



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

December 4, 2018

Via electronic mail

Mr. Jason T. Lundy
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Via electronic mail

Mr. William Bryant
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RE: FOIA Request for Review – 2018 PAC 52452; IDPH FOIA # 1804314122

Dear Mr. Lundy and Mr. Bryant:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons discussed below, this office concludes that the Illinois Department of Public Health (Department) improperly redacted portions of records in response to Mr. Jason Lundy's November 6, 2017, FOIA request.

On that date, Mr. Lundy, on behalf of Golfview Development Center, submitted a 10-part FOIA request to the Department seeking records relating to the Department's oversight of Intermediate Care Facilities for the Developmentally Disabled. On November 14, 2017, the Department responded by asserting that it did not possess records responsive to the request, and on January 5, 2018, Mr. Lundy submitted a Request for Review to this office contesting the Department's response to his request.¹ After this office forwarded Mr. Lundy's Request for Review to the Department, on January 29, 2018, the Department notified Mr. Lundy that it had

¹That Request for Review was assigned the file number 2017 PAC 51123.

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conducted an additional search and identified a responsive record; the Department furnished that record to Mr. Lundy with redactions pursuant to section 7(1)(i) of FOIA (5 ILCS 140/7(1)(i) (West 2017 Supp.)). On March 30, 2018, Mr. Lundy submitted the above-referenced Request for Review contesting the redactions.

On April 4, 2018, this office sent a copy of the Request for Review to the Department and asked it to provide an unredacted copy of the responsive records for our confidential review, together with a detailed explanation of its legal and factual bases for withholding it. On April 13, 2018, the Department provided this office with those records and a written response. On April 25, 2018, this office received Mr. Lundy's 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 2016). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2016)) further provides: "Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2017 Supp.)) are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

The record at issue is a seven-page document entitled "Staff Intensity Scale of Maladaptive Behaviors." Other than the fact that the record furnished to Mr. Lundy uses roman numerals in its headers, the unredacted parts of the form are identical to the Staff Intensity Scale found at Table B of Section 144 of Title 89 of the Illinois Administrative Code (89 Ill. Adm. Code §144. Table B (last amended at 19 Ill. Reg. 2890, effective February 22, 1995)). As explained in Table A of that same section, the Staff Intensity Scale was designed "to describe behavior problems which are displayed by children and adults who have developmental disabilities." 89 Ill. Adm. Code §144. Table A (last amended at 19 Ill. Reg. 2890, effective February 22, 1995). The scale measures 24 categories of behaviors, and between one and four specific behaviors are listed within each category. Table A further explains that the scale can be used to rate an individual with developmental disabilities by recording the frequency of the observed behavior so as to inform decision making about allocation of staffing resources. 89 Ill. Adm. Code §144. Table A(a)(1)(4) (last amended at 19 Ill. Reg. 2890, effective February 22, 1995). In the version furnished to Mr. Lundy, the Department redacted information that would be displayed in the section where the frequencies of each behavior is recorded. (The version of the scale available in the Administrative Code contains blank lines where the frequencies of each behavior would be recorded.) In its response to the Request for Review, the Department asserted

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that this record was responsive to the part of the FOIA request seeking scales or tools used by surveyor during an Inspection of Care survey or to prepare the Inspection of Care summary in relation to the determination of the level of specialized care required by residents of a facility and/or the reimbursement rate.

The Department asserted that the information redacted from the scale consists of scoring formulas used to complete the Staff Intensity Scale. The Department further described this information as the

numbers on the Form used internally by the Department to evaluate each maladaptive behavior of an individual client. Based upon the frequency of the behavior, a "score" is calculated which is used, in part, to formulate the reimbursement rate for an individual client that the facility receives and is intended to reimburse the facility for the additional care requirements due to the maladaptive behaviors.^[2]

For each specific behavior, if a client engages in that behavior with the frequency listed on the scale, the client's "score" is increased by the value assigned by the Department for that behavior and frequency level.

The Department redacted the scores it assigns to each behavior and frequency level pursuant to section 7(1)(i) of FOIA, which exempts from disclosure:

Valuable formulae, computer geographic systems, designs, drawings and research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss. The exemption for "computer geographic systems" provided in this paragraph (i) does not extend to requests made by news media as defined in Section 2 of this Act when the requested information is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public.

The Department's response to this office asserted that the scores redacted from the record are a "valuable formulae" because:

²Letter from William Bryant, Acting Freedom of Information Officer, Illinois Department of Public Health, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 13, 2018), at 2-3.

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The scoring information was developed through the expertise of the Department, specifically staff knowledgeable of the care of developmentally disabled clients, including individuals with maladaptive behaviors, and is based upon their technical knowledge of treatment requirements intended to reduce maladaptive behaviors. Based upon this knowledge and experience, the Department has developed a scoring formula to approximate the levels of care and treatment required to reduce maladaptive behaviors and utilizes this numerical formula to represent the additional burdens placed upon a facility to provide the required level of care to individuals with maladaptive behaviors and reimburse the facility accordingly. * * * [T]he numbers associated with each frequency of maladaptive behavior are not random or simplistic, i.e. 1, 2, 3, 4, rather they reflect a rational evaluation of the severity of the behaviors which reflect a higher number for the more frequent and potentially harmful behaviors.^[3]

The phrase "valuable formulae" is not defined in FOIA. Therefore, we look to the principles of statutory construction. When construing a statute, the primary purpose is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415, 844 N.E.2d 1, 14 (2006). "The best evidence of legislative intent is the language used in the statute itself, which must be given its plain, ordinary and popularly understood meaning." *Nelson v. Kendall County*, 2014 IL 116303, ¶23, 10 N.E.3d 893, 988 (2014). When a term is undefined in a statute, it is entirely appropriate to use a dictionary to help determine its meaning. *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 363, 904 N.E.2d 18, 26 (2009). "[W]here two words or phrases of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations, and give color and expression to each other." *Environmental Protection Agency v. Pollution Control Board*, 186 Ill. App. 3d 995, 999 (5th Dist. 1989).

The dictionary definition of "formula" is "a general fact, rule, or principle expressed in usually mathematical symbols" and "a group of symbols (such as letters and numbers) associated to express facts or data (such as the number and kinds of teeth in the jaw)

³Letter from William Bryant, Acting Freedom of Information Officer, Illinois Department of Public Health, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, (April 13, 2018), at 2.

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concisely[.]"⁴ In Binding Opinion 14-016, the Attorney General determined that the phrase "valuable formulae" should be "read in context with the rest of the exemption for 'computer geographic systems, designs, drawings and research data,'" and that in doing so, it is clear "that the General Assembly intended 'valuable formulae' to mean something technical in nature, similar to 'computer geographic systems' or 'research data.'" Ill. Att'y Gen. Pub. Acc. Op. No. 14-016, issued December 2, 2014, at 9.

Although the scores the Department has assigned to each behavior are meant to represent the additional burden of caring for a client exhibiting those behaviors, the scores themselves do not meet the definition of "formula" because they merely set forth assigned values rather than the rule or principle used to calculate those values. Even accepting the Department's assertion that the assigned scores are "technical in nature" because they are based on experience and technical knowledge, the scores are still not "research data." "Research" is defined as: "Serious study of a subject with the purpose of acquiring more knowledge, discovering new facts, or testing new ideas[]" or "[t]he activity of finding information that one needs to answer a question or solve a problem." Black's Law Dictionary (14th ed. 2014), *available at* Westlaw BLACKS. Although the scores may be derived from an analysis of what could arguably—based on the Department's explanation—be considered observational and experiential data compiled during "research," the scores themselves are not "research data."

Furthermore, the Department explained that the scores for each client are used, in part, to "formulate the reimbursement rate for an individual client that the facility receives and is intended to reimburse the facility for the additional care requirements due to the maladaptive behaviors."⁵ However, the information redacted from the record does not include any formula that incorporates the client's score with other factors to calculate the reimbursement rate. Accordingly, based on this office's review of the record itself and the explanation provided by the Department, the scores redacted from the Staff Intensity Scale do not constitute "valuable formulae," as that phrase is used in section 7(1)(i) of FOIA.

Even if the scores could be considered valuable formulae, they are only exempt from disclosure under section 7(1)(i) if the Department demonstrates by clear and convincing evidence that "disclosure could reasonably be expected to produce private gain or public loss." 5 ILCS 140/7(1)(i) (West 2017 Supp.). In its response to this office, the Department asserted:

⁴See *Formula*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/formula> (last visited October 2, 2018).

⁵Letter from William Bryant, Acting Freedom of Information Officer, Illinois Department of Public Health, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 1-2 (April 13, 2018).

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The release of the scoring information is reasonably expected to provide a private gain to facilities in possession of the information by potentially permitting the facility to reduce their costs by not providing appropriate care to individuals exhibiting maladaptive behaviors which do not increase the reimbursement rate. * * * An unscrupulous facility may not direct the appropriate resources to treat a zero or low scoring behavior knowing that their treatment will not be reimbursed despite the treatment still being a requirement.

Alternatively, release of the scoring information may provide an incentive for unscrupulous facilities to overstate the occurrences of higher scoring behaviors in an effort to receive a higher rate of reimbursement. * * * [That] result can occur by a facility instructing staff to more intensely observe clients for the behaviors identified as high scoring or creatively charting incidents to fit the descriptions on the Form corresponding to high scoring behaviors.^[6]

The Department further argued that this potential conduct by facilities could result in "public loss" due to inappropriately high reimbursement rates, or facilities refusing to accept clients who exhibit behaviors that do not score highly on the scale.

In reply, Mr. Lundy argues that Department cannot rely on the assumption that a facility caring for these clients "would ignore its regulatory and statutory obligations, jeopardize its licensure and risk the imposition of remedies for the sole basis of receiving a higher reimbursement rate," and presume that a facility would be able to estimate a potential client's "score" prior to beginning to care for a client, such that it could accurately reject those clients with lower scores.⁷

The Department has not met its burden of demonstrating that "disclosure could *reasonably* be expected to produce private gain or public loss." The Department has not demonstrated that the scores have inherent value to someone who obtains them, unlike a

⁶Letter from William Bryant, Acting Freedom of Information Officer, Illinois Department of Public Health, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 2 (April 13, 2018).

⁷Letter from Jason Lundy, Polsinelli, to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 2 (April 25, 2018).

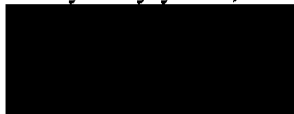
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confidential formula for a pharmaceutical or food additive. Instead, it is not only the scores, but also the willingness of an "unscrupulous" facility to misuse that information to its financial advantage, that could result in private gain or public loss. The Illinois Supreme Court has stated that the exemptions from disclosure are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997). The Department's argument is too speculative to satisfy its burden to demonstrate reasonable expectation of private gain or public loss.

Accordingly, the Department did not sustain its burden of demonstrating by clear and convincing evidence that the withheld scores are exempt from disclosure pursuant to section 7(1)(i) of FOIA. This office requests that the Department provide Mr. Lundy with an unredacted copy of the responsive Staff Intensity Scale.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, you may contact me at (312) 814-6437 or lbartelt@atg.state.il.us. This letter serves to close this matter.

Very truly yours,

A solid black rectangular redaction box covering the signature of Leah Bartelt.

LEAH BARTELT
Assistant Attorney General
Public Access Bureau

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