



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

August 4, 2020

Via electronic mail
Mr. John Kraft

Via electronic mail
Mr. Troy A. Fodor
Vice President & General Counsel
Illinois Municipal Electric Agency
3400 Conifer Drive
Springfield, Illinois 62711
tfodor@imea.org

RE: FOIA Request for Review – 2014 PAC 31238

Dear Mr. Kraft and Mr. Fodor:

This determination is issued to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)).¹

On September 15, 2014, Mr. John Kraft submitted the above-captioned Request for Review challenging the response by the Illinois Municipal Electric Agency (Agency) to his July 30, 2014, FOIA request seeking, in pertinent part, copies of the requests for capitol from Prairie State for the past twelve years. The Agency provided responsive records, but redacted/withheld the "private and financial information" of the non-public entities and information pertaining to the operating costs of its Prairie State plants pursuant to sections 7(1)(a), 7(1)(c), 7(1)(g), and 7(1)(i) of FOIA (5 ILCS 140/7(1)(a), (1)(c), (1)(g), (1)(i) (West

¹In issuing this letter, we recognize that it is coming long after the FOIA dispute took place. Because it raises a legal question that may reoccur, however, this letter is intended to provide guidance to the requester and public body.

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2013 Supp.)).² Mr. Kraft disputed the partial denial, contending that records relating to the use of public funds do not constitute "trade secrets" for purposes of FOIA.

In its response to this office, the Agency stated that it is a municipal power agency created pursuant to the Illinois Joint Municipal Electric Power Act (65 ILCS 5/11-119.1-1 *et seq.* (West 2014)) that "purchases and sells electric power and energy and provides wholesale electric service to its member municipalities and one eligible utility[.]" among other duties.³ Relevant to this matter, the Agency stated that it is a co-owner and participant of the Prairie State Energy Campus along with eight other members comprised of governmental and non-governmental entities; the members jointly manage the project pursuant to a participation agreement. The Agency argued that the operating costs of the Prairie State Energy Campus constituted market sensitive information, and that the information fell within the scope of sections 7(1)(a), 7(1)(g), and 7(1)(i).

Section 7(1)(a) of FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." In connection with section 7(1)(a), the Agency cited "section 1281 of the Energy Policy Act of 2005, codified at 16 U.S.C. § 824t(b)[.]"⁴ That provision provides, in pertinent part:

(a) In general

(1) The [Federal Energy Regulatory] Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the

²Letter from Phillip "Doc" Mueller, Sr. Vice President, IMEA, to John Kraft (August 13, 2014), at 2.

³Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 1.

⁴Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 5.

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availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.

* * *

(b) Exemption of information from disclosure

(1) Rules described in subsection (a)(2), if adopted, shall exempt from disclosure information the Commission determines would, if disclosed, be detrimental to the operation of an effective market or jeopardize system security.^[5]

The Agency contended that the Federal Energy Regulatory Commission (FERC) has issued regulations requiring the confidentiality of certain market information through a series of orders, notably the Order No. 719 series. The Agency directed this office to a specific passage from Order No. 719-A.⁶ According to the Agency, two regional transmission organizations (RTOs) oversee the wholesale power market in the State and have "very strict rules governing the competitive markets for capacity, energy and ancillary services within their regions."⁷ The Agency asserted that both RTOs "have implemented Order No. 719 through provisions of their respective FERC-approved tariffs requiring confidentiality" and that it is subject to those provisions.⁸ The Agency asserted that it bids its energy generation, and that "[t]he operating or variable costs of power from Prairie State are the key driver to the pricing on [the Agency's]

⁵16 U.S.C. §824t (2005).

⁶Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 5-6.

⁷Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 4.

⁸Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 7.

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bids, as they are with respect to their own resources for all generators."⁹ The Agency argued, in relevant part:

The operating cost of Prairie State is market sensitive information because it shows the price at which the owners lose money by running the unit. A market participant with that information could make market moves to manipulate the market price up or down to benefit its position or to harm the position of [the Agency] and the other Prairie State owners. The disclosure of market sensitive information that would allow for market manipulation is prohibited by federal law.^[10]

Additionally, the Agency contended that the Illinois Trade Secrets Act prohibited the disclosure of the operating cost information. Specifically, the Agency contended that the information "is financial data that falls within the definition of trade secrets under" that statute.¹¹ The Agency argued: "While the Illinois Trade Secrets Act, 765 ILCS 1065/1 et. seq., does not specifically prohibit the disclosure of trade secrets, it does provide a vehicle for a private party to obtain injunctive relief which would prohibit disclosure of the information and thus meets the standard set in Kibort."¹²

Upon review of the Agency's response and the unredacted records at issue, the Agency has not demonstrated that the Energy Policy Act or its implementing regulations prohibit the disclosure of the operating cost information contained in the records. It is a "well-settled rule of statutory construction that exceptions in statutes are to be strictly construed[.]" *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 299 (2005). Moreover, "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated - that is, such a proposed

⁹Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 4-5.

¹⁰Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 5.

¹¹Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 8.

¹²Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 8.

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disclosure must be *specifically* prohibited." (Emphasis in original.) *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (4th Dist. 2008); *see also Kibort v. Westrom*, 371 Ill. App. 3d 247 (2nd Dist. 2007). Here, section 1281 of the Energy Policy Act does not expressly prohibit the disclosure of information related to the operating costs of power plants, and the Agency has similarly not identified a regulatory provision that prohibits the disclosure of such information. Although the passage in Order No. 719-A highlighted by the Agency generally discusses the confidentiality of commercially sensitive material, the passage does not specifically address operating cost information or expressly restrict disclosure of that information.

As to the Illinois Trade Secrets Act, the Agency acknowledged that the Act contains no provision that expressly prohibits the disclosure of information constituting a "trade secret." The Agency nonetheless cited the Illinois Appellate Court's decision in *Kibort v. Westrom*, 371 Ill. App. 3d 247 (2nd Dist. 2007) for the proposition that the Illinois Trade Secrets Act need not expressly prohibit the disclosure of records for the 7(1)(a) exemption to apply. In *Kibort*, a case involving a FOIA request for election ballots and election materials, the court concluded that while the Election Code did not specifically state that disclosure of ballots was prohibited, the Code "unambiguously prohibited" disclosure by explicitly directing election officials to seal the ballots and election materials in a specific manner that would be inconsistent with allowing the public to access the records under FOIA. *Kibort*, 371 Ill. App. 3d at 252-253 (2d Dist. 2007). The court construed the language of section 7(1)(a) "to mean that records are exempt from disclosure under the [Freedom of] Information Act in instances where the plain language contained in a State or federal statute reveals that public access to records was not intended." *Kibort*, 371 Ill. App. 3d at 256. However, the *Kibort* court further stated that the 7(1)(a) exemption "does not apply in instances where a State or federal statute is ambiguous or silent in regard to the disclosure of public records[.]" *Kibort*, 371 Ill. App. 3d at 256.

Here, the Agency has not directed this office to a provision in the Illinois Trade Secrets Act that is comparable to the Election Code's language requiring the sealing of ballots and election materials that would evidence a clear legislative intent to restrict public access to the operating cost information at issue. Instead, the Act simply provides certain relief for claims involving misappropriation. Further, the Attorney General has issued a binding opinion concluding that section 8(b)(4) of the Illinois Trade Secrets Act (765 ILCS 1065/8(b)(4) (West 2014)) "expressly provides that it does not displace the definition of 'trade secrets' contained in other Acts, which includes FOIA." Ill. Att'y Gen. Pub. Acc. Op. No. 15-002, issued January 23, 2015, at 12 (determining a public body's citation to the Illinois Trade Secrets Act was unavailing with respect to information pertaining to funds that the public body expended or received from its agreement with a private entity). Accordingly, this office concludes that the Agency has not demonstrated by clear and convincing evidence that the information at issue is exempt from disclosure pursuant to section 7(1)(a).

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The Agency also contended that it properly withheld operating cost information pursuant to section 7(1)(g) of FOIA, which 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. (Emphasis added.)

For a record 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. (Emphasis in original.) *Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶27, 78 N.E.3d 446, 455 (2017).

As discussed in *Janssen*, section 7(1)(g) was substantively amended by the General Assembly in 2010.¹³ 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." 5 ILCS 140/7(1)(g) (West 2008). The current version of section 7(1)(g) specifically requires that such records be "furnished under a claim that they are proprietary, privileged, or confidential." The addition of this requirement demonstrates that the General Assembly intended "to limit the scope of the 7(1)(g) exemption to records expressly claimed to fall under one or more of those three categories at the time that the records are provided to the public body." Ill. Att'y Gen. Pub. Acc. Op. No. 18-004, issued March 6, 2018, at 5.

¹³See Public Act 96-542, effective January 1, 2010.

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Additionally, the *Janssen* court clarified that a public body must demonstrate that disclosing documents would cause competitive harm in order for the documents to be withheld under section 7(1)(g). *Janssen, Inc.*, 2017 IL App (1st) 150870, ¶29, 78 N.E.3d at 456. To do so, the 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)).

The Agency contended that the operating cost information constituted commercial and financial information, and that the information had been submitted under a claim of confidentiality. Specifically, the Agency asserted that the information was submitted pursuant to the confidentiality provision of the Prairie State Campus members' participation agreement. The Agency maintained its previous claim regarding the market sensitivity of the information. It argued that "disclosure of the information would cause competitive harm to the business of [the Agency] and the other owners of Prairie State in that having this information public would require them to alter their market bidding strategies, to the extent possible, or risk being subject to manipulation."¹⁴

In this matter, the Agency redacted line items listing fixed and variable operating costs and certain totals/subtotals in the provided invoices. The Agency also redacted certain limited descriptions relating to the costs and totals/subtotals and the identities of certain vendors of the Prairie State Campus.¹⁵ Even assuming that this information was submitted under a claim of confidentiality, the Agency has not provided sufficient factual evidence to support its claim that it faces actual competition, and that none of the information can be disclosed without causing competitive harm to the Prairie State members. In particular, the Agency has failed to illustrate the competition that the members face in bidding their energy generation and how competitors could utilize the information at issue "to alter their market bidding strategies" to the detriment of the members or "make market moves to manipulate the market price up or down to benefit [their] position."¹⁶ See Ill. Att'y Gen. Pub. Acc. Op. No. 19-007, issued September 23,

¹⁴Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 10.

¹⁵Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 9.

¹⁶Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 5, 10.

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2019, at 10 (finding that a public health department failed to provide facts or evidence demonstrating how disclosure of certain reports "could be used to 'reverse-engineer' [a company's] market share or cost structure or enable its competitors to undermine [the company's] market position or 'steal' its business or customers."). Further, the agency has not established the risks of price manipulation as, according to the Agency, "FERC has strict rules in place to prevent improper market manipulation, and it enforces those rules actively."¹⁷ Additionally, although section 7(1)(g) may "be applicable to the disclosure of financial information obtained from a private entity by a public body acting in a regulatory or investigatory capacity[,] * * * [t]he scope of section 7(1)(g) does not appear to encompass commercial or financial information relating to the public body's own business transactions." Ill. Att'y Gen. Pub. Acc. Op. No. 14-016, issued December 2, 2014, at 6. In this case, the Agency is a co-owner of the Prairie State Campus. Operating costs pertaining to the power plants thus appear in part to relate to its own business transactions.

Moreover, information pertaining to the obligation, receipt, and use of public funds are subject to disclosure under article VIII, section 1(c) of the Illinois Constitution of 1970 and section 2.5 of FOIA (5 ILCS 140/2.5 (West 2014)). As Mr. Kraft highlighted, the Attorney General has issued binding opinions concluding that, based on the specific disclosure requirements of the Illinois Constitution and section 2.5 of FOIA, the financial terms of contracts, billing invoices, and other information reflecting the expenditure of public funds do not fall within the scope of section 7(1)(g). *See, for example*, Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, issued June 30, 2014; Ill. Att'y Gen. Pub. Acc. Op. No. 17-003, issued May 26, 2017. Here, the Agency disclosed the total Third Party Costs, the Sub-Total, and the Total Invoice amount in the invoices covering the months of October 2007 through December 2011. In contrast, the Agency appeared to redact that information in the invoices for the months of January 2014 through August 2014. Although the Agency contended that it had redacted totals and sub-totals in the latter invoices because disclosure would reveal the operating costs given the disclosure of other line items, the totals and sub-totals reflecting the amounts billed to the Agency directly relate to the use of public funds and are therefore subject to disclosure. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 14-005, at 8 ("Simply put, entities that contract to perform services for a governmental agency do not enjoy the same ability to withhold information that they do with respect to their private contracts."). For the same reasons, the Agency has failed to illustrate that disclosure of the limited descriptions and identities of the Prairie State Campus vendors

¹⁷Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 5.

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would constitute a clearly unwarranted invasion of personal privacy,¹⁸ as those details pertain to the use of public funds. The details also relate to businesses rather than individuals and thus would not constitute an invasion of personal privacy. Accordingly, this office concludes that the Agency has not demonstrated by clear and convincing evidence that the information is exempt from disclosure under section 7(1)(g).

The Agency further argued that the operating cost information falls within the scope of 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 Agency contended, in relevant part: "The operating cost data for Prairie State is not a formulae per se, by itself, but it can be combined with other information that may be public * * * to create formulae or market strategy to manipulate the market for private gain or public loss."¹⁹ In addition, the Agency contended that market participants could use the operating cost information to "create models to predict market movements" and that "[o]perating cost data is certainly research data for market participants."²⁰

¹⁸Section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2013 Supp.)) exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." Section 7(1)(c) defines an "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information."

¹⁹Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 11.

²⁰Letter from Troy A. Fodor, Vice President & General Counsel, Illinois Municipal Electric Agency, to Christopher Boggs, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (October 8, 2014), at 11.

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The phrases "valuable formulae" and "research data" are not defined in FOIA. Nonetheless, 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) concisely[.]"²¹ 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. Here, the Agency acknowledged that the information at issue does not itself reflect a formula, and it has provided no legal or factual basis to support its assertion that the information still falls within the scope of the exemption because competitors could use the information to develop formulae or market strategy. Likewise, the Agency has provided no basis to support its claim that "research data" encompasses operating cost information because competitors might use the information for their own research purposes. Accordingly, the Department has not demonstrated by clear and convincing evidence that the withheld information is exempt from disclosure pursuant to section 7(1)(i) of FOIA.²²

This office requests that the Agency provide Mr. Kraft with copies of the invoices at issue that disclose the information pertaining to the operating costs, including the notes and vendors of the Prairie State Campus.

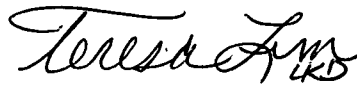
²¹See *Formula*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/formula> (last visited October 2, 2018).

²²Mr. Kraft's Request for Review contested the redaction/withholding of any asserted "trade secrets" in the records. Because the Agency contended that information relating to its operating costs constituted "trade secrets" that are exempt from disclosure pursuant to sections 7(1)(a), 7(1)(g), and 7(1)(i), this office's determination is limited to a review of the applicability of those asserted exemptions to that information.

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

Very truly yours,



TERESA LIM
Assistant Attorney General
Public Access Bureau

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