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STATE OF ILLINOIS

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December 19, 2019

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RE: FOIA Request for Review – 2018 PAC 56759

Dear Mr. Werner and Ms. Mehta:

This determination 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 Illinois Department of Health and Family Services (Department) improperly withheld records responsive to Mr. Mathew Werner's January 8, 2019, FOIA request.

On that date, Mr. Werner submitted a FOIA request to the Department seeking four categories of records, including quarterly cost reports of managed care organizations (MCOs) contracted to manage medical services under the Illinois Medicaid program. On February 4, 2019, the Department denied that portion of the request pursuant to section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2018)). On February 4, 2019, Mr. Werner submitted a Request for Review disputing the denial of the cost reports.

On February 13, 2019, the Public Access Bureau sent a copy of the Request for Review to the Department and asked it to provide unredacted copies of the cost reports along with a detailed explanation of the factual and legal basis for the applicability of the section

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7(1)(g) exemption to those records. On February 25, 2019, the Department provided a blank template of a cost report¹ showing the categories of information documented in cost reports and a written response detailing its rationale for denying the reports under 7(1)(g); seven MCOs also submitted supporting letters or e-mails. On March 8, 2019, Mr. Werner submitted a reply.

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 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

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. *City of Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶27, 78 N.E.3d at 455 (2017).

¹The Department's FOIA officer discussed the response with an Assistant Attorney General in the Public Access Bureau, who agreed the template would suffice for this office's review.

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As a threshold matter, the Department's response to the FOIA request and to this office asserted that the cost reports were exempt under section 7(1)(g) because their disclosure would discourage vendors and similar organizations from bidding on contracts with the State. The Department cited *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 995 (1st Dist. 2007), *superseded by statute*, Freedom of Information Act (5 ILCS 140/7(1)(g) (West 2014)), as recognized in *Janssen*, 2017 IL App (1st) 150870, ¶28, 78 N.E.3d at 456, for the proposition that "*trade secret* in the context of the FOIA has been interpreted to include information that (1) would either inflict substantial competitive harm or (2) make it more difficult for the agency to induce people to submit similar information in the future." (Emphasis in original.)

Before 2010, section 7(1)(g) of FOIA exempted from disclosure "[t]rade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm." (Emphasis added.) 5 ILCS 140/7(1)(g) (West 2008). In contrast, the current version of section 7(1)(g) specifically requires that disclosure of such records "**would** cause competitive harm." (Emphasis added.) Because the General Assembly's addition of these requirements indicates its intention to restrict the scope of the 7(1)(g) exemption to only those records that, if disclosed, would result in competitive harm to a person or business, the prospective chilling effect described by the Department no longer provides a valid basis to withhold records under section 7(1)(g) of FOIA. *See Janssen*, 2017 IL App (1st) 150870, ¶28, 78 N.E.3d at 456; *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 18-004, issued March 6, 2018, at 9 ("although the City has raised the concern that requiring disclosure of the Budget would have a chilling effect on its ability to contractually require developers to submit sensitive financial information, it has not demonstrated how disclosing the budget would cause competitive harm.").

As part of its burden of establishing that records are exempt from disclosure under section 7(1)(g), a public body must first 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, at 5. Although the materials provided to this office state that the cost reports contain proprietary information, neither the Department's response to this office nor the letters submitted by the MCOs asserted that the costs reports were submitted to the Department under a claim that they are proprietary or privileged. During a conference call with an Assistant Attorney General (AAG) in the Public Access Bureau, a Department official stated that the costs are furnished with the understanding that they are to be maintained confidentially; another Department official stated that the cost reports are submitted through encrypted, password-protected e-mail, but acknowledged that they are not marked as confidential. The Department's contracts with the

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Department's contracts with the MCOs,² however, provide that MCOs' information is subject to public disclosure unless expressly marked as confidential:

Confidential Information. It is understood that each Party to this Contract, including its agents and Subcontractors, may have or gain access to Confidential Information or data owned or maintained by the other Party in the course of carrying out its responsibilities under this Contract. Contractor shall presume that all information received from the State or to which it gains access pursuant to this Contract is confidential. **Contractor's information (excluding information regarding rates paid by Contractor to its Providers and Subcontractors), unless clearly marked as confidential and exempt from disclosure under the Illinois Freedom of Information Act, shall be considered public.** No confidential data collected, maintained, or used in the course of performance of the Contract shall be disseminated except as authorized by law and with the written consent of the disclosing Party, either during the term of the Contract or thereafter, or as otherwise set forth in this Contract. (Emphasis added).³

Because the information provided to this office indicates that the cost reports are not clearly marked confidential, they were not furnished under a claim of confidentiality and are subject to public disclosure under the Department's contracts with the MCOs.

Even if the costs reports had been submitted under a claim that they were proprietary, privileged, or confidential, the Department and the MCOs have not demonstrated that disclosure of the reports would cause competitive harm. Doing so 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)).

²On June 27, 2019, the Department's FOIA officer confirmed that each of the MCOs signed contracts containing the terms in the model contract posted on the Department's website.

³State of Illinois Contract between the Department of Healthcare and Family Services and [Model Contract] for Furnishing Health Services by a Managed Care Organization, §9.1.6 (undated), available at <https://www.illinois.gov/hfs/SiteCollectionDocuments/2018MODELCONTRACTadministrationcopy.pdf> (last visited September 4, 2019).

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The Department's response to this office included several letters or e-mails in which MCOs contended, among other things, that the MCOs' cost reports contain detailed information that would provide insight into the MCOs' strategies for coordinating medical care. They contended that competitors could exploit that information to steer away their healthcare providers and underbid MCOs for future contracts, and asserted that health care providers could use it to demand higher reimbursements in negotiations. One MCO contended that "release of the redacted information would allow a [MCO] competitor to calculate [the MCO's] MLRs [medical loss ratios] by cohorts by combining the redacted information with other blinded information that is currently publicly available, which could be used to gain insight into [the MCO's] financial terms, rates, and arrangements."⁴ The Department's response and several of the MCOs relied on specific contractual language describing the expansive information that MCOs are required to submit concerning "MCO eligibility, revenue, medical expenses, medical expense adjustments, estimated unpaid claim liability, quality improvement expenses, operating expenses, and MCO assessments and taxes."⁵ In his reply, Mr. Werner asserted that the MCOs' competitive harm arguments were based on speculation rather than facts, and contended that the "cost reports are not rates. * * * There is no plausible way I could use this information to tell what each plan pays a specific hospital or other provider type. None. The MCOs do not offer any broad or detailed explanation [of] how this could occur."⁶

Based on this office's confidential review, the information contained in the cost reports is much more limited than the information described in MCOs' contracts. Although it is undisputed that the MCOs face competition in the healthcare services industry, the cost reports themselves do not reveal any strategic information concerning the delivery of care. They do not reflect the payment or denial of specific claims, or rates for specific treatments. Instead, the cost reports contain aggregate data concerning broad categories of medical services. The conclusory assertion that information in the cost reports could be combined with other publicly-available information to gain insight into a MCO's financial terms, rates, and arrangements is unsupported by specific factual and evidentiary material. The Department and the MCOs have not demonstrated how disclosure of the costs reports could be exploited by competitors to cause the type of harm that section 7(1)(g) is designed to prevent.

⁴Letter from Jennifer Pipersburgh, Associate General Counsel, Legal Division, Blue Cross and Blue Shield of Illinois, to Sherri K. Sadala, Compliance Manager, Illinois Department of Healthcare and Family Services, Bureau of Managed Care (January 31, 2019), at 2.

⁵State of Illinois Contract between the Department of Healthcare and Family Services and [Model Contract] for Furnishing Health Services by a Managed Care Organization, §7.11.1 (undated), available at <https://www.illinois.gov/hfs/SiteCollectionDocuments/2018MODELCONTRACTadministrationcopy.pdf> (last visited September 4, 2019).

⁶Letter from Matthew Werner, Werner Consulting, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (March 8, 2019), at 3.

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Further, Article 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." Section 2.5 of FOIA (5 ILCS 140/2.5 (West 2018)) 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." During the conference call with the AAG, Department officials explained that the reports are used to assess whether MCOs have provided sufficient data for the Department's monitoring of claims and assessments of MCO performance; MCOs that fail to provide sufficient data can face a fine of \$100,000 or even the suspension of beneficiaries being assigned to their health plans. The data also is considered "in the development of actuarially sound capitation rates (encounter data may also be used)."⁷ "Capitation" is "[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* (11th ed. 2019), available at Westlaw BLACKS. Thus, the cost reports are considered in determining how much MCOs are paid under their contracts, and cost reports with insufficient data provide a basis for levying hefty fines against MCOs. Because such records directly and unequivocally relate to the receipt and use of public funds, they are subject to disclosure under section 2.5 of FOIA.

Two of the MCOs' letters contained brief references to sections 7(1)(t) and 7(1)(u) of FOIA (5 ILCS 140/7(1)(t), (1)(u) (West 2018)), but did not explain how those exemptions apply to the cost reports. Section 7(1)(t) exempts from disclosure "[i]nformation contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of a public body responsible for the regulation or supervision of financial institutions or insurance companies, unless disclosure is otherwise required by State law." Even if the cost reports could be construed as falling within the scope of the first clause of this exemption, the second clause renders the exemption inapplicable because disclosure of the cost reports is required by section 2.5 of FOIA. Section 7(1)(u) exempts from disclosure "[i]nformation that would disclose or might lead to the disclosure of secret or confidential information, codes, algorithms, programs, or private keys intended to be used to create electronic or digital signatures under the Electronic Commerce Security Act." There is no indication that the cost reports have any connection to the creation of electronic or digital signatures.

In accordance with the conclusions expressed in this determination, this office requests that the Department provide Mr. Werner with copies of the cost reports. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a

⁷E-mail from Kiran [Mehta] to [Steven] Silverman (June 27, 2019).

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binding opinion. This file is closed. If you have any questions, please contact me at (312) 814-6756.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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