



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 1, 2017

Via electronic mail

Mr. Barry B. Burr
Editorial Page Editor
Pensions & Investments
150 North Michigan Avenue, Floor 19
Chicago, Illinois 60618
bburr@pionline.com

Via electronic mail

Ms. Tondalaya Lloyd
Investment Compliance Officer
Illinois State Board of Investment
180 North LaSalle Street, Suite 2015
Chicago, Illinois 60601
tondalaya.lloyd@illinois.gov

RE: FOIA Request for Review – 2016 PAC 44377

Dear Mr. Burr and Ms. Lloyd:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2014)). For the reasons explained below, the Public Access Bureau concludes that the Illinois State Board of Investment (Board) improperly withheld certain information responsive to the request made by Mr. Barry Burr on behalf of *Pensions & Investments*.

On September 19, 2016, Mr. Burr submitted a FOIA request to the Board seeking nine records or categories of records pertaining to the Board's real estate and other investments. On September 23, 2016, the Board partially denied Mr. Burr's request. In his Request for Review, Mr. Burr sought review of three of the Board's responses. First, he challenged the Board's denial of his second request, for "[d]etails about the North Dakota housing investing that the board discussed at last Thursday's morning [*sic*]?" In which Clarion fund is that North Dakota

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 2

investment?"¹ The Board responded that it is not required to answer questions posed by a FOIA requester and asserted that it did not possess any responsive documents. The Board noted that Mr. Burr might find relevant information in the September 15, 2016, Investment Policy Committee meeting minutes, once they are ratified and made public. Second, regarding his fourth request, Mr. Burr sought review of the redactions to the Courtland Partners, LTD. report under section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016). Third, regarding his ninth request, Mr. Burr challenged the Board's decision to withhold the KPMG audit report pursuant to section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016).

On October 14, 2016, the Public Access Bureau sent a copy of the Request for Review to the Board and asked it to provide a description of the measures it took to search for records responsive to Mr. Burr's second request, including the specific recordkeeping systems that were searched and the individuals who were consulted. Further, we asked the Board to provide the Public Access Bureau with un-redacted copies of records responsive to Mr. Burr's fourth and ninth requests and to submit a detailed explanation of the factual and legal bases for the applicability of the section 7(1)(g) and 7(1)(m) exemptions to the information that was withheld.

On October 24, 2016, the Board furnished a written response and an un-redacted copy of the Courtland Partners, LTD. report. On December 1, 2016, the Board provided an un-redacted copy of the KPMG audit report. On December 23, 2016, the Board provided a supplemental response to the Public Access Bureau. Mr. Burr did not reply.

DETERMINATION

Second Request: North Dakota Investment

Section 1.2 of FOIA (5 ILCS 140/1.2 (West 2014)) provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." However, "[a] request to inspect or copy must reasonably identify a public record[.]" *Chicago Tribune Co. v. Department of Financial and Professional Regulation*, 2014 IL App (4th) 130427, ¶33, 8 N.E.3d 11, 19 (2014). A FOIA request "reasonably describes records if 'the agency is able to determine precisely what records are being requested.'" *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982)). Public bodies are not required to search beyond the four corners of a FOIA request, nor are they required to divine the requester's intent. *Manna v. United States Department of Justice*, 106 F. Supp. 3d 16, 19 (D.D.C. 2015).

¹E-mail from Barry Burr, Editorial Page Editor, *Pensions & Investments*, to William Atwood (September 19, 2016).

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 3

The first part of Mr. Burr's second request sought "[d]etails about the North Dakota housing investing that the board discussed at last Thursday's morning [*sic*]." Although not framed as a question, seeking "details" about a topic does not reasonably identify a public record. Not only does the request fail to make clear the records that are being requested, the request requires the Board to interpret its records and determine what information could be considered a "detail" about the investment, a subjective exercise that is beyond the requirements in FOIA.

The second part of Mr. Burr's second request asked "[i]n which Clarion fund is that North Dakota investment?" This request is plainly a question rather than a request for a record. A public body is not required to answer questions in response to a FOIA request (*Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (4th Dist. 1989)); nor is a public body required to create new records in response to a FOIA request. *Krohn v. Department of Justice*, 628 F.2d 195, 198 (D.C. Cir. 1980).

Accordingly, this office finds that the Board's response to Mr. Burr's second request did not violate FOIA. Mr. Burr may wish to submit a revised FOIA request seeking specific records maintained by the Board from which he could obtain the details about the North Dakota housing investments that he seeks.

Fourth Request: Courtland Partners, LTD. Report

In response to Mr. Burr's fourth request, the Board redacted information from ten pages of the Courtland Partners, LTD. report (Courtland report) prepared by Courtland Partners, LTD., (Courtland) as trade secrets pursuant to section 7(1)(g) of FOIA. The Board also argued in its response to the Public Access Bureau that information on page four is exempt pursuant to both section 7(1)(g) and section 7(1)(r) (5 ILCS 140/7(1)(r) (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016) of FOIA.

In its response to the Public Access Bureau, the Board indicated that it is willing to provide to Mr. Burr the information on pages two, four, ten, and 11 of the Courtland report's Executive Summary. Accordingly, the Public Access Bureau will not address whether those pages were properly withheld in the Board's response to Mr. Burr.

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 4

Section 7(1)(g)

Section 7(1)(g) exempts from disclosure:

(g) 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 information included under this exemption includes all trade secrets and commercial or financial information obtained by a public body, including a public pension fund, from a private equity fund or a privately held company within the investment portfolio of a private equity fund as a result of either investing or evaluating a potential investment of public funds in a private equity fund. The exemption contained in this item does not apply to the aggregate financial performance information of a private equity fund, nor to the identity of the fund's managers or general partners. The exemption contained in this item does not apply to the identity of a privately held company within the investment portfolio of a private equity fund, unless the disclosure of the identity of a privately held company may cause competitive harm.

Trade secrets and commercial or financial information in the context of FOIA is "confidential only if disclosure would either inflict substantial competitive harm on the supplier of the information or impair the recipient agency's ability to induce people to submit similar information to it in the future." *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1013 (1st Dist. 1994); *see also BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 995 (1st Dist. 2007). "To show substantial competitive harm, the agency 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*, 266 Ill. App. 3d at 1013 (quoting *Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988)). "Parties opposing disclosure need not demonstrate actual competitive harm; instead, they need only show actual competition and a likelihood of substantial competitive injury in order to 'bring [that] commercial information within the realm of confidentiality.'" *New Hampshire Right to Life v. United States Department of Health & Human Services*, 778 F.3d 43, 50 (1st Cir. 2015) (quoting

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 5

Public Citizen Health Research Group v. Food & Drug Administration, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

In discussing the potential competitive harm that would result from disclosure of the redacted sections of the Courtland report, the Board addressed the competitive interests of (1) Courtland, (2) the funds mentioned in the report, and (3) itself. Courtland is a consultant that the Board pays for investment advice, which includes researching funds and recommending funds to the Board for consideration of future investment. The Board paid for the Courtland report, which contains information provided by Courtland as well as information Courtland obtained from private equity funds. The Board confirmed in an e-mail to an Assistant Attorney General in the Public Access Bureau that the Courtland report was presented in full at the September 15, 2016, Investment Policy Committee meeting. The publically available minutes of the meeting indicate that a representative from Courtland led the discussion of the report.² The meeting was open to the public and in addition to the Board's Investment Policy Committee members, Board members, and staff, members of the public were present, including Mr. Burr and a representative from *Financial News*.

The Board asserted that Courtland could be harmed by disclosure of the information on page five of the report. The Board has not argued directly that the Courtland report was furnished under a claim that it contained proprietary, privileged or confidential information, but the Board contended that information provided by Courtland is proprietary.

In *Cooper*, the Illinois Appellate Court considered whether a list of vendors of lottery tickets and a "media plan developed by Bozell Inc. (the 'Bozell Plan') to advertise and promote the Illinois State Lottery" were exempt from disclosure pursuant to section 7(1)(g). *Cooper*, 266 Ill. App. 3d at 1010. The Illinois Department of the Lottery contended that disclosure of the Bozell Plan would cause competitive harm to Bozell. *Cooper*, 266 Ill. App. 3d at 1013. The court, however, concluded that "to the extent that [the Department of the Lottery] is reluctant to release the disputed material on Bozell's behalf rather than its own behalf, the exemption on which it relies is inapplicable. * * * [T]he Bozell Plan, commissioned and paid for by [the Department of the Lottery], is not the type of confidential business information that section 7(1)(g) exempts." *Cooper*, 266 Ill. App. 3d at 1013. The court further explained that the Department:

assumes that 'Bozell has a proprietary interest in the ideas and recommendations it developed,' when, in fact, if anyone has a 'proprietary' interest in the Bozell plan, it is the [Department of the Lottery] who commissioned and paid for the plan. Unlike the usual 7(1)(g) case, where a third party's trade secrets are submitted in the course of bidding on a government project or in response to

²Investment Policy Committee, Meeting, September 15, 2016, Minutes 3.

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 6

an agency's investigation, the 'business strategies and information'
* * * are those of [the Department of the Lottery] and not Bozell.
Cooper, 266 Ill. App. 3d at 1014.

Courtland created the Courtland report at the request of the Board. Thus, the report is proprietary information of the Board rather than of Courtland and the information on page five may not be withheld on the basis of Courtland's interests pursuant to section 7(1)(g) of FOIA. *See Cooper*, 266 Ill. App. 3d at 1013-14. Moreover, the Board's arguments regarding any potential harm to Courtland are conclusory, stating only that "Courtland faces competition for its consulting services, which include researching funds and recommending such funds to [the Board] for consideration of future investment" and that the pipeline of investments that Courtland is monitoring is "proprietary and disclosure would cause competitive harm to" Courtland and "would impair its competitive position."³ Not only is the competitive harm argument unsupported by facts, it is further diminished by the Board's confirmation that the report was presented in full at the September 15, 2016, meeting. A review of the publically available minutes from the meeting confirms that a representative from Courtland presented the report during an open meeting. *See General Electric Co. v. United States Nuclear Regulatory Commission*, 750 F.2d 1394, 1403 (7th Cir. 1984) (noting that the fact that some of the information at issue was revealed during congressional hearings undercuts a finding that the third party could be harmed severely by the record's further disclosure). Were there a serious concern about competitive harm resulting from disclosure of the information on page five, Courtland likely would have taken precautions before sharing that information with members of the press and the general public.

The Board also contended that its own competitive interests could be harmed by disclosure of information on pages three, four, and five, and pages eight, 12, and 13 of the Executive Summary. Regarding the redactions on page three of the Courtland report, the Board explained that the redacted information included "reference to specific pending investments as well as future investment plans which are confidential and its disclosure would cause competitive harm to [the Board]."⁴ A comparison of the disclosures on the Board's website to the redacted information reveals that the investments that were withheld on page three are no longer pending.⁵ The Board confirmed for an Assistant Attorney General in the Public Access Bureau that once the investments are made, the redacted information is no longer confidential.

³Letter from Chris Brannan, General Counsel & Chief Compliance Officer, to Laura S. Harter, Assistant Attorney General, at 3 (October 24, 2016).

⁴Letter from Chris Brannan, General Counsel & Chief Compliance Officer, to Laura S. Harter, Assistant Attorney General, at 3 (October 24, 2016).

⁵*See* Illinois State Board of Investment, Reporting and Disclosures, <https://www.illinois.gov/isbi/Pages/Reporting.aspx> (last visited February 1, 2017).

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 7

Accordingly, the Board no longer has a valid claim of confidentiality over the information on page three and should release the information to Mr. Burr.

With respect to pages four and five, and pages eight, 12, and 13 of the Executive Summary, an analysis of a public body's interests in the trade secret context begins with a determination of whether disclosure of the information would "make it more difficult for the agency to induce people to submit similar information in the future." *BlueStar Energy Services, Inc.*, 374 Ill. App. 3d at 995; *see also Cooper*, 266 Ill. App. 3d at 1013. Nowhere in its response to the Public Access Bureau has the Board argued that disclosure of the information in the Courtland report would make it difficult for it to obtain similar consultant reports in the future. In any event, such an argument would strain credulity, as the report was disclosed by Courtland itself at the open meeting of the Board's Investment Policy Committee, suggesting that Courtland had no objection to the disclosure of the information in that setting. Given that the disclosure was made to members of the public, including members of the press, it is reasonable to expect that the disclosure at an open meeting could lead to a wider dissemination of the information in the report.

The Board also repeatedly asserted that it would suffer competitive harm from disclosure of the redacted information in the Courtland report. In addition to the two-part test for trade secret confidentiality articulated by the courts in *Cooper* and *BlueStar Energy Services*, that in order to be exempt, disclosure would have to (1) "either inflict substantial competitive harm on the supplier of the information or [(2)] impair the recipient agency's ability to induce people to submit similar information to it in the future" (*Cooper*, 266 Ill. App. 3d at 1013), some courts have recognized that there might be other governmental interests protected by the trade secret exemption to FOIA. *See Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992); *9 to 5 Organization v. Board of Governors of the Federal Reserve*, 721 F.2d 1 (1st Cir. 1983). A public body's claim that it would face competitive harm from disclosure of a trade secret is an interest that courts may consider. *See News Group Boston, Inc. v. National Railroad Passenger Corp.*, 799 F. Supp. 1264, 1268-69 (D. Mass. 1992) (analyzing Amtrak's claim that its interest in its ability to compete in the marketplace would be harmed by disclosure of a certain record).

Like the standard for establishing competitive harm to the suppliers of trade secrets, to meet its burden under section 7(1)(g), the Board must demonstrate by specific facts and evidence that it faces actual competition and that disclosure would result in a likelihood of substantial competitive harm. *See Cooper*, 266 Ill. App. 3d at 1013; *New Hampshire Right to Life*, 778 F.3d at 50; *News Group Boston, Inc.*, 799 F. Supp. at 1268-69. For the redacted information regarding pending real estate sales on page four, the Board contended that "[p]ublic disclosure of future specific disposition plans would harm [the Board's] ability to retain

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 8

maximum negotiating power and control over the sale process."⁶ Regarding the withheld information on page five, which included details about potential investments, the Board argued that it "seeks to make the best investments in funds that are frequently capped and oversubscribed. Information made public regarding potential [Board] investments would hurt [the Board's] ability to invest in these capped funds[.]"⁷ For the fund information on pages eight, 12, and 13 of the Executive Summary, the Board asserted that the redacted information "reflect[s] current investment strategies paid for by the Board and are therefore proprietary trade secrets that could cause competitive harm to [the Board.]"⁸ These explanations are conclusory and are unsupported by facts or evidence that demonstrate how disclosure of the information would result in substantial harm to the Board. In particular, the Board failed to explain what competition it faces for its real estate dispositions or its investments. Further, its contentions regarding competitive harm are vague and do not detail how harm would arise or how substantial the harm would be. Moreover, the Board did not address how its likelihood of substantial injury is affected by the fact that it previously disclosed the information during the Investment Policy Committee meeting. As noted above, it seems likely that any claim of harm would be diminished by the partial public disclosure. In sum, the Board has failed to demonstrate by clear and convincing evidence that the redacted information on pages four and five, and pages eight, 12, and 13 of the Executive Summary should be withheld on the basis of the potential for competitive harm to its own interests.

The remaining information in the Courtland report that the Board claims is exempt under 7(1)(g) pertains to specific fund information on pages eight, 12, and 13 of the Executive Summary. In its supplemental response to this office, the Board explained that the source of the information on these pages was the fund managers, who then provided the information to Courtland. Page eight of the Executive Summary contains information on the proportions of public equity, private equity, public debt, and private debt within each of the funds in the Board's portfolio. In its response, the Board indicated that it is willing to disclose the names of the funds, but it asserted that the remaining information could cause competitive harm to the funds. The information on page eight of the Executive Summary falls within the plain language of section 7(1)(g) because it constitutes "financial information obtained by a public body * * * from a private equity fund[.]" albeit indirectly, as a result of the public body investing in the funds. *See* Ill. Att'y Gen. Req. Rev. Ltr. 9147, issued May 1, 2012, at 6 (finding, without consideration of competitive harm to the equity funds at issue, that fair market value back-up information from fund managers falls within the 7(1)(g) exemption). Accordingly, the

⁶Letter from Chris Brannan, General Counsel & Chief Compliance Officer, to Laura S. Harter, Assistant Attorney General, at 3 (October 24, 2016).

⁷Letter from Chris Brannan, General Counsel & Chief Compliance Officer, to Laura S. Harter, Assistant Attorney General, at 3 (October 24, 2016).

⁸Letter from Chris Brannan, General Counsel & Chief Compliance Officer, to Laura S. Harter, Assistant Attorney General, at 4 (October 24, 2016).

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 9

Public Access Bureau concludes that the Board did not violate FOIA by withholding the equity and debt information on page eight of the Executive Summary.

For pages 12 and 13 of the Executive Summary, the Board indicated that it is willing to provide all information except for the leverage ratios. However, the Board previously disclosed the leverage ratios in its response to Mr. Burr, redacting only the fund names. As the Board is no longer asserting that section 7(1)(g) exempts from disclosure the names of the funds and because it has previously disclosed the leverage ratios, the Board should release to Mr. Burr pages 12 and 13 in full.

Section 7(1)(r)

In its response to the Public Access Bureau, the Board asserted for the first time that the real estate investment information on page four of the Courtland report is exempt under 7(1)(r) as information regarding a real estate sale. Section 7(1)(r) of FOIA exempts from inspection and copying "records, documents, and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated. * * * The records, documents and information relating to a real estate sale shall be exempt until a sale is consummated."

In its supplemental response, the Board clarified that only two of the planned dispositions listed on page four were still pending. The names of the assets qualify as "information" relating to a real estate sale and therefore fall within the scope of section 7(1)(r). However, as described above, the Courtland report was shared in full at the September 15, 2016, meeting of the Board's Investment Policy Committee.

A public body may waive the right to withhold records under FOIA if it has voluntarily disclosed the same records on a previous occasion. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 412-13 (1997). This "waiver rule must not be mechanically applied whenever there is disclosure of information but, rather, requires consideration of the circumstances related to the disclosure, including the purpose and extent of the disclosure as well as the confidentiality surrounding the disclosure." *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 202 (1st Dist. 2004). In *Chicago Alliance*, the court concluded that the City did not waive the right to redact the names and addresses of people who attended community meetings to promote neighborhood safety because it had disclosed that information on a confidential basis to a public policy research organization monitoring and evaluating the City's alternative policing strategies. *Chicago Alliance for Neighborhood Safety*, 348 Ill. App. 3d at 203. The court emphasized that the disclosure "was made for consultation purposes and limited to a single entity which treated the names and addresses as confidential." *Chicago Alliance for Neighborhood Safety*, 348 Ill. App. 3d at 202.

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 10

In contrast, the information on page four of the Courtland Report was disclosed during an open meeting in the presence of members of the public and the media, including the requester. The Board had no reasonable expectation that information disclosed in such a public setting would be maintained confidentially or that its dissemination would be limited in any manner. Accordingly, the Board waived the assertion that the information is exempt from disclosure pursuant to section 7(1)(r) of FOIA.

Ninth Request: KPMG Audit Report

The Board withheld in full the document responsive to Mr. Burr's ninth request, referred to in the request as the "KPMG audit report," pursuant to section 7(1)(m), which exempts from disclosure:

Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and * * * materials prepared or compiled with respect to *internal audits* of public bodies. (Emphasis added.)

The Board contended that the report was created by the Board's auditor specifically for and with respect to the Board's upcoming internal audit, and was therefore exempt under section 7(1)(m). However, the report in question was prepared for an audit to be conducted by KPMG, a private accounting firm. The Public Access Bureau has previously determined that audits prepared by private firms do not constitute materials prepared or compiled with respect to internal audits of public bodies. *See* Ill Att'y Gen. Req. Rev. Ltr. 17844, issued April 11, 2012 ("[a]lthough th[e] portion of the audit report [at issue] may pertain to 'internal control,' that does not mean that it is an internal audit."); Ill. Att'y Gen. Req. Rev. Ltr. 14434, issued September 6, 2011 (distinguishing an internal audit as one prepared by an organization's personnel from an independent audit, which is prepared by an outside person or firm). Accordingly, we conclude that that the Board has not sustained its burden of demonstrating by clear and convincing evidence that the record in question is exempt from disclosure under section 7(1)(m).

In accordance with the conclusions expressed in this letter, this office requests that the Board provide Mr. Burr with copies of the records determined not to be exempt from disclosure. The records to be disclosed include the Courtland report, with redactions only to the debt and equity information on page eight of the Executive Summary, in response to Mr. Burr's fourth request, and the KPMG audit report in response to Mr. Burr's ninth request.

Mr. Barry Burr
Ms. Tondalaya Lloyd
February 1, 2017
Page 11

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at the Springfield address on the first page of this letter.

Very truly yours,

A solid black rectangular box redacting the signature of Laura S. Harter.

LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

44377 f 7(1)(g) improper proper 7(1)(r) improper 7(1)(m) improper sa