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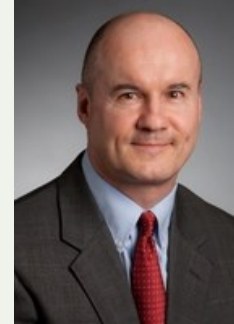
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LEGAL ALERT

AG Finds Budget on TIF Project Provided to City By Private Developer Must Be Released Under FOIA

A local reporter requested information about the budget for a redevelopment project, submitted by the private developer of the project, to the City of Elgin. The project was being subsidized with TIF funds. The City denied the request, contending that such budget information from the private developer was exempt from disclosure under the FOIA exception for trade secrets or financial information that is proprietary, privileged or confidential. The Attorney General concluded that the information must be disclosed since the private developer did not claim the information was proprietary, privileged or confidential when the developer provided it to the City, and there was no evidence provided by the City or developer that disclosure of such information would likely result in substantial harm to the private developer or City.

A detailed summary of the opinion of the Attorney General is provided herein.

A full copy of the decision is available at:

<http://foia.ilattorneygeneral.net/pdf/opinions/2018/18-004.pdf>

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SUMMARY - PUBLIC ACCESS OPINION 18-004

Third Party Records Submitted to a City Related to a City – Funded Redevelopment Project Are Not Exempt From Disclosure under Section 7(1)(g) of FOIA

Following the receipt of the FOIA request for copies of the project budget submitted to the City of Elgin by a private development, regarding a City subsidized TIF redevelopment property, the City denied the request for the record, citing to the following exception under FOIA for:

“[a] trade secret[s] 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...”

In analyzing the disclosure duties under FOIA, the Attorney General carefully noted that prior to amendments made to FOIA in 2010, for a record to be exempt under this exception it had to meet the following standard:

“[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.” Citing to *Chicago v Janssen*, 78 N.E.3d 446,455 (2017).

Prior to 2010, the exception above exempted from disclosure “trade 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.” The prior exception did not require disclosure of such information if they were simply “obtained” from a person or business. The 2010 amendment changed the language of this exception to now require that such records be “furnished under a claim that they are proprietary, privileged or confidential.” The Attorney General concluded then that this exception is more limiting and the scope



of the exception is now narrowed to records which are “expressly claimed to fall under one or more categories (proprietary, privileged or confidential) at the time the records are provided to the public body.”

In this instance the City produced a letter from the President of the private development company which stated that the financial information which would be provided to the City was with the “belief that it would remain confidential and privileged.” This letter however was provided to the City after the private developer had shared the financial information with the City. The City contended then that the letter showed that there was an implicit expectation by the developer of confidentiality. The developer had not shared the information with the City under an express claim that the information was proprietary, privileged or confidential. The Attorney General concluded that while an “implied” claim may have satisfied the pre-2010 requirements of FOIA, that the current, amended language now requires an “express claim” by an entity submitting such information to a public body.

The Attorney General went on the note that the City had not provided any information to address the remaining element of the exception involved: that disclosure of this budget information would cause competitive harm to the developer. The Attorney General noted that the standard for making that determination was as follows:

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“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.”

Citing to *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’”).

While the City made the assertion that release of the private developer’s budget information would lead to competitive harm, there were not facts provided to substantiate the claim. The Attorney General concluded that such an assertion without any factual basis was insufficient to meet the required standard.