



Newsletters

Informing Illinois Newsletter - January 2017

January 10, 2017

How to Protect Business Information From Disclosure Under Illinois' FOIA

Local governments often possess sensitive proprietary information of their vendors or of regulated businesses. Because the Illinois Freedom of Information Act (FOIA) provides that all recorded information used, received or possessed by an Illinois public body is presumably available for inspection and copying by any requesting person, the tender of such information can create a risk of disclosure to third parties, including competitors of the vendors or regulated businesses. All public records are presumed to be available for any person unless the record falls within a listed exemption.

The Trade Secret and Confidential Business Information Exemption

The Illinois legislature has recognized a specific need to protect confidential business information from public dissemination. Patterned after Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. § 522(b)(4), Section 7(1)(g) of the Illinois act exempts from disclosure "trade secrets and commercial or financial information." The term "trade secret" for purposes of FOIA has been construed to be broader than the definition found in the Illinois Trade Secrets Act.

The two-prong test to determine whether an exemption applies focuses on whether or not disclosure of the information would either (1) impair the government's ability to obtain similar information in the future or (2) inflict substantial competitive harm to the submitter. Regardless of the sensitivity of the business information or any possible harm to the submitter's competitive position by the disclosure, the trade secret exemption is not available to prevent disclosure of business information unless the information was "furnished under a claim that [the information is] proprietary, privileged, or confidential" and that its disclosure "would cause competitive harm" to the submitter. The submitted desiring the information to be withheld under this exemption should be prepared to establish both actual competition in the relevant market and the likelihood of substantial competitive injury by the release of the information.

Types of Business Information Exempted

There is another specific exemption for "[v]aluable formulae, computer geographic systems, designs, drawings, and research data obtained or produced by a public body when the disclosure could reasonably be expected to produce private gain or public loss." 5 ILCS 140/7(1)(i). This provision may be employed to complement Section 7(1)(g)'s trade secret exemption. Examples of documents that would fall into this exemption would be marking programs, profit

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and cost margins, overhead calculations and strategic business plans.

Factors to consider in determining whether or not this exemption applies are:

1. The extent the information is neither known or available to persons outside the submitter's company;
2. The extent the information gives the submitter a competitive advantage;
3. The cost and ease of acquiring the information;
4. Any measures undertaken to maintain the confidentiality or secrecy of the information;
5. The money spent and efforts by the submitter in developing the information; and
6. Whether or not the information customarily would not be released to the public by the person from whom it was obtained.

A frequent issue under FOIA is whether contract prices can be considered trade secrets. The total price to the public body from a public contract must be disclosed pursuant to Section 2.5 of the Act. However, the unit or line item pricing could be considered exempt and federal courts have examined it under the federal exemption. The courts concluded that disclosure of line item pricings may cause competitive harm enabling competitors to undercut their prices in a future letting. Provided Section 7(1)(g)'s requirements are satisfied, a claim of trade secret protection for unit prices may reasonably be asserted despite the mandate of Section 2.5 of the Illinois act.

Measures to Implement to Minimize Risk of Disclosure

Plan ahead. The submitter must claim any exemption at the time it furnishes the confidential information. Failure to timely assert the exemption could constitute a waiver. A later assertion may be ineffective.

Designate Confidential Information

When confidential business information is provided to a public body, the party desiring protection against disclosure should include a cover page stating that the submission contains trade secrets or confidential commercial or financial information. The submitter also should state that the information has not been released to any party that is not in a confidential relationship with the submitter and that the information is not commonly known within the industry nor easily obtained by persons not related to the submitter. Information stating that the disclosure of such information will cause substantial harm in the competitor's position also should be included. If plausible, the submitter should describe any likely competitive harm. Every page of the document that is confidential should be designated as such. But over-designation should be avoided. Any unwarranted designations could dilute the claim as to truly confidential information.

Nondisclosure Agreement

Before any information is submitted, the submitter should request the public body to enter into a nondisclosure agreement of the designated exempt information. Whether or not this is enforceable, it could accomplish two things:

1. Demonstrate that the submitter has taken reasonable efforts to protect the information; and
2. Establish the public body's acknowledgment that the information contains confidential business information that needs protection from disclosure.

Notice of Requests

Although several states have statutorily provided that a public body should give notice of a request for confidential business information to the submitter, Illinois is not one of them. So attempting to secure an agreement with the public body that it will give notice to the submitter of any requests for exempt records can be challenging. If such an agreement has been made; however, remember that public bodies must respond within five business days. As a result, this leaves little time for a submitter to prepare a persuasive argument for the exemption claim.

Thus, it is advisable to have the justification prepared at the time that the information is submitted. This prepared justification will aid the public body in claiming the exemption. Moreover, the burden of proving the propriety of the exemption lies with the public body. If the public body is not promptly supplied with the justification for the use of the trade



secret exemption, including a description of the harm to the submitter that would result from the release, the burden may not be satisfied and the result is disclosure.

For more information, please contact Charles R. Schmadeke.