



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

December 9, 2022

Via electronic mail

Mr. Nathaniel Pence
2704 Central Park Avenue
Evanston, Illinois 60201
natepence@gmail.com

Via electronic mail

Mr. Brian Crowley
Franczek
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
bpc@franczek.com

RE: FOIA Request for Review – 2018 PAC 56208

Dear Mr. Pence and Mr. Crowley:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2020)).

On December 21, 2018, Mr. Nathaniel Pence submitted a Request for Review to the Public Access Bureau alleging that Community High School District No. 99 (District) improperly withheld a copy of a PowerPoint presentation that an attorney presented during a District staff in-service training session regarding sexual harassment in the workplace.¹ On January 3, 2019, this office forwarded a copy of the Request for Review to the District and asked for a copy of the withheld presentation along with an explanation for its claim that the record was exempt under section 7(1)(g) of FOIA.² On February 1, 2019, counsel for the District

¹Mr. Pence submitted a six-part FOIA request to District, however, his Request for Review did not dispute the response to the other five portions of his FOIA request. Therefore, the scope of this determination is limited to the District's response to the above-mentioned part of his request.

²5 ILCS 140/7(1)(g) (West 2020).

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provided those materials. The District's written answer was forwarded to Mr. Pence; he did not reply.

"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 2020). Exemptions to disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 408 (1997).

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.

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 at 455 (2017).

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." *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1013 (1st Dist. 1994) (quoting *Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988)).

The Public Access Bureau has reviewed the materials Mr. Pence submitted, the District's written answer to this office, and the responsive PowerPoint presentation. In its

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response to this office, the District asserted the withheld PowerPoint presentation constituted trade secret material exempt from disclosure pursuant to section 7(1)(g) of FOIA. The District explained that it retained an attorney from the Franczek law firm to provide sexual harassment prevention training to all District staff. The District indicated that this attorney "and her law partners and associates regularly provide such trainings for a fee for client school districts"³ and asserted that the presentation was furnished under a claim that the information was proprietary, privileged, and confidential. As such, the District contended that the records were confidential proprietary records of Franczek, the release of which would cause Franczek substantial competitive harm, stating:

Here, the materials Franczek prepared and provided to the District would, if made public, provide a free roadmap to Franczek's competitors about how to comply with sexual harassment laws and regulations that govern the educational industry. Franczek's competitors would have no need to undertake time consuming research, analysis, and preparation of the PowerPoint to provide the same document to other school districts. They would just have to FOIA the record.^[4]

Based on this office's confidential review, it appears that the disclosure of the requested PowerPoint presentation would cause competitive harm to Franczek. The training presentation contains detailed information concerning sexual harassment in the workplace, such as the Illinois and federal laws governing sexual harassment, as well as the District's policies. The document also reflects the substance of Franczek's research, analysis, and opinions concerning how the District's staff can help prevent sexual harassment at work and steps that the District should take to fulfill its compliance obligations under those laws and its policy. The disclosure of this training material, via FOIA, could easily be exploited by competitors by allowing competing law firms or consultants to slightly adapt the training for other school districts without sustaining the considerable effort that Franczek has incurred. *See generally 100Reporters LLC v. United States Department of Justice*, 248 F. Supp. 3d 115, 140 (D.D.C. 2017) (determining compliance and training materials exempt from disclosure under federal

³Letter from Jaqueline Wernz, Franczek, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Illinois Attorney General (February 1, 2019), at 2.

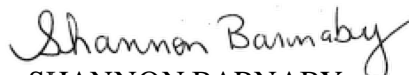
⁴Letter from Jaqueline Wernz, Franczek, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Illinois Attorney General (February 1, 2019), at 3.

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FOIA⁵ because disclosure could cause competitive harm by providing competitors with the unique details necessary to comply with the regulatory laws that govern the industry without incurring the same costs); *Public Citizen v. United States HHS*, 66 F. Supp. 3d 196, 210 (D.D.C. 2014) (finding disclosure of FDA compliance information could pose a competitive risk because the materials were, "in a sense, a free roadmap as to what works in pharmaceutical marketing without violating the legal framework of regulatory enforcement and laws that govern the industry."). Therefore, this office concludes that the District has met its burden of establishing that the document is exempt from disclosure pursuant to section 7(1)(g) of FOIA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, my e-mail address is Shannon.Barnaby@ilag.gov

Very truly yours,


SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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⁵Exemption 4 permits the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" Federal courts' interpretations of the exemption for trade secrets in the federal FOIA are instructive in construing section 7(1)(g). See *Roulette v. Department of Central Management Services*, 141 Ill. App. 3d 394, 400 (1st Dist. 1986).