



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 27, 2020

PUBLIC ACCESS OPINION 20-006
(Request for Review 2020 PAC 62579)

FREEDOM OF INFORMATION ACT:
Records Directly Related to Providing
Medical Care to Inmates in Possession
of Third Party Contracted to Provide
Medical Care to Inmates are Public Records
of Illinois Department of Corrections

Mr. Roshan Abraham
121 Oakwood Drive
Syosset, New York 11791

Mr. Joel M. Diers
Freedom of Information Office
Illinois Department of Corrections
1301 Concordia Court, P.O. Box 19277
Springfield, Illinois 62794-9277

Dear Mr. Abraham and Mr. Diers:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)). For the reasons discussed below, this office concludes that the Illinois Department of Corrections (IDOC) violated the requirements of FOIA by improperly denying Mr. Roshan Abraham's FOIA request for copies of certain aggregate data on head injuries incurred by inmates in IDOC custody during an indicated period of time and policies for evaluating certain injuries of IDOC inmates and IDOC employees incurred within the correctional facilities.

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BACKGROUND

On March 15, 2020, Mr. Abraham submitted a FOIA request to IDOC seeking:

access to and a copy of aggregate data on head injuries incurred since 2015 by inmates while in Illinois Department Corrections custody, including time and place of injury, type or severity of injury and cause of injury. We are also requesting records reflecting the Department's policies, since 2015, regarding evaluating concussions or traumatic brain injury for inmates and correctional officers or other employees when these injuries happen within correctional facilities.^[1]

On March 23, 2020, IDOC responded that it did "not maintain or possess aggregate data" or "the requested policies."² With respect to whether its healthcare vendor, Wexford Health Sources, Inc. (Wexford), may have responsive records IDOC stated:

[w]hen requesting such policies from [Wexford], IDOC has been told the requested policies and procedures, to the extent they exist and/or are otherwise reasonably described by the requestor, are consistent with Judge Schmidt's November 14, 2017 ruling granting Wexford's motion for summary judgment in *Serio v. IDOC*, 2015-MR-683,^[3] confidential and proprietary business documents exempt from disclosure pursuant to the Freedom of Information Act's trade secret exemption, 5 ILCS 140/7(g) [sic].^[4]

IDOC further asserted that "[a]s Judge Schmidt observed, Wexford Health Sources deems and consistently designates such policies and procedures confidential and proprietary information not

¹Public Records Request from Roshan Abraham to Lisa Weitekamp, Illinois Department of Corrections (March 15, 2020).

²Letter from Lisa Weitekamp, Freedom of Information Officer, Illinois Department of Corrections, to Roshan Abraham (March 23, 2020).

³*Serio v. Illinois Department of Corrections*, Docket No. 2015-MR-000683 (Circuit Court, Sangamon County) was an unrelated lawsuit granting Intervenor-Wexford summary judgment on a claim that documents requested from IDOC under FOIA were exempt as trade secrets under section 7(g) of FOIA

⁴Letter from Lisa Weitekamp, Freedom of Information Officer, Illinois Department of Corrections, to Roshan Abraham (March 23, 2020), at 1.

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subject to FOIA, as is permitted under the contract with IDOC/[Illinois Department of Healthcare and Family Services]/[Wexford]."^{5, 6} IDOC's response did not address whether Wexford might possess records containing data concerning head injuries.

In an e-mail transmitted on Sunday, April 12, 2020, Mr. Abraham submitted a Request for Review contesting the denial of the records responsive to his FOIA request.⁷ He argued that the responsive records in the possession of Wexford are public records subject to disclosure by IDOC pursuant to section 7(2) of FOIA (5 ILCS 140/7(2) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019).⁸ He also argued that IDOC had not met its burden of demonstrating competitive harm under the section 7(1)(g) exemption (5 ILCS 140/7(1)(g) (West 2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019), citing *City of Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, 78 N.E.3d 446 (2017).⁹ Further, Mr. Abraham argued that in *Rushton v. Department of Corrections*, 2019 IL 124552, __ N.E.3d __ (2019), the Illinois Supreme Court "affirmed that records held in Wexford's possession relating to the medical care of inmates are public documents subject to production under FOIA."¹⁰

On April 15, 2020, the Public Access Bureau sent a copy of the Request for Review to IDOC. The Public Access Bureau also sent IDOC a letter requesting unredacted copies of all of the responsive records "whether they are in IDOC's direct possession or must be obtained from Wexford" for this office's confidential review and "a detailed written explanation of the legal and factual bases for IDOC's response to the request." The letter also asked IDOC to describe any communications with Wexford about these particular records and to specify how each element of section 7(1)(g) applies."¹¹

⁵Letter from Lisa Weitekamp, Freedom of Information Officer, Illinois Department of Corrections, to Roshan Abraham (March 23, 2020).

⁶IDOC later confirmed that it did not have a copy of the referenced order. E-mail from Joel M. Diers to Joshua Jones (May 6, 2020).

⁷E-mail from Roshan Abraham to Sarah Pratt (April 12, 2020).

⁸E-mail from Roshan Abraham to Sarah Pratt (April 12, 2020).

⁹E-mail from Roshan Abraham to Sarah Pratt (April 12, 2020).

¹⁰E-mail from Roshan Abraham to Sarah Pratt (April 12, 2020).

¹¹Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Lisa Weitekamp, Freedom of Information Officer, Illinois Department of Corrections (April 15, 2020), at 2.

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On April 21, 2020, IDOC provided a written answer but did not provide copies of records for this office to review.¹² On that same date, this office forwarded a copy of IDOC's answer to Mr. Abraham and notified him of his opportunity to reply.¹³ On April 30, 2020, Mr. Abraham submitted a reply.¹⁴

On June 8, 2020, this office asked IDOC whether it had sought records from Wexford in response to the particular FOIA request at issue in this matter or had relied on Wexford's past refusals to provide records to IDOC in denying Mr. Abraham's FOIA request.¹⁵ Later that same day, IDOC replied that it "relied upon previous rejections from Wexford to provide [IDOC] with policies" when responding in this matter.¹⁶

On June 10, 2020, the Public Access Bureau properly extended the time within which to issue a binding opinion by 30 business days, to July 27, 2020, pursuant to section 9.5(f) of FOIA.¹⁷

ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2018)) declares that it is "the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." Under FOIA, "[a]ll 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 2018). Bare assertions without a detailed rationale do not satisfy a public body's burden of explaining

¹²Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Office of the Illinois Attorney General (April 21, 2020).

¹³Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Roshan Abraham (April 21, 2020).

¹⁴E-mail from Roshan Abraham to [Joshua] Jones (April 30, 2020).

¹⁵E-mail from Sarah L. Pratt, Public Access Counselor, to Lisa Weitekamp, Joel M. Diers, and Joshua Jones (June 8, 2020).

¹⁶E-mail from Joel M. Diers to Sarah Pratt, Lisa Weitekamp, and Joshua Jones (June 8, 2020).

¹⁷Letter from Josh Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Roshan Abraham and Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections (June 10, 2020).

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how exemptions are applicable. *Rockford Police Benevolent and Protective Ass'n v. Morrissey*, 398 Ill. App. 3d 145, 150-51 (2d Dist. 2010).

Possession of Responsive Records

IDOC and Wexford have entered into a contract under the terms of which Wexford has agreed to provide "medical, dental, vision, pharmaceutical and mental health services for offenders at specified state correctional centers."¹⁸ The contract states that "[c]onfidential [r]eports, proprietary financial information (such as salaries, subcontractor fees, etc.), medical and mental health manuals, guidelines, policies and procedures, * * * as well as other knowledge and expertise based work product employed to provide care in Illinois pursuant to the contract shall be treated [as] [c]onfidential [i]nformation and [is] not subject to FOIA disclosure, **if exempt under FOIA.**"¹⁹ (Emphasis added.) The contract also expressly provides that "[t]he state retains the right to make the final determination with respect to FOIA disclosures[.]" IDOC is to submit "FOIA requests to Wexford Health for review, comment, and justification of any requests to deny."²⁰ The contract notes, however, that "[a] request for confidential treatment [by Wexford] will not supersede [IDOC's] legal obligations under" FOIA.²¹

Section 7(2) of FOIA addresses records held by a party with whom a public body has contracted to provide a governmental function on behalf of the public body and provides:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

¹⁸Renewal to contract for the purpose of providing health care to prison inmates, Wexford Health Sources, Inc. and Illinois Department of Corrections, §1, April 30, 2018.

¹⁹Renewal to contract for the purpose of providing health care to prison inmates, Wexford Health Sources, Inc. and Illinois Department of Corrections, §2.2.4.16(k), April 30, 2018.

²⁰Renewal to contract for the purpose of providing health care to prison inmates, Wexford Health Sources, Inc. and Illinois Department of Corrections, §2.2.4.16(k), April 30, 2018.

²¹Contract for the purpose of providing health care to prison inmates, Wexford Health Sources, Inc., Illinois Department of Healthcare and Family Services, and Illinois Department of Corrections, §4.6, May 9, 2011 (as renewed on April 30, 2018).

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"[S]ection 7(2) ensures that governmental entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibility to a private entity." *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶62, 89 N.E.3d 376, 390 (2017).

In *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290 (1976), the United States Supreme Court held that the government has an "obligation to provide medical care for those whom it is punishing by incarceration." Likewise, in *Rushton*, the Illinois Supreme Court noted that "Illinois has both a constitutional and a statutory duty to provide medical care to inmates[.]" and that IDOC "has contracted with Wexford to perform this governmental function on its behalf." *Rushton*, 2019 IL 124552, ¶24, ___ N.E.3d at ___. The Court recognized that in seeking to prevent disclosure of a settlement agreement concerning Wexford's alleged inadequate medical care for an inmate, "Wexford's position is that the [IDOC] can avoid" its duty of disclosure under FOIA "by delegating its governmental function to a private entity—precisely the situation section 7(2) was intended to prevent." *Rushton*, 2019 IL 124552, ¶32, ___ N.E.3d at ___. The Court concluded that the settlement agreement directly related to the governmental function Wexford was performing for IDOC of providing medical care to inmates, and therefore was subject to disclosure by IDOC pursuant to FOIA. *Rushton*, 2019 IL 124552, ¶¶31, 41, ___ N.E.3d at ___. Thus, it is clear that records in Wexford's possession that directly relate to its provision of medical care to IDOC inmates on behalf of IDOC are public records subject to disclosure under FOIA.

In its response to this office, IDOC restated its March 23, 2020, response to Mr. Abraham's request, but added that it "has been unable to access the responsive records for review to either disseminate or provide an applicable exemption[.]" "has no mechanism with which to procure these policies[.]" and "is unable to provide any further information regarding these records."²² Section 4.7 of IDOC's contract with Wexford, however, provides that Wexford "assigns to the State all right, title, and interest in and to" work performed or supplies created by Wexford under the contract.²³ Under this provision, Wexford "waives any and all claims" to these materials, which include "written documents or data, [and] goods or deliverables of any kind[.]"²⁴ This contract provision appears to encompass some, if not all, records in the physical

²²Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Office of the Illinois Attorney General (April 21, 2020), at [2].

²³Contract for the purpose of providing health care to prison inmates, Wexford Health Sources, Inc., Illinois Department of Healthcare and Family Services, and Illinois Department of Corrections, §4.7, May 9, 2011 (as renewed on April 30, 2018).

²⁴Contract for the purpose of providing health care to prison inmates, Wexford Health Sources, Inc., Illinois Department of Healthcare and Family Services, and Illinois Department of Corrections, §4.7, May 9, 2011 (as renewed on April 30, 2018).

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custody of Wexford which are responsive to the request. There is no indication, however, that IDOC has sought to enforce its rights to access the records and determine whether they are subject to disclosure under FOIA, as it is entitled to under the contract. Indeed, in this instance, IDOC has acknowledged that it did not transmit Mr. Abraham's FOIA request to Wexford or inquire whether Wexford has aggregate data or policies concerning head injuries that would be responsive to this specific FOIA request.

Although IDOC's response to this office addressed responsive policies in the possession of Wexford, IDOC did not address whether Wexford possesses responsive data related to inmate head injuries; IDOC merely stated that it had verified that "IDOC does not compile data regarding injuries such as these other than what may be maintained in each individual medical file."²⁵ In any event, it is undisputed that both types of records Mr. Abraham requested directly relate to the governmental function of providing medical care to inmates. As the Court explained in *Rushton*, the direct relation requirement "helps to ensure that parties are only able to access records of private contractors that are truly related to its exercise of a governmental function and not those records that are only incidentally or tangentially related to the contract with the government." *Rushton*, 2019 IL 124552, ¶29, __ N.E.3d at __.

Even more clearly than the settlement agreement at issue in *Rushton*, any records in the possession of Wexford reflecting aggregate data on inmate head injuries since 2015, and any policies for evaluating concussions or traumatic brain injuries for inmates since 2015, directly relate to the governmental function of providing medical care to inmates. Therefore, even if IDOC does not have physical custody of the records responsive to Mr. Abraham's request, records concerning those matters in the possession of Wexford are considered IDOC's public records under section 7(2) of FOIA. Accordingly, IDOC has the duty to request the information from Wexford, and, to the extent that Wexford possesses responsive information, to provide Mr. Abraham with copies thereof, unless the records are otherwise exempt from disclosure.

Section 7(1)(g) of FOIA

Section 7(1)(g) of FOIA exempts from disclosure commercial or financial information in certain qualifying circumstances and provides:

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

²⁵Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Office of the Illinois Attorney General (April 21, 2020), at [1].

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disclosure of the trade secrets or commercial or financial 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. (Emphasis in original.) *Janssen*, 2017 IL App (1st) 150870, ¶27, 78 N.E.3d at 455.

Demonstrating competitive harm requires a showing "'by **specific factual or evidentiary material** that: (1) the person or entity from which information was obtained actually faces competition; and (2) substantial harm to a competitive position would likely result from disclosure of the information in the agency's records.'" (Emphasis added.) *Cooper v. Dep't of the Lottery*, 266 Ill. App. 3d 1007, 1013 (1st Dist. 1994) (quoting *Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988)).

As noted above, IDOC's response to this office simply restated its March 23, 2020, response to Mr. Abraham's request that "the requested policies and procedures * * * are * * * confidential and proprietary business documents exempt from disclosure" pursuant to FOIA and added that it "has been unable to access the responsive records for review to either disseminate or provide an applicable exemption[.]" and "is unable to provide any further information regarding these records."²⁶

Although Wexford may claim that the responsive records are confidential, IDOC did not set forth any facts indicating that the responsive records constitute "a trade secret, commercial, or financial information" within the meaning of section 7(1)(g), nor did it set forth any specific factual or evidentiary material indicating that disclosure of the records would cause competitive harm. IDOC's reference to the circuit court order in *Serio*, which IDOC admitted that it had not reviewed, is plainly insufficient to demonstrate that the records Mr. Abraham

²⁶Letter from Joel M. Diers, Freedom of Information Office, Illinois Department of Corrections, to Josh Jones, Office of the Illinois Attorney General (April 21, 2020), at [2].

requested are exempt from disclosure under section 7(1)(g). *See Delgado v. Board of Election Commissioners*, 224 Ill. 2d 481, 488 (2007) ("Under Illinois law, the decisions of circuit courts have no precedential value[.]"). Therefore, IDOC did not sustain its burden of proving by clear and convincing evidence that any responsive records in the physical custody of Wexford are exempt from disclosure pursuant to section 7(1)(g) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) On March 15, 2020, Mr. Roshan Abraham submitted a FOIA request to IDOC seeking copies of aggregate data on head injuries incurred by inmates since 2015 while in IDOC custody, and records reflecting IDOC's policies since 2015 regarding evaluating inmates and IDOC employees for concussions or traumatic brain injuries that occur within prisons.

2) On March 23, 2020, IDOC responded that it did not possess the requested aggregate data or policies. IDOC stated that when requesting such policies from Wexford, its healthcare vendor, Wexford has responded that the policies were exempt from disclosure under section 7(1)(g) of FOIA and the circuit court's ruling in *Serio v. IDOC*.

3) In an e-mail transmitted after business hours on April 12, 2020, and received by the Public Access Bureau on April 13, 2020, Mr. Abraham submitted a Request for Review contesting IDOC's denial of records responsive to his FOIA request in the possession of Wexford. 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 2018)).

4) On April 15, 2020, the Public Access Bureau forwarded a copy of Mr. Abraham's Request for Review to IDOC and asked it to provide unredacted copies of the responsive records, whether in IDOC's possession or in the possession of Wexford, for this office's confidential review, and a detailed written explanation of the legal and factual bases for IDOC's response to the request, describing any communications with Wexford about the requested records and specifying how each element of section 7(1)(g) applies.

5) On April 21, 2020, this office received a written answer from IDOC but did not receive copies of the requested records.

6) On that same date, the Public Access Bureau forwarded to Mr. Abraham a copy of IDOC's answer and notified him of his opportunity to reply. On April 30, 2020, Mr. Abraham submitted a reply to IDOC's answer.

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7) On June 10, 2020, the Public Access Bureau extended the time within which to issue a binding opinion by 30 business days, to July 27, 2020, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 7(2) of FOIA provides that "[a] public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act." IDOC has contracted with Wexford to perform the governmental function of providing medical care to inmates on its behalf. Because the data and policies Mr. Abraham requested directly relate to that governmental function, any such records in the possession of Wexford are public records of IDOC for purposes of FOIA.

9) Section 7(1)(g) of FOIA exempts from inspection and copying "[t]rade 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 information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested." IDOC demonstrated neither that the requested records qualify as trade secrets, or commercial or financial information, within the scope of section 7(1)(g), nor that disclosure would cause competitive harm. Accordingly, IDOC did not prove by clear and convincing evidence that the responsive records are exempt from disclosure under section 7(1)(g).

Therefore, it is the opinion of the Attorney General that IDOC violated the requirements of FOIA by denying records responsive to Mr. Abraham's Freedom of Information Act request which are in the possession of Wexford. Accordingly, IDOC is hereby directed to take immediate and appropriate action to comply with this opinion by obtaining from Wexford and providing to Mr. Abraham copies of any data and policies responsive to his March 15, 2020, FOIA request.

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 2018). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook or Sangamon County within

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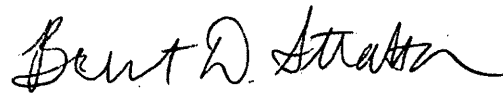
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35 days of the date of this decision naming the Attorney General of Illinois and Mr. Roshan Abraham as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:

A handwritten signature in cursive script, appearing to read "Brent D. Stratton".

Brent D. Stratton
Chief Deputy Attorney General

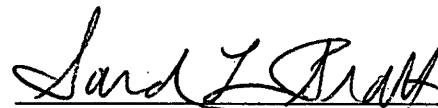
CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 20-006) upon:

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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 27, 2020.



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