



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 23, 2019

PUBLIC ACCESS OPINION 19-007
(Request for Review 2019 PAC 58468)

FREEDOM OF INFORMATION ACT:
Reports of Manganese Throughputs Submitted to a
City Public Health Department Are Not Exempt
From Disclosure under Section 7(1)(g) of FOIA

Ms. Nancy C. Loeb
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Bluhm Legal Clinic
Northwestern University Pritzker School of Law
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Mr. Marc Augustave
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30 North LaSalle Street, Suite 1720
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Dear Ms. Loeb and Mr. Augustave:

This is a binding opinion issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)). For the reasons discussed below, this office concludes that the City of Chicago (City) Department of Public Health (Department) violated the requirements of FOIA by improperly denying a March 29, 2019, FOIA request submitted by the Northwestern University Pritzker School of Law Environmental Advocacy Clinic (Advocacy Clinic) seeking records concerning the amount of manganese that enters and leaves a business's facility.

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BACKGROUND

On March 29, 2019, Ms. Deborah Chizewer, on behalf of the Advocacy Clinic,¹ submitted a FOIA request to the Department:

This is a request regarding manganese throughput^[2] in Chicago. Please produce all Chicago Department of Public Health ("CDPH") records pertaining to manganese throughput in Chicago, submitted in accordance with Municipal Code of Chicago § 17-9-0117-D(5). * * *

* * *

Please produce all records [of] any and all manganese throughput information possessed by the CDPH to date, including, but not limited to * * * quarterly reports. This request includes, but is not limited to, information possessed by CDPH regarding manganese throughput at the facilities listed below:

- Watco Transloading, LLC, 2926 E. 126th St.
- S.H. Bell, 10218 South Avenue O
- NASCO, 9301 S. Kreiter Ave.^[3]

On April 12, 2019, the Department provided the Advocacy Clinic with the requested manganese reports for Watco Transloading, LLC (Watco) and NASCO, as well as two

¹Ms. Chizewer submitted the FOIA request, on behalf of the Advocacy Clinic, that underlies this binding opinion. Ms. Chizewer and Nancy C. Loeb, Director of the Advocacy Clinic, jointly submitted the Request for Review related to the City's FOIA response. During the pendency of this Request for Review, Ms. Chizewer left the Advocacy Clinic to pursue other professional opportunities. Accordingly, this binding opinion is addressed only to Ms. Loeb on behalf of the Advocacy Clinic.

²A "throughput" is "the amount of manganese-bearing material received at a facility in a given calendar month, plus the amount of non-packaged manganese-bearing material leaving the facility in that same month, divided by 2." (Emphasis in original.) CHI., ILL. CODE § 17-9-0117-D(5)(d) (2019).

³FOIA request from Deborah Chizewer, Montgomery Environmental Law Fellow, Environmental Advocacy Center, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Freedom of Information Officer, Chicago Department of Public Health (March 29, 2019), at 1-2.

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other manganese-bearing material operators.^{4,5} That same day, the Department sent a letter to the Advocacy Clinic via e-mail denying the request for manganese records (manganese reports) from S.H. Bell, citing section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2018)).⁶ The denial included a statement from S.H. Bell explaining why the information in the manganese reports should not be disclosed. On June 10, 2019, Ms. Nancy C. Loeb and Ms. Chizewer, on behalf of the Advocacy Clinic, jointly submitted a Request for Review to the Public Access Counselor contesting the Department's withholding from disclosure S.H. Bell's manganese reports.⁷

On June 12, 2019, the Public Access Bureau sent the Department a copy of the Request for Review and a letter requesting copies of the withheld manganese reports for this office's confidential review. The letter also requested a detailed explanation of the legal and factual bases for the assertion that the records are exempt from disclosure under section 7(1)(g) of FOIA.⁸

On June 20, 2019, the Public Access Bureau received a written answer from the Department.⁹ Along with its written answer, the Department furnished the Public Access Bureau with copies of the withheld manganese reports. On June 21, 2019, the Public Access Bureau forwarded to Ms. Chizewer a copy of the Department's written answer and notified her of the

⁴E-mail from Jennifer (Hesse), cdphfoia@cityofchicago.org, to Debbie [Chizewer] (April 12, 2019).

⁵The Department later sent a supplemental response consisting of manganese reports filed by a fifth company, after confirming that the company was not claiming that the reports were confidential. E-mail from Jennifer (Hesse), cdphfoia@cityofchicago.org, to Deborah Gail Musiker [Debbie Chizewer] (April 23, 2019).

⁶Letter from Jennifer Hesse, Attorney, Department of Public Health, City of Chicago, to Deborah Chizewer, Montgomery Environmental Law Fellow, Environmental Advocacy Center, Bluhm Legal Clinic, Northwestern University Pritzker School of Law (April 12, 2019), at [1-2].

⁷Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Sarah Pratt, Public Access Counselor, Office of Illinois Attorney General (June 10, 2019).

⁸Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Jennifer Hesse, Attorney, Department of Public Health, City of Chicago (June 12, 2019).

⁹Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014). The Department's written answer to this office was dated June 20, 2014. We have assumed that the indicated date contains a scrivener's error as the answer was received at the Office of the Attorney General via e-mail on June 20, 2019, and expressly states that it is "in response to your June 12, 2019, letter."

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Advocacy Clinic's opportunity to reply.¹⁰ On July 8, 2019, Ms. Loeb and Ms. Chizewer jointly submitted a written reply on behalf of the Advocacy Clinic.¹¹

Pursuant to section 9.5(f) of FOIA, on August 7, 2019, this office extended the time within which to issue a binding opinion by 30 business days, to September 23, 2019.¹²

ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA]." 5 ILCS 140/1 (West 2018). "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 2018). The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2018)) are to be narrowly construed. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997). Under FOIA, bare assertions without a detailed rationale do not satisfy a public body's burden of demonstrating that an exemption is applicable. *Rockford Police Benevolent and Protective Ass'n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 151 (2d Dist. 2010) (citing *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003)).

Manganese Reports

On March 28, 2018, the City Council of the City of Chicago adopted an ordinance¹³ amending the Municipal Code of Chicago (Municipal Code) to require that manganese-bearing materials operators provide the City with quarterly reports concerning the

¹⁰Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ms. Debbie (Musiker) Chizewer, Montgomery Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University School of Law (June 21, 2019).

¹¹Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Matthew Hartman, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (July 8, 2019).

¹²Letter from Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Nancy C. Loeb, Director, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, and Marc Augustave, Senior Counsel, Department of Law, City of Chicago, (August 7, 2019).

¹³Chicago, Ill., Ordinance SO2018-1055 (March 28, 2018).

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amount of material being handled at their facilities.¹⁴ In its Request for Review, the Advocacy Clinic asserted "[t]he Manganese Ordinance¹⁵ is an important piece in a set of local legislative and rulemaking actions designed to protect Chicago residents from manganese, a known neurotoxin[.]"¹⁶ The Department's response to this office stated that the City's "Mn-Ordinance Reporting Form requires S.H. Bell to submit information on the material name, form, transportation methods, percent manganese, tonnages shipped, received, and stored in a particular month, and throughput. * * * [T]his information * * * represents detailed information on S.H. Bell's confidential monthly product inventories[.]"¹⁷ Thus, the Department asserted that

¹⁴The use regulations of the Chicago Zoning Ordinance in the Municipal Code amended by Ordinance SO2018-1055 provide:

(5) Owners and operators of manganese-bearing material operation uses allowed under this subsection 17-9-0117-D shall report and certify, under penalty of perjury, the following data, expressed in both tons and cubic yards, in quarterly reports, due within thirty days of the end of each quarter, submitted to the department of planning and development, pursuant to a form and format set by that department:

(a) the total monthly amount of non-packaged manganese-bearing material received;

(b) the total monthly amount of non-packaged manganese-bearing material leaving the facility by truck, barge, boat, railcar, or other means of conveyance;

(c) the maximum daily amount of non-packaged manganese-bearing material present at the facility in each calendar month; and

(d) the monthly non-packaged manganese-bearing material throughput, i.e., the amount of manganese-bearing material received at a facility in a given calendar month, plus the amount of non-packaged manganese-bearing material leaving the facility in that same month, divided by 2. CHI., ILL. CODE § 17-9-0117-D(5) (2019).

¹⁵The "Manganese Ordinance" is the short title given to §17-9-0117-D of the Municipal Code, as amended by SO2018-1055, by the Advocacy Clinic.

¹⁶Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Sarah Pratt, Public Access Counselor, Office of Illinois Attorney General (June 10, 2019), at 2.

¹⁷Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 3.

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S.H. Bell's manganese reports are exempt under section 7(1)(g) of FOIA as "confidential commercial information."¹⁸

Section 7(1)(g) of FOIA

Section 7(1)(g) of FOIA 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), the courts have indicated that:

[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 2010.¹⁹ Prior to 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." (Emphasis added.) 5 ILCS 140/7(1)(g) (West 2008). In contrast, the current version of section 7(1)(g) specifically requires that disclosure of such records "**would** cause competitive harm" in order for that

¹⁸Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 3.

¹⁹See Public Act 96-542, effective January 1, 2010.

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exemption to apply. (Emphasis added.) The General Assembly's addition of these requirements indicates its intention to restrict the scope of the 7(1)(g) exemption to only those records that if disclosed would result in competitive harm to the business.

The Department's response to this office asserted that the manganese reports are a form of commercial information that was provided to the Department under a claim that it is proprietary and confidential and that disclosure of "S.H. Bell's manganese throughput records would cause competitive harm to its business."²⁰ The Department stated that the manganese reports contain "detailed information on S.H. Bell's confidential monthly product inventories, which is the fundamental core of S.H. Bell's business."²¹ The Advocacy Clinic does not dispute that the reports contain "commercial information" within the meaning of section 7(1)(g). However, in its Request for Review, the Advocacy Clinic asserted that the Department had not "provided any information indicating that at the time S.H. Bell furnished the throughput information, it did so under a claim of confidentiality."²² In its answer, the Department stated that "S.H. Bell asserted that the manganese throughput was proprietary, privileged, or confidential before and at the time the information was provided to CDPH."²³ The Department also furnished e-mail correspondence from July and September 2018, and other documents from 2018 for the confidential review of the Public Access Bureau establishing that S.H. Bell provided its quarterly manganese reports to the Department under a claim that the reports were proprietary. Thus, the resolution of this matter turns on whether the Department has demonstrated that disclosure of the reports would cause competitive harm to S.H. Bell.

To support its contention that disclosure of the requested manganese reports would cause competitive harm, the Department relies on case law interpreting a provision in the Federal Freedom of Information Act (5 U.S.C. § 552(b)(4) (2018)) that is similar to, but substantively distinguishable from, section 7(1)(g) of FOIA. That provision, Exemption 4, applies to "trade secrets and commercial or financial information obtained from a person and

²⁰Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 2.

²¹Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 3.

²²Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Sarah Pratt, Public Access Counselor, Office of Illinois Attorney General (June 10, 2019), at 6.

²³Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 2.

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privileged or confidential[.]”²⁴ The Department cites *Public Citizen Health Research Group v. Food & Drug Administration*, 704 F.2d 1280, 1286 (D.C. Cir. 1983), arguing that the court recognized “that Congress clearly indicated that FOIA Exemption 4 covered ‘inventories’ and other specifically enumerated types of commercial business information in the legislative history.”²⁵ The court, however, was not so definitive; rather, it stated that “Congress clearly indicated that Exemption 4 *as a whole* could cover such materials[,] but “offered no guidance concerning which prong of the exemption would protect each of these diverse types of information.” (Emphasis in original.) *Public Citizen Health Research Group*, 704 F.2d at 1286.

The Department also analogized the manganese throughput information in S.H. Bell’s reports to facility-level data related to greenhouse gas emission captures that the United States Environmental Protection Agency (EPA) considered for treatment as confidential business information that it would not publish or provide in response to Freedom of Information Act requests. In particular, the Department cited proposed rules by the EPA in which the EPA explained, as an example, that “disclosure of facility-level production/throughput quantities and product compositions could give competitors insight into a firm’s local and regional market conditions and expansion plans, enabling competitors to devise strategies to prevent expansion and to steal market share in specific locations.” Proposed Confidentiality Determinations for Data Required Under the Mandatory Greenhouse Gas Reporting Rule, 75 Fed. Reg. 39094-01, 39123 (proposed July 7, 2010) (to be codified at 40 C.F.R. pt.2). The Advocacy Clinic countered the Department’s assertion that the EPA rulemaking controls by stating that, although the EPA found certain emissions throughput information was confidential business information, it also found that other throughput data fit within the scope of emissions data, which is not eligible for classification as confidential business information. The Advocacy Clinic asserted that the requested manganese reports “closely align[] with the information that was subject to

²⁴Although decisions construing Federal FOIA are generally helpful and relevant for interpreting Illinois FOIA (*Margolis v. Director, Ill. Department of Revenue*, 180 Ill. App. 3d 1084, 1087 (1st Dist. 1989)), they have limited relevance here because of substantive differences between section 7(1)(g) and its Federal corollary. The United States Supreme Court recently rejected the reasoning in a series of Federal appeals court decisions which held that records were only “confidential” under Exemption 4 if disclosure would result in substantial competitive harm or impairment of the government’s ability to obtain necessary information in the future; the court held those rulings erroneously imposed a requirement that did not appear in the text of the exemption. *Food Marketing Institute v. Argus Leader Media*, ____ U.S. ____, 139 S. Ct. 2356, 2364 (2019) (“We cannot approve such a casual disregard of the rules of statutory interpretation.”). Instead, a record is “confidential” within the meaning of Exemption 4 if it “is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy[.]” *Food Marketing Institute*, ____ U.S. ____, 139 S. Ct. at 2366. This is not the standard under Illinois FOIA. Section 7(1)(g) of FOIA specifically requires that a public body demonstrate that disclosure would cause competitive harm.

²⁵Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 3.

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disclosure [in the EPA rulemaking] because it is data that informs [the Department] and [the City of Chicago Department of Planning and Development] about fugitive dust emissions at [S.H. Bell's] facility."²⁶ Regardless, the Public Access Bureau does not find the EPA rulemaking to be persuasive because section 7(1)(g) of FOIA requires the Department to demonstrate by clear and convincing evidence that disclosure of the manganese reports would cause competitive harm to S.H. Bell. *See Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶27, 78 N.E.3d at 455.

Illinois courts have looked to federal case law interpreting "substantial competitive harm" for guidance in determining what constitutes competitive harm under section 7(1)(g) of FOIA. "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 v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1013 (1st Dist. 1994) (quoting *Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988)). In binding opinion No. 18-004 (Ill. Att'y. Gen. Pub. Acc. Op. No. 18-004, issued March 6, 2018), this office applied the elements of the competitive harm analysis from *Cooper* to conclude that that the City of Elgin (Elgin) had improperly denied access under section 7(1)(g) to the budget for a redevelopment project prepared by an outside developer receiving funding from Elgin. Elgin had asserted that the budget contained sensitive information concerning costs, profits, and fees. The opinion concluded that Elgin had not established that the outside developer or the redevelopment project faced competition. *See Ill. Att'y Gen. Pub. Acc. Op. No. 18-004*, at 7. The opinion further concluded that, despite providing a letter from the president of the development organization that asserted disclosure of the information in the budget would harm the developer and the redevelopment project, Elgin had not provided sufficient facts demonstrating that harm would likely result from the disclosure. *See Ill. Att'y Gen. Pub. Acc. Op. No. 18-004*, at 7-8 ("These generalized statements are not sufficient to demonstrate that disclosure of the Tower's Budget would cause competitive harm to any person or business.").

In its reply to this office, the Advocacy Clinic asserted that the "[Department] fails to identify a single S.H. Bell competitor."²⁷ Instead, the Department suggested that S.H. Bell's competitors would improve their market position "especially in the Chicago region" as a

²⁶Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Sarah Pratt, Public Access Counselor, Office of Illinois Attorney General (June 10, 2019), at 10 n. 15.

²⁷Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Matthew Hartman, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (July 8, 2019), at 3.

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result of the disclosure of S.H. Bell's reports.²⁸ Although the Advocacy Clinic has provided information to this office indicating that there are at least five other operators, including Watco and NASCO, that have provided the Department with manganese reports, the mere existence of other manganese-bearing material operators does not establish that those operators compete with S.H. Bell. Further, the Department has not provided this office with detailed information suggesting that S.H. Bell actually competes with other operators to receive and ship manganese-bearing material.

Even assuming the Department established that S.H. Bell has competitors and faces actual competition, the Department has not established the second element—that substantial competitive harm would likely result from disclosure of the information in the manganese reports. The Department's response to this office asserted that the S.H. Bell's business is "unique" and that the disclosure of the reports would enable competitors "to determine and/or 'reverse engineer' highly sensitive business information about S.H. Bell's volume of business and market share, such as monthly product inventories, sales volume, percentage of sales of certain manganese products, financial situation, and warehouse and processing capacity."²⁹ The Department further asserted that competitors could use the information from S.H. Bell's reports "to assess competition, market conditions, and customer base and to devise strategies to attempt to increase their market share and steal business and customers from S.H. Bell[.]"³⁰

It is unclear how such specific insights into S.H. Bell's business operations could be gleaned from the limited information in the reports, which identify the form of the material, how it is transported in and out of the facility, its density and percentage of manganese, the amounts shipped, received, and stored, and the throughput. This information reveals nothing about S.H. Bell's revenue, expenditures, or customers. Further, the Department has not provided facts or evidence that demonstrate how disclosure of the reports could be used to "reverse-engineer" S.H. Bell's market share or cost structure or enable its competitors to undermine S.H. Bell's market position or "steal" its business or customers. In its reply to the Department's response, the Advocacy Clinic correctly notes that "[a]ny information about the quantity of

²⁸Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 4.

²⁹Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 4.

³⁰Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 4.

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manganese bearing material does not reveal the source of the material (seller of manganese material) or the destination (buyer of manganese material)."³¹ As a result, the Department's assertions regarding competitive harm are largely conclusory and fail to provide specific factual evidence demonstrating how harm would occur from the disclosure of the S.H. Bell's manganese reports.

In its answer to this office, the Department also argued that "disclosure of S.H. Bell's manganese throughput records, without their consent, would make it more difficult for [the Department] to induce S.H. Bell to submit similar information in the future."³² To support this assertion, the Department cited *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 995 (1st Dist. 2007), *superseded by statute*, Freedom of Information Act (5 ILCS 140/7(1)(g) (West 2014)), as recognized in *Janssen*, 2017 IL App (1st) 150870, ¶28, 78 N.E.3d at 456, for the proposition that "*trade secret* in the context of the FOIA has been interpreted to include information that (1) would either inflict substantial competitive harm or (2) make it more difficult for the agency to induce people to submit similar information in the future." (Emphasis in original.) The *Janssen* court, however, held that interpretation only applied to the version of section 7(1)(g) that preceded the amendment discussed above which took effect in 2010. *Janssen*, 2017 IL App (1st) 150870, ¶28, 78 N.E.3d at 456; *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 18-004, at 9 ("[A]lthough the City has raised the concern that requiring disclosure of the Budget would have a chilling effect on its ability to contractually require developers to submit sensitive financial information, it has not demonstrated how disclosing the budget would cause competitive harm[.]").

Accordingly, this office concludes that the Department has not sustained its burden of demonstrating that the manganese reports requested by the Advocacy Clinic are exempt from disclosure pursuant to section 7(1)(g) of FOIA.

³¹Letter from Nancy C. Loeb, Director, and Debbie Chizewer, Montgomery Foundation Environmental Law Fellow, Environmental Advocacy Clinic, Bluhm Legal Clinic, Northwestern University Pritzker School of Law, to Matthew Hartman, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (July 8, 2019), at 4 n.2.

³²Letter from Marc Augustave, Senior Counsel, City of Chicago, Department of Law, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (June 20, 2014), at 4.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the available information, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On March 29, 2019, Ms. Deborah Chizewer, on behalf of the Advocacy Clinic, submitted a FOIA request to the Department seeking a copy of, among other things, the quarterly manganese reports filed by Watco, S.H. Bell, and NASCO. On April 12, 2019, the Department denied the Advocacy Clinic's request for reports from S.H. Bell citing as its basis section 7(1)(g) of FOIA. The Department provided the Advocacy Clinic with copies of the reports from Watco, NASCO, and three other business organizations.

2) On June 10, 2019, the Public Access Bureau received a joint Request for Review from Ms. Chizewer and Nancy C. Loeb, on behalf of the Advocacy Clinic, contesting the Department's denial of the disclosure of the manganese reports from S.H. Bell. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2018)).

3) On June 12, 2019, the Public Access Bureau sent a copy of the Request for Review to the Department and asked it to provide copies of the withheld reports for this office's confidential review. This office also asked the Department to provide a detailed explanation of the factual and legal bases for the assertion that the reports are exempt from disclosure pursuant to section 7(1)(g) of FOIA.

4) On June 20, 2019, the Department provided a written answer along with copies of the withheld manganese reports for the Public Access Bureau's confidential review. The Department also argued that the reports were exempt from disclosure under section 7(1)(g) of FOIA because the reports were furnished to the Department under a claim that they were confidential and proprietary and because disclosure of the reports would cause S.H. Bell competitive harm.

5) On June 21, 2019, the Public Access Bureau forwarded the Department's written answer to the Advocacy Clinic and notified it of the opportunity to reply. On July 8, 2019, Ms. Loeb and Ms. Chizewer, on behalf of the Advocacy Clinic, jointly submitted a reply.

6) On August 7, 2019, this office extended the time within which to issue a binding opinion by 30 business days, to September 23, 2019, pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Section 7(1)(g) of FOIA exempts from disclosure "[t]rade secrets and commercial or financial information obtained from a person or business where the trade secrets

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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."

8) A public body that withholds a record pursuant to section 7(1)(g) must demonstrate that (1) the record contains a trade secret, commercial, or financial information; (2) it was obtained from a person or business where the trade secrets or commercial or financial information was furnished under a claim that it was either proprietary, privileged, or confidential; and (3) disclosure of the trade secrets or commercial or financial information would cause competitive harm to that person or business.

9) The withheld manganese reports consist of the amount of manganese-bearing material in tons received and shipped by S.H. Bell each month and the manganese content of that material. The Department established that the reports contain commercial information and that S.H. Bell provided the reports under a claim that they were both proprietary and confidential. However, the Department has not provided clear and convincing evidence to establish that the disclosure of the reports would cause competitive harm to S.H. Bell. Although the Department has raised concerns that disclosure of the reports may harm S.H. Bell's competitive position, the Department has not established that S.H. Bell actually faces competition or provided specific facts demonstrating the competitive harm to S.H. Bell that would result from disclosing the limited information in the reports, which reveals nothing about the business's revenue, expenditures, and customers. Under these circumstances, the manganese reports from S.H. Bell are not exempt from disclosure pursuant to section 7(1)(g) of FOIA.

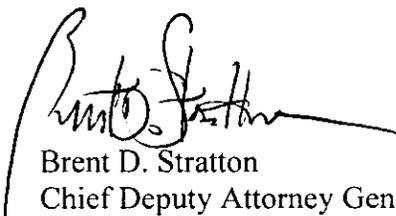
Therefore, it is the opinion of the Attorney General that the Department's withholding from disclosure the S.H. Bell manganese reports responsive to the Advocacy Clinic's Freedom of Information Act request violated the requirements of FOIA. Accordingly, the Department is directed to take immediate and appropriate action to comply with this opinion by disclosing to the Advocacy Clinic copies of the responsive manganese reports.

Ms. Nancy C. Loeb
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This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2018). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Nancy C. Loeb, of the Northwestern University Pritzker School of Law Environmental Advocacy Clinic, as defendants. *See* 5 ILCS 140/11.5 (West 2018).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By: 
Brent D. Stratton
Chief Deputy Attorney General

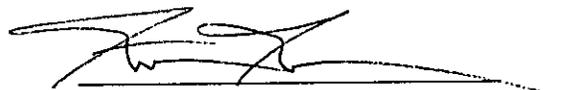
CERTIFICATE OF SERVICE

Steven J. Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 19-007) upon:

Ms. Nancy C. Loeb
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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Chicago, Illinois on September 23, 2019.



STEVEN J. SILVERMAN
Bureau Chief
Public Access Bureau

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