



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

December 12, 2023

PUBLIC ACCESS OPINION 23-015
(Request for Review 2023 PAC 77982)

FREEDOM OF INFORMATION ACT:
Non-disclosure Agreement Concerning
Planned Commercial Development Project
That Has Been Publicly Announced is Not
Exempt Under Section 7(1)(g) of FOIA

Ms. Megann Horstead
News Reporter
Daily Chronicle
121 West Lincoln Highway
DeKalb, Illinois 60115

Mr. Scott Zak
FOIA Officer
City of DeKalb
164 East Lincoln Highway
DeKalb, Illinois 60115

Dear Ms. Horstead and Mr. Zak:

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 2022)). For the reasons discussed below, this office concludes that the City of DeKalb (City) violated the requirements of FOIA by denying Ms. Megann Horstead's request for a non-disclosure agreement (NDA) concerning a development project.

BACKGROUND

On July 26, 2023, Ms. Horstead, on behalf of the *Daily Chronicle*, submitted a FOIA request to the City seeking "[a]ny non-disclosure agreement between the city of DeKalb

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 2

and Kraft-Heinz concerning the development of what was known as Supernova."¹ On August 3, 2023, the City extended the time for responding to the request by five business days pursuant to section 3(e)(v) of FOIA (5 ILCS 140/3(e)(v) (West 2022)).² On August 10, 2023, the City denied the request pursuant to section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023).³ The City quoted the language of the exemption without setting forth facts as to how or why it applies.⁴ On August 31, 2023, Ms. Horstead submitted a Request for Review disputing the City's denial of her request.⁵

On September 8, 2023, the Public Access Bureau sent a copy of the Request for Review to the City. Along with a copy of the Request for Review, this office sent the City a letter requesting an unredacted copy of the NDA that was withheld for this office's confidential review, and a detailed written explanation of the legal and factual bases for the applicability of the section 7(1)(g) exemption.⁶ On September 19, 2023, counsel for the City furnished via e-mail⁷ a copy of the NDA along with a confidential letter, which this office is precluded from disclosing,⁸ from Kraft Heinz in support of the City's assertion of section 7(1)(g). On the same

¹FOIA request submitted by Megann Horstead to City of DeKalb FOIA portal (July 26, 2023).

²FOIA portal message from Scott Zak, FOIA Officer, City of DeKalb, to Megann Horstead (August 3, 2023).

³FOIA portal message from Scott Zak, FOIA Officer, City of DeKalb, to Megann Horstead (August 10, 2023).

⁴FOIA portal message from Scott Zak, FOIA Officer, City of DeKalb, to Megann Horstead (August 10, 2023).

⁵E-mail from Megann Horstead, Daily Chronicle news reporter, to Public Access Office (August 31, 2023).

⁶Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Scott Zak, FOIA Officer, City of DeKalb (September 8, 2023), at 1.

⁷E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Silverman (September 19, 2023).

⁸5 ILCS 140/9.5(d) (West 2022) ("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.").

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 3

date, counsel for the City separately e-mailed a non-confidential response,⁹ a copy of which this office forwarded to Ms. Horstead on September 26, 2023;¹⁰ she did not reply to that response.

On October 20, 2023, this office extended the time within which to issue a binding opinion by 30 business days,¹¹ to December 13, 2023, pursuant to section 9.5(f) of FOIA.

ANALYSIS

Section 1 of FOIA (5 ILCS 140/1 (West 2022)) declares that "it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." 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 2022).

In relevant part, section 7(1)(g) of FOIA exempts from disclosure:

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

The City's non-confidential response to this office asserted that disclosure of the NDA "would cause a chilling effect that would deter private businesses from entering into

⁹E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Silverman (September 19, 2023).

¹⁰Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Megann Horstead, News Reporter, *Daily Chronicle* (September 26, 2023).

¹¹Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Megann Horstead, News Reporter, *Daily Chronicle*, and Matthew D. Rose, Donahue & Rose, PC (October 20, 2023), at 1.

potential future developments and public-private partnerships."¹² The response cited *Roulette v. Department of Central Management Services*, 141 Ill. App. 3d 394, 399-400 (1986), in which the Illinois Appellate Court stated that the General Assembly "intended the term trade secret would be construed broadly[,] " so as not "to discourage private parties from doing business with the State." The court observed: "Federal law indicates that a trade secret includes information that would either inflict substantial competitive harm *or* make it more difficult for the agency to induce people to submit similar information in the future." (Emphasis added.) *Roulette*, 141 Ill. App. 3d at 400. Because disclosure of a psychological evaluation of an applicant for employment "would have a chilling effect upon [a State agency's] ability to receive similar information in the future," the court held that the evaluation was exempt from disclosure pursuant to section 7(1)(g) without considering the potential for competitive harm. *Roulette*, 141 Ill. App. 3d at 400.

The *Roulette* court reviewed a prior version of section 7(1)(g) of FOIA. At the time of *Roulette*, section 7(1)(g) exempted from disclosure "[t]rade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential." Ill. Rev. Stat., 1984 Supp., ch. 116, par. 207(g). That version of the exemption encompassed information that entities might be discouraged from providing to the government if it was subject to disclosure under FOIA, regardless of whether or not disclosure would result in competitive harm. *Roulette*, 141 Ill. App. 3d at 400. In 2010, however, the General Assembly amended section 7(1)(g) to specifically require that disclosure of records "would cause competitive harm" in order for the exemption to apply.¹³ Accordingly, to be exempt from disclosure pursuant to 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.) (Emphasis added.) *City of Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶ 27.

¹²E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Silverman (September 19, 2023).

¹³See Public Act 96-542, effective January 1, 2010.

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 5

In addition to expressly including "competitive harm" as an element of section 7(1)(g), the use of "would" by the General Assembly in section 7(1)(g), rather than the language "could reasonably be expected to," which is used in other FOIA exemptions,¹⁴ signifies a narrower scope and more onerous standard to demonstrate records are exempt from disclosure under FOIA. *Chicago Sun-Times v. Chicago Transit Authority*, 2021 IL App (1st) 192028, ¶ 43 (noting that "[t]he General Assembly knew the difference between the use of the term *could* instead of *would* []" in rejecting argument that the section 7(1)(v) exemption for records that "could reasonably be expected to jeopardize the effectiveness of" certain security measures applies only if disclosure "*would* jeopardize them.") (Emphasis in original.). Thus, a public body that fails to demonstrate that the disclosure of records *would* cause competitive harm cannot sustain its burden of proving that the records are exempt pursuant to section 7(1)(g) of FOIA. *Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶ 29.

The City's non-confidential response to this office cited a line of federal court decisions construing the trade secret exemption in the Federal FOIA statute,¹⁵ which exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" In *Food Marketing Institute v. Argus Leader Media*, 588 U.S. ___, ___, 139 S. Ct. 2356, 2366 (2019), the U.S. Supreme Court held: "At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of" the Federal FOIA exemption. The City's non-confidential response stated that the text of the NDA provides that its very existence is confidential, and that "Kraft Heinz customarily and actually treats the NDA as private and confidential."¹⁶

This office has reviewed the NDA and confirmed that it satisfies the first two elements of the section 7(1)(g) exemption: the agreement is commercial information as it relates to a commercial project, and it contains a clause providing that the existence of the agreement is confidential. But customarily and actually treating commercial information as private and confidential does not provide an independent basis for withholding it under section 7(1)(g) of FOIA. The Federal FOIA exemption for trade secrets does not require showing a likelihood of competitive harm and therefore is significantly broader than section 7(1)(g). *See Food*

¹⁴See 5 ILCS 140/7(1)(i), (1)(v) (West 2022), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023.

¹⁵5 U.S.C § 552(b)(4) (2018).

¹⁶E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Silverman (September 19, 2023).

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 6

Marketing Institute, 588 U.S. at ___, 139 S. Ct. at 2361 (finding lower court decision that disclosure of information must be likely to cause competitive harm to be exempt was "inconsistent with the terms of the statute[.]"). As discussed above, a public body must demonstrate disclosure would cause competitive harm to sustain its burden of demonstrating records are exempt pursuant to section 7(1)(g) of FOIA.

Other cases cited by the City held that the Federal FOIA version of section 7(1)(g) permitted agencies to withhold pricing and rate information in contracts,¹⁷ royalty rates and revenues,¹⁸ and a loan agreement and progress reports concerning a related construction project.¹⁹ The City also cited a case in which a federal appellate court vacated and remanded for further consideration a lower court decision that salary survey data was not exempt.²⁰ All of those cases are factually distinguishable from the NDA in this matter, which does not reveal any specific information about Kraft Heinz's prices, expenditures, or financial condition, or the status of the development project.

The City's non-confidential response also generally asserted that businesses would be deterred from pursuing development projects "if the existence of the potential development is publicly disclosed because competitors would use that information to either obtain the confidential information for their competitive purposes or cut a better deal with respect to the potential" incentives and approvals required for such projects.²¹ Yet, the non-confidential response appeared to acknowledge that the potential for competitive harm on that basis is not present in this matter because "Kraft Heinz publicly announced this specific development[.]"²² Indeed, on July 17, 2023, Ms. Horstead reported that Kraft Heinz had issued a press release announcing that it expected to open a distribution facility in the City in 2025.²³ Because that

¹⁷*Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 43 (D.C. Cir. 2008); *Airline Pilots Ass'n, International v. U.S. Postal Service*, 2004 U.S. Dist. LEXIS 26067 at **16-17 (D.D.C. 2004).

¹⁸*Public Citizen Health Research Group v. National Institutes of Health*, 209 F. Supp. 2d 37, 54-55 (D.D.C. 2002).

¹⁹*Comstock International, Inc., v. Export-Import Bank of the United States*, 464 F. Supp. 804, 810 (D.D.C. 1979).

²⁰*9 to 5 Organization for Women Office Workers v. Board of Governors of Federal Reserve System*, 721 F. 2d 1, 11 (1st Cir. 1983).

²¹E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Silverman (September 19, 2023).

²²E-mail from Matthew D. Rose, Donahue & Rose, PC, to Assistant Attorney General Silverman (September 19, 2023).

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 7

article was published nine days before Ms. Horstead submitted her FOIA request,²⁴ the City would not have revealed the existence of the development project by disclosing the NDA.

The confidential response submitted by Kraft Heinz did provide a separate explanation for the assertion that it would sustain competitive harm from disclosure of the NDA. Although Kraft Heinz undoubtedly faces competition as a distributor, the confidential response provides only vague and conclusory assertions that disclosure of the NDA would cause competitive harm. Kraft Heinz has not set forth specific facts or evidence establishing that any harm to a competitive position could reasonably be expected to result from disclosure of the information in the NDA, much less that it would. The agreement primarily consists of boilerplate text setting forth the parameters for confidentiality and other terms and conditions typically found in such agreements. The NDA does not reveal Kraft Heinz's information about sensitive matters such as business strategies, expenses, or revenues, or details concerning plans for the distribution center. While the NDA may serve to protect certain confidential or proprietary information that potentially could be exploited for competitive gain by another distributor, it is unclear how disclosure of any information in the NDA itself could result in such harm. Accordingly, this office concludes that the City has not sustained its burden of proving by clear and convincing evidence that the NDA is 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 July 26, 2023, Ms. Megann Horstead, on behalf of the *Daily Chronicle*, submitted a FOIA request to the City of DeKalb seeking a copy of the non-disclosure agreement between the City and Kraft Heinz concerning the development of a distribution facility. Ms. Horstead's 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 2022)).

2) On August 10, 2023, the City denied the request pursuant to section 7(1)(g) of FOIA.

²³Megann Horstead, *New distribution facility for Kraft Heinz coming to DeKalb by 2025*, Daily Chronicle (July 17, 2023, 5:00 a.m.), <https://www.shawlocal.com/shaw-local-newsletter/2023/07/17/new-distribution-facility-for-kraft-heinz-coming-to-dekalb-by-2025/>

²⁴FOIA request submitted by Megann Horstead to City of DeKalb FOIA portal (July 26, 2023).

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 8

3) On August 31, 2023, Ms. Horstead submitted a Request for Review disputing the denial of her request.

4) On September 8, 2023, the Public Access Bureau sent a copy of the Request for Review to the City and requested an unredacted copy of the NDA for this office's confidential review, and a detailed written explanation of the legal and factual bases for the applicability of the section 7(1)(g) exemption.

5) On September 19, 2023, the attorney for the City provided this office with the requested materials, including both a confidential letter from Kraft Heinz in support of the City's denial of the NDA and a non-confidential response from the City for forwarding to Ms. Horstead.

6) On September 26, 2023, this office forwarded a copy of the City's non-confidential answer to Ms. Horstead and notified her of the opportunity to reply; she did not submit a reply.

7) On October 20, 2023, the Public Access Bureau extended the time within which to issue a binding opinion by 30 business days, to December 13, 2023, pursuant to section 9.5(f) of FOIA. Accordingly, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 7(1)(g) of FOIA exempts from disclosure, in relevant 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 information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested."

9) Under the current language of section 7(1)(g), a public body that withholds a record pursuant to this exemption must demonstrate that: (1) it contains a trade secret, commercial, or financial information; (2) it 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 proprietary, privileged, or confidential; and (3) disclosure of the trade secrets or commercial or financial information would cause competitive harm to that person or business.

10) Although it is undisputed that Kraft Heinz faces competition as a distributor, neither the confidential letter submitted by Kraft Heinz nor the City's non-confidential response sets forth clear and convincing evidence to support the assertion that competitive harm to a person or business would result from disclosure of the information in the NDA. The NDA may

Ms. Megann Horstead
Mr. Scott Zak
December 12, 2023
Page 9

be intended to protect confidential and proprietary information about matters such as business strategies and expenses related to the development project, but the City has not demonstrated how any information in the agreement itself could be exploited by a competitor to gain an advantage.

Therefore, it is the opinion of the Attorney General that the City of DeKalb violated the requirements of FOIA by denying the NDA responsive to Ms. Megann Horstead's Freedom of Information Act request. The City is hereby directed to take immediate and appropriate action to comply with this opinion by providing Ms. Horstead with a copy of the NDA.

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 2022). 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 35 days of the date of this decision naming the Attorney General of Illinois and Megann Horstead as defendants. *See* 5 ILCS 140/11.5 (West 2022).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:



Brent D. Stratton
Chief Deputy Attorney General

cc: Mr. Matthew D. Rose
Donahue & Rose, P.C.
9501 West Devon Avenue, Suite 702
Rosemont, Illinois 60018

CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 23-015) upon:

Ms. Megann Horstead
News Reporter
Daily Chronicle
121 West Lincoln Highway
DeKalb, Illinois 60115

Mr. Scott Zak
FOIA Officer
City of DeKalb
164 East Lincoln Highway
DeKalb, Illinois 60115
Scott.zak@cityofdekalb.com

Mr. Matthew D. Rose
Donahue & Rose, P.C.
9501 West Devon Avenue, Suite 702
Rosemont, Illinois 60018
mrose@drlawpc.com

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 Chicago, Illinois on December 12, 2023.



STEVE SILVERMAN
Chief, Public Access Bureau

STEVE SILVERMAN
Bureau Chief
Public Access Bureau
Office of the Attorney General
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
(312) 814-6756