



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 30, 2020

Via electronic mail

Mr. Cezary Podkul
Reporter
The Wall Street Journal
1211 Avenue of the Americas
5th Floor
New York, New York 10036
Cezary.podkul@wsj.com

Via electronic mail

Ms. Anjali Julka
Freedom of Information Officer
City of Chicago Office of the Mayor
121 North LaSalle Street, Suite 500
Chicago, Illinois 60602
mofoia@cityofchicago.org

RE: FOIA Request for Review – 2019 PAC 56600

Dear Mr. Podkul and Ms. Julka:

This determination letter 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 that follow, the Public Access Bureau concludes that the Office of the Mayor (Mayor's Office) of the City of Chicago (City) did not improperly withhold records responsive to Mr. Cezary Podkul's January 3, 2019, FOIA request.

On that date, Mr. Podkul submitted a FOIA request to the Mayor's Office seeking copies of "any pitchbooks, presentations and marketing materials provided by investment banking firms to the office of the Mayor between Jan. 1, 2018 and today Jan. 3, 2019, regarding potential sales of bonds to fund the city's pension plans[.]"¹ On January 17, 2019, the Mayor's

¹E-mail from Cezary Podkul, The Wall Street Journal, to MOfoia@cityofchicago.org (January 3, 2019).

Mr. Cezary Podkul
Ms. Anjali Julka
June 30, 2020
Page 2

Office denied the request in its entirety pursuant to section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2018). In his Request for Review Mr. Podkul contested the Mayor's Office's denial.

On February 6, 2019, the Public Access Bureau sent a copy of the Request for Review to the Mayor's Office and asked it to provide copies of a representative sample of each type of record withheld, e.g., pitchbooks, presentations, or other types of marketing materials, along with a detailed explanation of the factual and legal basis for the applicability of the section 7(1)(g) exemption to those records. On February 26, 2019, the Mayor's Office provided six of the eighteen responsive pitchbooks as a representative sample of the records it maintains and a written response detailing its rationale for denying the records under 7(1)(g). On March 15, 2019, Mr. Podkul submitted a reply. On September 9, 2019, after repeated attempts to discuss this matter with the FOIA Officer for the Mayor's Office and with lawyers in the City's Law department, this office sent an e-mail to the Mayor's Office asking it to provide the additional twelve pitchbooks for our confidential review.² On September 27, 2019, the Mayor's Office provided eight pitchbooks, three of which were copies of pitchbooks previously provided on February 26, 2019; on September 30, 2019, the Mayor's Office provided a cover page for an additional pitchbook.

DETERMINATION

"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 2018). Exemptions to disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois Univ.*, 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

²E-mail from Edie Steinberg, Assistant Attorney General, Public Access Bureau to [Anjalai] Julka [Freedom of Information Officer, City of Chicago, Office of the Mayor](September 9, 2019).

Mr. Cezary Podkul
Ms. Anjali Julka
June 30, 2020
Page 3

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).

Trade Secret, Commercial, or Financial Information

In his Request for Review, Mr. Podkul asserted that the withheld pitchbooks are not exempt because pitchbooks do not contain trade secrets. To fall within the scope of section 7(1)(g), records must contain trade secrets, or commercial, or financial information. FOIA does not define these terms. Accordingly, the terms are defined by their ordinary and commonly understood meaning. *Lake County Bd. of Review v. Prop. Tax Appeal Bd. of State of Ill.*, 119 Ill. 2d 419, 423 (1988). A "trade secret" is defined as "[a] formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors[.]" Black's Law Dictionary (11th ed. 2019), available at Westlaw BLACKS. "Commercial" means "pertaining or relating to or dealing with commerce." *New Hampshire Right to Life v. U.S. Department of Health & Human Services*, 778 F.3d 43, 49 (1st Cir. 2015).³

A pitchbook is a marketing tool used by banks and investment firms to sell its services and persuade potential clients to use its services for certain transactions.⁴ Here, the pitchbooks in question were provided by various investment banking firms to the Mayor's Office to market services to underwrite the potential sale of bonds to fund the City's pension plans. A

³See also the definition of "Commercial" in Black's Law Dictionary (11th ed. 2019) ("5. Of, relating to, or involving the ability of a product or business to make a profit."), available at Westlaw BLACKS.

⁴See *Lapin v. Goldman Sachs Group, Inc.*, 506 F. Supp. 2d 221, 230 (S.D.N.Y. 2006) (pitchbooks are used as a tool to attract and recruit potential new investment banking clients); *Minnesota Life Ins. Co. v. AXA Inv. Mgr.*, CIV. 03-4383 (DWF/SR, 2005 WL 1475336, at *5 (D. Minn. June 22, 2005)) ("Pitch books are advertising materials containing information about a particular business entity sent to prospective customers by the business entity to solicit business.");

Mr. Cezary Podkul
Ms. Anjali Julka
June 30, 2020
Page 4

review of a representative sample of the pitchbooks establishes that the pitchbooks show each firm's unique approach to selling its services. As such, the pitchbooks pertain to commerce and fall within the scope of the first prong of section 7(1)(g).

Furnished Under a Claim it is Proprietary, Privileged, or Confidential

As part of its burden of establishing that records are exempt under section 7(1)(g), a public body must demonstrate that the records were furnished under a claim that they are proprietary, privileged, or confidential. See Ill. Att'y Gen. Pub. Acc. Op. No. 18-004, issued March 6, 2018, at 5.

In its response to this office, the Mayor's Office explained that it discussed the withheld records with its Chief Financial Officer (CFO), Deputy Controller, Chief of Staff to the CFO, and the City's Independent Registered Municipal Advisor who is in charge of maintaining all pitchbooks and materials received from investment banks. The Mayor's Office explained that "[t]he longstanding relationship between the City and financial institutions proposing their services is based on the understanding that these records are proprietary. In addition, they have been marked confidential by the investment banking firms that created them."⁵ Accordingly, the Mayor's Office contended that the records were confidential, proprietary records of the financial institutions.

The Mayor's Office provided to this office for our confidential review copies of twelve pitchbooks, eight of which are labeled or otherwise denoted as confidential. The plain language of section 7(1)(g) requires records withheld pursuant to it to be "furnished under a claim that they are proprietary, privileged or confidential." See *Food Marketing Institute v. Argus Leader Media*, ___ U.S. ___, 139 S. Ct. 2356, 2363, 2366 (2019) (under federal FOIA, "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[.]'"⁶; Ill. Att'y Gen. Pub. Acc. Op. No. 18-004, at 6-7 (records not exempt under 7(1)(g) where they were not furnished to the public body with a claim that that the records were proprietary, privileged, or confidential). The Mayor's Office's confirmation that there is a longstanding understanding between the City and financial institutions that the pitchbooks are proprietary, combined with the fact that a majority of the pitchbooks provided are expressly marked or otherwise noted as being confidential, establish that the pitchbooks were furnished

⁵Letter from Shannon I Leonard, Freedom of Information Officer, City of Chicago, Office of the Mayor (February 26, 2019), at 2.

⁶The trade secret exemption in the Federal FOIA applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential[.]" 5 U.S.C. §552(b)(4) (2018).

Mr. Cezary Podkul
Ms. Anjali Julka
June 30, 2020
Page 5

under a claim that they are proprietary and confidential. Accordingly, this office concludes that the Mayor's Office has demonstrated that the pitchbooks were furnished under a claim that they are proprietary or privileged.

Competitive Harm to a Person or Business

To establish that records are exempt under section 7(1)(g), a public body must also demonstrate that disclosing the records would cause competitive harm. *Janssen, Inc.*, 2017 IL App (1st) 150870, ¶29, 78 N.E.3d at 456. To cause competitive harm, a public body must "show 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. 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)). In this matter, numerous companies were competing to underwrite bonds to fund the City's pension plans and provided pitchbooks to the Mayor's Office in an attempt to acquire that business. Accordingly, it is apparent that the financial institutions furnishing the pitchbooks actually faced competition.

In addition to demonstrating actual competition, a public body opposing disclosure must show that substantial harm to a competitive position would likely result from disclosure of the information. However a public body need not demonstrate actual competitive harm; instead, it needs to show a likelihood of substantial competitive injury. *New Hampshire Right to Life*, 778 F.3d at 50-51 (where potential future competitor could take advantage of institutional knowledge contained in a manual and letter describing the manual, manual and letter were exempt commercial information); Ill. Att'y Gen. Pub. Acc. Op. No. 19-007, issued September 23, 2019, at 11 (assertions regarding competitive harm that are largely conclusory fail to provide specific factual evidence demonstrating how substantial harm would occur).

The Mayor's Office asserted that the release of the pitchbooks would cause competitive harm, explaining:

[T]he requested records reflect these banks proprietary work regarding their ideas on the best ways to handle a particular financial situation. Should a competitor bank obtain these banks' work, they could easily undercut the proposal, or plagiarize their concepts, which would clearly cause competitive harm. The release of these proprietary pitchbooks would provide insight for

Mr. Cezary Podkul
Ms. Anjali Julka
June 30, 2020
Page 6

competitors to structure financial proposals, both to the City and other governmental clients.^[7]

In Mr. Podkul's reply he contends that the release of the records would be beneficial to the various firms, explaining:

[I]nvestment banks typically include in their pitchbooks information on previously - announced deals and engagements for which they were hired. * * * By disclosing these pitchbooks to The Wall Street Journal, the top business and financial newspaper in the U. S., the city will help burnish these firms' business credentials and obtain them publicity that would, if anything, be helpful to their business interests -- not harmful, as the city claims.^[8]

Although pitchbooks include this type of self-promotion, it is unclear how a sales pitch by an investment firm, which might have been unsuccessful, would be advantageous to that firm's reputation. Further, review of the pitchbooks reveal that disclosure of the pitchbooks would enable competing financial firms to copy the way a firm presents information, and would allow competitors to utilize unique marketing methods, ideas, design, and analysis. Therefore the Mayor's Office has sustained its burden of establishing that release of the pitchbooks would cause substantial harm to a competitive position.

Mr. Podkul asserts that because the Illinois Governor's Office of Management and Budget (Illinois Budget Office) provided him with copies of certain pitchbooks, it establishes that the pitchbooks withheld by the Mayor's Office are not exempt under section 7(1)(g) of FOIA. However, under section 7(1) of FOIA (5 ILCS 140/7(1) (West 2018)), a public body *may* elect to redact or withhold exempt information; FOIA does not require it do so. *See People v. Reed*, 177 Ill. 2d 389, 393 (1997) (legislature's use of the word "may" generally indicates a permissive or directory reading, rather than a mandatory one); *Crumpton v. Stone*, 59 F.3d 1400, 1404 (D.C. Cir. 1995) (FOIA allows an agency to withhold certain information but it does not limit an agency's discretion to disclose information). A state agency's choice to disclose certain records does not preclude the Mayor's Office from asserting an available exemption to withhold

⁷Letter from Shannon I Leonard, Freedom of Information Officer, City of Chicago, Office of the Mayor (February 26, 2019), at 2.

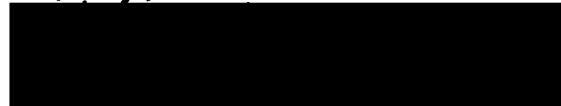
⁸E-mail from Cezary Podkul to Public Access; Steinberg, Edie [Assistant Attorney General, Public Access Bureau] (March 15, 2019).

Mr. Cezary Podkul
Ms. Anjali Julka
June 30, 2020
Page 7

similar records.

Accordingly, based on the available information, this office concludes that the Mayor's Office sustained its burden of demonstrating by clear and convincing evidence that the withheld pitchbooks are 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. Please contact me at (312) 814-5201 or at the Chicago address on the first page of this letter if you have questions.

Very truly yours,

A large black rectangular redaction box covering the signature of Edie Steinberg.

EDIE STEINBERG
Senior Assistant Attorney General
Public Access Bureau

56600 f 71g proper mun

cc: *Via electronic mail*
Ms. Tia Mathew
Supervising Assistant Corporation Counsel
Legal Information and Prosecutions Division
30 North LaSalle Street, Suite 1720
Chicago, Illinois 60602
tia.mathew@cityofchicago.org