMPM capitation rate determines the extent of CCHHS's expenditure of public funds.

In strikingly similar circumstances, the Commonwealth Court of Pennsylvania concluded that capitation rates were not exempt from disclosure under Pennsylvania law. In *Department of Public Welfare v. Eiseman*, 85 A.3d 1117 (Pa. Commw. Ct. 2014), *rev'd on other grounds*, 633 Pa. 366 (Pa. 2015), the requesters sought PMPM capitation rates paid by Pennsylvania's Department of Public Welfare (DPW) to Managed Care Organizations (MCOs) to provide Medicaid coverage. *Eiseman*, 85 A.3d at 1121. DPW denied the request, as the MCOs claimed that the records were exempt from disclosure under Pennsylvania's Uniform Trade Secrets Act⁴⁰ and the exception in its Right-to-Know Law for confidential proprietary information and trade secrets.⁴¹ *Eiseman*, 85 A.3d at 1122. The requesters appealed to the Office of Open Records (OOR), which is similar to this office's Public Access Bureau. *Eiseman*, 85 A.3d at 1122. An appeals officer for OOR ordered disclosure of the PMPM capitation rates, concluding that the exception for confidential proprietary information and trade secrets did not apply. *Eiseman*, 85 A.3d at 1122.

On appeal, the court agreed with OOR that the PMPM capitation rates were "financial records" for purposes of the Pennsylvania Right-to-Know Law. *Eiseman*, 85 A.3d at 1124. Just as section 2.5 of FOIA provides that "records relating to the obligation, receipt, and use of public funds of * * * units of local government * * * are public records subject to inspection and copying[.]" section 67.708(c) of the Right-to-Know Law (65 Pa. Const. Stat. Ann. § 67.708(c) (West 2014)) generally requires disclosure of "financial records," which are defined as: "(1) Any account, voucher or contract dealing with: (i) the receipt or disbursement of funds by an agency; or (ii) an agency's acquisition, use or disposal of services, supplies,

³⁹This office notes that CCHHS's reliance on the Illinois Trade Secrets Act is misplaced because "the Trade Secrets Act provides only that '[a]ctual or threatened misappropriation [of trade secrets] may be enjoined.' [Citation.] The Trade Secrets Act does not specifically prohibit any disclosures." *Better Government Association v. Village of Rosemont*, 2017 IL App (1st) 161957, ¶29, 82 N.E.3d 710, 717 (2017).

⁴⁰12 Pa. Const. Stat. Ann. §§ 5301-5308 (West 2014).

⁴¹65 Pa. Const. Stat. Ann. § 67.708(b)(11) (West 2014).

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materials, equipment or property." 65 Pa. Const. Stat. Ann. § 67.102 (West 2014). Because the requested PMPM capitation rates were "financial records," the Right-to-Know Law's exception for confidential proprietary information and trade secrets was inapplicable. *Eiseman*, 85 A.3d at 1124. Furthermore, the court concluded that the capitation rates were not trade secrets under the Uniform Trade Secrets Act, which is analogous to the Illinois Trade Secrets Act. *Eiseman*, 85 A.3d at 1126-27. Subsequently, DPW provided the PMPM capitation rates to the requesters, and the requesters appealed a separate portion of the court's ruling. *See Department of Public Welfare v. Eiseman*, 633 Pa. 366, 376, 125 A.3d 19, 26 (Pa. 2015).⁴²

Similarly, section 2.5 of FOIA requires disclosure of the requested PMPM capitation rate in this matter. Based on this analysis, this office concludes that CCHHS has not sustained its burden of demonstrating by clear and convincing evidence that the capitation rate information is exempt from disclosure pursuant to section 7(1)(g) of FOIA.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On March 28, 2018, Dr. Judy King submitted a FOIA request to CCHHS seeking a copy of an amendment to an agreement between CCHHS-CountyCare and the Community Counseling Centers of Chicago, executed or signed on May 15, 2015, showing the monthly capitated rate per member per month that CCHHS-CountyCare agreed to pay C4. In response to Dr. King's previous request for a copy of the same contract amendment, CCHHS had redacted the same PMPM capitation rate pursuant to section 7(1)(g) of FOIA; this office subsequently determined that CCHHS had improperly denied that information. Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697, issued March 9, 2018.

⁴²Although this office could not locate any Federal court decisions analyzing whether capitation rates are exempt from disclosure under FOIA, Federal courts have reached conflicting conclusions about somewhat similar records. *See e.g. Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 44-46 (D.D.C. 2002) (royalty rates in a Federal agency's licensing agreement with a private company exempt from disclosure under the provision in Federal FOIA (5 U.S.C. § 552(b)(4) (1994)) that permits an agency to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]") *But see e.g., Racal-Milgo Government Systems, Inc., v. Small Business Administration*, 559 F. Supp. 4, 6 (D.D.C. 1981) ("Adequate information enables the public to evaluate the wisdom and efficiency of federal programs and expenditures. * * * That the supplier and the Government intended the [per unit] price information to remain confidential is not determinative."). Notably, Federal FOIA does not have a provision similar to section 2.5 of Illinois FOIA or section 67.708(c) of Pennsylvania's Right-to-Know Law which generally require disclosure of records relating to the use of public funds. Accordingly, because the Commonwealth Court of Pennsylvania analyzed the same type of records at issue in this matter under statutory provisions that most closely correspond to those in Illinois FOIA, this office follows the Pennsylvania court's approach.

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2) On March 29, 2018, CCHHS denied Dr. King's second FOIA request for the amendment to the agreement as an unduly burdensome repeated request pursuant to section 3(g) of FOIA, arguing that it had previously responded to the same request.

3) On March 30, 2018, the Public Access Bureau received Dr. King's Request for Review in which she contested CCHHS's assertion that her request was an unduly burdensome repeated request. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2016)).

4) On April 6, 2018, this office forwarded a copy of the Request for Review to CCHHS and asked it to provide a written response addressing the assertion that it previously properly responded to the same request in light of Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697. CCHHS did not respond. On May 3, 2018, this office sent a second letter to CCHHS seeking the same information.

5) On May 21, 2018, this office received CCHHS's response, which it designated as confidential. On June 7, 2018, this office notified Dr. King that CCHHS submitted its response under a claim of confidentiality and asked if she wished to reply. On June 28, 2018, Dr. King submitted her written reply.

6) On May 23, 2018, this office extended the time within which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA, to July 11, 2018. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) A request is an unduly burdensome repeated request under section 3(g) of FOIA only if the public body has either previously provided the requester with copies of the responsive records or has properly denied a prior request for the same records.

8) CCHHS did not previously provide Dr. King with the PMPM capitation rate she sought or properly deny her request for that information, as explained in Ill. Att'y Gen. PAC Req. Rev. Ltr. 35697. Therefore, CCHHS improperly denied Dr. King's second request for the same information as an unduly burdensome repeated request under section 3(g).

9) Section 2.5 of FOIA provides that "records relating to the obligation, receipt, and use of public funds of * * * units of local government * * * are public records subject to inspection and copying by the public." CCHHS is a unit of local government and the PMPM capitation rate determines the amount of public funds it spends for mental health services based on the number of CountyCare enrollees who have certain coverage.

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10) CCHHS has not sustained its burden of demonstrating by clear and convincing evidence that the PMPM capitation rate is exempt from disclosure as a trade secret or commercial or financial information furnished under a claim of confidentiality pursuant to section 7(1)(g) of FOIA. A public body must demonstrate that disclosing information would cause competitive harm in order to withhold the information pursuant to section 7(1)(g). CCHHS did not do so in this instance.

For the reasons stated above, it is the opinion of the Attorney General that CCHHS improperly denied Dr. King's Freedom of Information Act request in violation of the requirements of the FOIA. Accordingly, CCHHS is directed to take immediate action to comply with this binding opinion by providing Dr. King with a copy of the responsive amendment to the agreement that includes the PMPM capitation rate.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2016). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County within 35 days of the date of this decision naming the Attorney General of Illinois and Dr. Judy King as defendants. *See* 5 ILCS 140/11.5 (West 2016).

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
Counsel to the Attorney General

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 18-008) upon:

Dr. Judy King
945 West George Street, Suite 218
Chicago, Illinois 60657
Judyking15@gmail.com

Ms. Deborah J. Fortier
Assistant General Counsel
Office of the General Counsel
Cook County Health & Hospital System
1900 West Polk Street, Suite 104
Chicago, Illinois 60612
dfortier@cookcountyhhs.org

by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on July 11, 2018.


SARAH L. PRATT
Public Access Counselor

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