



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

April 1, 2011

Lisa Madigan
ATTORNEY GENERAL

Mr. Thomas Hardy
Executive Director, University Relations
University of Illinois
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Via e-mail:
hardyt@uillinois.edu

PUBLIC ACCESS OPINION No. 11-003
(Request for Review– 2011 PAC 12170)

FREEDOM OF INFORMATION:

Unduly Burdensome Requests: A subsequent FOIA request cannot be deemed “unduly burdensome” unless the public body has either previously disclosed the requested records or properly denied the request.

Dear Mr. Hardy:

This binding opinion is issued pursuant to Section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f), added by Public Act 96-542, effective January 1, 2010).

The Office of the Public Access Counselor (Office) has reviewed the above-referenced Request for Review submitted by *The News-Gazette* on January 31, 2011, the responsive documents previously submitted by the University of Illinois concerning these records, and correspondence received by both parties since *The News-Gazette* submitted this Request for Review.

Background

On January 21, 2011, Julie Wurth, a reporter with *The News-Gazette* submitted a FOIA request to the University seeking records that *The News-Gazette*, *Chicago Tribune*, and *WDWS-AM* and *WHMS-FM* previously requested concerning the University’s recent presidential search.¹ In

¹ Specifically, on April 27, 2010, Ms. Wurth submitted a FOIA request seeking “copies of all payments or reimbursements, and supporting documentation, to members of the University of Illinois presidential search committee, Michael Baer and/or staff for Isaacson, Miller. This request includes but is not limited to, vouchers, itineraries and receipts, and covers the period from Oct. 1 to the present.” On May 14, 2010, Jodie Cohen, Staff Reporter, *Chicago Tribune*, submitted a FOIA request seeking “[a]ll documentation, from October 1, 2009 to the present, showing expenditure funds related to University of Illinois’ presidential search. This could include, but not

response to these previous records requests, the University initially submitted Pre-Authorization Requests with this Office on May 11, 2010, May 28, 2010, and June 9, 2010 (2010 PAC 7336, 7704, 7852) seeking to withhold under Section 7(1)(c) (5 ILCS 140/7(1)(c)) certain responsive information, including: (1) the names and personal identifiers of job applicants; (2) information such as the name of an applicant that is currently employed by the University; (3) the address of an on-campus travel agency used to arrange airfare; and (4) the airport of departure when it is small enough to clearly point to a specific candidate. After reviewing the University's position, this Office issued a determination as to these Pre-Authorization Requests on August 2, 2010 concluding, among other things, that the University had not met its initial burden of justifying a Section 7(1)(c) redaction of: (1) the name of the university at which any of the applicants is currently employed; (2) the address of on-campus travel agencies used to arrange travel related to the University's presidential search; and (3) any of the airports of departure related to the University's presidential search.

After receiving our August 2, 2010 determination letter, the University partially denied the FOIA requests, informing the requesters that it disagreed with this Office's determination and was withholding the following information pursuant to Section 7(1)(c): (1) the name of the university at which any of the applicants are currently employed; (2) the address of on-campus travel agencies used to arrange travel related to the presidential search; and (3) any of the airports of departure related to the presidential search. The University also informed the requesters that pursuant to Section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g)), it was withholding information relating to the calculation of the fees charged to the University by the Boston-based recruitment firm Isaacson, Miller which was hired to assist with the presidential search.

Following the University's partial denial of their FOIA requests, *The News-Gazette* and the other media requesters submitted FOIA Requests for Review to this Office. This Office issued a non-binding determination on November 17, 2010 in 2010 PAC 8971 finding that the University had only met its burden of justifying the redaction of unsuccessful candidates' identities and current employers. This Office concluded that the University had failed to meet its burden to demonstrate that the disclosure of the regional airport, flight number, date of flight and on-campus travel agency used as part of the presidential search would be highly personal or objectionable to a reasonable person. We further concluded that a legitimate public interest exists in disclosure of this information because it is ultimately related to the expenditure of public funds and Section 2.5 of FOIA subjects this information to disclosure. With regard to the information concerning the fees charged by Isaacson, Miller, we concluded that the University had not met its burden to demonstrate that that disclosure of this information would cause substantial harm to the search firm as required under Section 7(1)(g). We also found that the fee

be limited to, copies of all payments or reimbursements, along with supporting documentation, to members of the search committee or the search firm. It also could include direct payments from the university to vendors for such items as airfare, entertainment or other expenses." On May 25, 2010, Patrick Phingsten, News Anchor, *WDWS-AM* and *WHMS-FM*, submitted a FOIA request seeking "all applicants and/or applications received during recently concluded search for the position of University of Illinois President. (October 1, 2009 to May 20, 2010) [and] [a]ll bills, travel expenses, vouchers, itineraries provided to the University by applicants, search committee members, or search firm Issacson-Miller. (October 1, 2009 to the present) Our request also applies to airfare, hotel or other travel-related expenses."

information relates directly to the expenditure of public funds and is subject to disclosure under Section 2.5. Based on these conclusions, this Office directed the University to disclose all non-exempt records. The University did not disclose the records in response to this Office's letter.

In the current FOIA request, Ms. Wurth specifically stated: "The University has yet to provide information it was obligated to disclose pursuant to a Nov. 17 letter to you from the Illinois Attorney General. In that letter, ... the Office of the Public Access Counselor determined that a number of documents related to the Presidential search were not exempt documents under the Illinois FOIA and that the university was obligated to disclose them. Therefore, we are requesting copies of all of those documents." On January 28, 2011, the University denied that request. The University relied on Section 3(g) of FOIA (5 ILCS 140/3(g)) and asserted that the request is "unduly burdensome" as a "[r]epeated request from the same person for the same records that are unchanged or identical to records previously provided or properly denied." On January 31, 2011, this Office received *The News-Gazette's* Request for Review. On February 9, 2011, we notified the University that we would require additional information to determine whether the University's response complied with FOIA. Since that time, we have received a written response from the University, as well as additional correspondence from *The News-Gazette*, all of which we have considered in making a determination regarding this matter.

Section 1.2 of FOIA (5 ILCS 140/1.2) provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection and 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." Therefore, in the context of a Request for Review, the issue is whether the public body has proved by clear and convincing evidence that the information it has withheld is exempt from disclosure under FOIA. As set forth more fully below, we find that the University has not met its burden of demonstrating that the records responsive to Ms. Wurth's FOIA Request are exempt under Section 3(g) of FOIA.²

The University asserts that the requested records are exempt under Section 3(g) of FOIA, which provides:

Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this

² As noted above, in response to *The News-Gazette's* and the other media outlets' initial FOIA requests, the University asserted that certain responsive records are exempt from disclosure under Section 7 (1)(c) and Section 7(1)(g). Our November 17, 2010 determination in 2010 PAC 8971 included an analysis of the records and the arguments made by the University and the requesters under Section 7(1)(c) and Section 7(1)(g) of FOIA. Although the University does not assert a Section 7 exemption in response to the current FOIA request in either its January 28, 2011 denial letter or its subsequent correspondence to our Office as part of this Request for Review, we restate as part of this binding opinion and explicitly incorporate herein by reference our previous analysis and findings concerning the application of the Section 7 exemptions to the records at issue here. (See attached November 17, 2010 determination in 2010 PAC 8971).

exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.

Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision.

In its January 28, 2011 denial to Ms. Wurth's FOIA request, the University stated:

This request is identical to elements of the FOIA request received by my office on April 27, 2010 (#10-029). Our August 5 response to that request was reviewed by the office of the Public Access Counselor, which issued a non-binding determination (PAC #8971), dated November 17, 2010, on which you were copied. The PAC advised that its correspondence served to close the matter. Pursuant to section 140(3)(g) of the Illinois Freedom of Information Act, your January 21 request is denied. Section 140(3)(g) of the Act states that "... Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision."

In response to our request for additional information, the University also argues:

The prohibition in section 140(3)(g) of FOIA against repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied is an attempt to protect public bodies and the office of the PAC from having to repeatedly address requests that have already been processed through the FOIA review process. Such repeat requests are an unduly burdensome imposition on the limited resources of taxpayer-funded entities and should not be permitted under the statute. . . . Given that the full costs of that search and very nearly all other information sought has already been produced, and the matter declared by the PAC to be closed, the News-Gazette's attempt to resume its inquiry constitutes an

improper and unduly burdensome attempt to revive a completed review process. Moreover, by filing a second FOIA request seeking to recover the same documents that the PAC has considered and ruled upon its November 17, 2010, non-binding determination letter, the News-Gazette in effect is improperly asking the PAC to reconsider its decision to issue its November 17 ruling as a non-binding decision. Under FOIA section 140/9.5(f), "In responding to any request under this Section 9.5, the Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. The decision not to issue a binding opinion shall not be reviewable." . . . Regardless of what advantages the News-Gazette hopes to obtain from making the PAC decision binding, the process it has sought to employ to achieve that result plainly contravenes the actions taken by the PAC to date, as well as the language of the statute.

In reply, *The News-Gazette* argues:

[t]he records requested have not been "previously provided." Furthermore, The News-Gazette's position is that the records have not been "properly denied" when there is a November 17, 2010 written opinion from PAC that the documents requested are not exempt from disclosure. Therefore, The News-Gazette is requesting documents that have been improperly denied to it by the University.

Analysis

Section 3(g) creates an exemption for "unduly burdensome" FOIA requests, and provides that a second or subsequent request may be deemed unduly burdensome when it is "from the same person for the same records that are unchanged or identical to records **previously provided or properly denied** under this Act . . ." (Emphasis added.) Under the plain language of Section 3(g), to be deemed unduly burdensome, a request (1) must be from the same person as a previous request, (2) seek the same records as the previous request, and (3) the records must be unchanged or identical to the records which were (4) either provided in response to the previous request or properly denied under the law.

In the newspaper's April 27, 2010 FOIA request, it sought "copies of all payments or reimbursements, and supporting documentation, to members of the University of Illinois presidential search committee, Michael Baer and/or staff for Isaacson, Miller. This request includes but is not limited to, vouchers, itineraries and receipts, and covers the period from Oct. 1 to the present." By its terms, this request focused on payments or reimbursements "to members of the University of Illinois presidential search committee." Unlike the FOIA requests

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from the *Chicago Tribune* reporter and the *WDWS-AM* and *WHMS-FM* news anchor, *The News-Gazette* request did not seek all expenditures relating to the presidential search or the expenditures relating to the applicants. In the current FOIA request, however, *The News-Gazette* is now seeking all of the documents that the University failed to provide in response to all three FOIA requests – including the records responsive to the *Chicago Tribune* and *WDWS-AM* and *WHMS-FM* requests. As a result of the differences in the three initial FOIA requests from the media outlets, it appears that the current FOIA is not from the same person as two of the three previous FOIA requests and does not seek the same records as two of those requests.

Even if *The News-Gazette* was only seeking the same documents that it previously sought, however, the University cannot establish that Section 3(g) applies. The University argues that it previously provided records to *The News-Gazette* in response to the newspaper's April 27, 2010 request. The only records sought by *The News-Gazette* in its present FOIA request are those that the University refused to disclose in response to the three April and May, 2010 media FOIA requests. *The News-Gazette* does not seek to obtain records that the University previously provided. As a result, the remaining issue here is whether the University properly denied the previous FOIA requests for these records.

In our November 17, 2010 letter (attached hereto and incorporated herein as part of this binding opinion), this Office analyzed the University's arguments and determined that it had not met its burden to demonstrate that the records are exempt under Section 7(1)(c) and Section 7(1)(g). Notwithstanding that analysis and direction from this Office, the University refused to disclose the records. The University now argues that despite that determination from this Office, it properly denied the previous request and, therefore, Section 3(g) applies. Given this Office's previous determination, the University's reliance on Section 3(g) to withhold these records is unfounded. The University's argument as to Section 3(g) implies that unless a FOIA request has been determined to have been improperly denied through a binding decision by the Public Access Counselor, the public body can simply assert that a second or subsequent request was properly denied. Section 3(g) provides no support for that argument. On the contrary, given FOIA's clear language creating a presumption that records are open to the public and placing the burden on the public body to establish by clear and convincing evidence that records are exempt, the University bears the burden here of establishing that it properly denied the previous FOIA requests for these records. Because the University cannot establish that it has previously properly denied the records responsive to Ms. Wurth's January 21, 2011 request, it cannot treat this request as an unduly burdensome repeated request under Section 3(g).

The University also argues that our Office lacks authority to issue any further determinations with regard to Ms. Wurth's January 21, 2011 request, due to our November 17, 2011 determination in 2010 PAC 8971. It cites Section 9.5(f) in support of this argument. This Section provides, in pertinent part:

In responding to any request under this Section 9.5, the Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the

issuance of a binding opinion. The decision not to issue a binding opinion shall not be reviewable. Upon receipt of a binding opinion concluding that a violation of this Act has occurred, the public body shall either take necessary action immediately to comply with the directive of the opinion or shall initiate administrative review under Section 11.5. If the opinion concludes that no violation of the Act has occurred, the requester may initiate administrative review under Section 11.5.

The University attempts to construe this provision so as to deny any effective review of a denial of a FOIA request under Section 3(g). It is important to note that *The News-Gazette* did not merely seek reconsideration or enforcement of this Office's November 17, 2010 determination letter. Rather, *The News-Gazette* sent a new FOIA request to the University seeking the documents previously withheld in response to FOIA requests from the newspaper and two other media outlets. Once the University failed or refused to disclose these records, *The News-Gazette* filed a new Request for Review under Section 9.5(c). Under these circumstances, *The News-Gazette* exercised its statutory right to seek this Office's review of the University's Section 3(g) denial. This Office, therefore, has jurisdiction to issue a binding opinion under Section 9.5(f).

Findings and Conclusions

After full review and giving due consideration to the positions of the parties, the Attorney General finds that:

- 1) *The News-Gazette's* Request for Review was timely filed and otherwise complies with the requirements of Section 9.5(a) of the Freedom of Information Act (5 ILCS 140/9.5(a)). Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the requested records.
- 2) The University of Illinois possesses records responsive to *The News-Gazette's* request but has asserted that the request is "unduly burdensome" and the records are exempt from disclosure under Section 3(g) of the Freedom of Information Act because it is a "[r]epeated request[]" from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act"
- 3) The University of Illinois has failed to sustain its burden of demonstrating that the request in question constitutes a "[r]epeated request[]" from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act" under Section 3(g).
- 4) Accordingly, these records of the University of Illinois are not exempt from disclosure under Section 3(g) of the Freedom of Information Act.


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Therefore, it is the opinion of the Attorney General that the University of Illinois has violated FOIA by improperly denying *The News-Gazette's* January 21, 2011 request for records. The University is required to provide copies of the requested records to Ms. Wurth pursuant to her January 21, 2011 request. Under Section 9.5(f) of FOIA, the University must either immediately comply with this binding opinion or initiate administrative review under Section 11.5 of FOIA.

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 4/3-101 *et seq.* 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 the decision naming the Attorney General of Illinois and Ms. Julie Wurth as defendants. See 5 ILCS 140/11.5.

Sincerely,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

November 17, 2010

Lisa Madigan
ATTORNEY GENERAL

Mr. Thomas Hardy
Executive Director, University Relations
University of Illinois 506 Wright Street
Urbana, Illinois 61801

Re: FOIA Request for Review – 2010 PAC 8971, 9114

Dear Mr. Hardy:

The Office of the Public Access Counselor (Office) has reviewed the Request for Reviews submitted by the *Champaign News-Gazette*, *Chicago Tribune*, and *WDWS-AM* and *WHMS-FM* and the responsive documents submitted by the University of Illinois (University) on August 31, 2010.

Findings of Fact

On April 27, 2010, Julie Wurth, Staff Reporter, *Champaign News-Gazette (News Gazette)* submitted a Freedom of Information Act (FOIA) request seeking the following information:

“...copies of all payments or reimbursements, and supporting documentation, to members of the University of Illinois presidential search committee, Michael Baer and/or staff for Isaacson, Miller. This request includes but is not limited to, vouchers, itineraries and receipts, and covers the period from Oct. 1 to the present.”

On May 14, 2010, Jodie Cohen, Staff Reporter, *Chicago Tribune (Tribune)*, submitted a FOIA request seeking the following information:

“..All documentation, from October 1, 2009 to the present, showing expenditure funds related to University of Illinois’ presidential search. This could include, but not be limited to, copies of all payments or reimbursements, along with supporting documentation, to members of the search committee or the search firm. It also could include direct payments from the university to vendors for such items as airfare, entertainment or other expenses.”

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On May 25, 2010, Patrick Phingsten, News Anchor, *WDWS-AM* and *WHMS-FM*, submitted a FOIA request to the University and requested the following information:

1. All applicants and/or applications received during recently the concluded search for the position of University of Illinois President (October 1, 2009 to May 20, 2010); and
2. All bills, travel expenses, vouchers, itineraries provided to the University by applicants, search committee members, or search firm Issacson-Miller (October 1, 2009 to the present). The request also applies to airfare, hotel or other travel-related expenses.

Because all three FOIA requests seek similar sets of records, we are addressing them as one consolidated Request for Review herein.¹

The University submitted a Pre-Authorization Request with this Office on June 9, 2010 and asserted that certain information is exempt from disclosure pursuant to Section 7(1)(c) (5 ILCS 140/7(1)(c)), which exempts from inspection or copying “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless disclosure is consented to in writing by the individual subjects of the information.” *Id.* The exemption defines “[u]nwarranted 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.” *Id.* Specifically, the University stated the following information was exempt pursuant to Section 7(1)(c):

1. Names and personal identifiers of job applicants;
2. Information such as the name of an applicant that is currently employed by the University, the address of an on-campus travel agency that used to arrange airfare, and the airport of departure when it is small enough to clearly point to a specific candidate; and
3. The names of private citizens who work for trustees in a non-University capacity.

This Office responded to the University’s Pre-Authorization Request on August 2, 2010, granting in part and denying in part the University’s request to withhold information pursuant to Section 7(1)(c). In the letter, this Office concluded the following:

- The University has met its burden to justify redacting the names and applications of all non-hired applicants for the position of University president.
- The University has not met its burden to justify redacting the name and application of the selected applicant, Michael J. Hogan.²

¹ The University also seeks to redact the name of a student contained in a document pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99. In October 28, 2010 conversations with both Brendan Healey and Traci Nally, both parties have confirmed that they are not seeking this information.

- Home telephone numbers, personal cell phone numbers and home addresses of applicants do not properly fall within the Section 7(1)(c) exemption, and we decline to make a determination as to whether the University may redact this information pursuant to Section 7(1)(b). Work telephone numbers and addresses of the non-hired applicants, however, do fall within the Section 7(1)(c) exemption and the University has met its burden to justify redacting this information pursuant to this Section of FOIA.
- The University has not met its burden to justify redacting (1) the name of the University at which any of the applicants is currently employed; (2) the address of on-campus travel agencies used to arrange airfare related to the University's presidential search; or (3) any of the airports of departure related to the University's presidential search and (4) the names of private citizens who work for trustees in a non-University capacity.

In the Pre-Authorization letter, this Office declined to address any matters relating to Section 7(1)(g) (5 ILCS 140/7(1)(g)) which exempts from inspection and copying "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 . . ."

On August 5, 2010, the *Tribune, News-Gazette, WDWS-AM, and WHMS-FM* received a partial denial letter from the University indicating that it disagreed with this Office's findings in 2010 PAC 7336, 7704 and 7852 and asserting that the University had met its burden pursuant to Section 7(1)(c) with respect to withholding: (1) the name of the University at which any of the applicants are currently employed; (2) the address of on-campus travel agencies used to arrange airfare related to the University's presidential search; and (3) any of the airports of departure related to the University's presidential search.

The University also asserted that information relating to the University's procurement of the Boston-based recruitment firm Isaacson, Miller to assist the University with the Presidential search is exempt from disclosure pursuant to Section 7(1)(g).

On August 5, 2010, the University provided the *Tribune, News-Gazette, WDWS-AM, and WHMS-FM* with approximately 1,000 pages of documents from October 2009 through July 2010 that related to the University's search for the new President. Included in these documents were the names of private citizens who worked for the trustees in a non-University capacity. On October 8, 2010, the University sent a letter to *WDWS-AM* indicating that it would be providing Mr. Phingsten with copies of all application information relating to Dr. Hogan.

² This is only pertinent to the request filed by *WDWS-AM* and *WHMS-FM*.

This Office received a Request for Review from the *News-Gazette*, *WDWS-AM* and *WHMS-FM* on August 9, 2010 and from the *Tribune* on August 16, 2010. This Office initiated further review with regard to the *News-Gazette*, *WDWS-AM* and *WHMS-FM* on August 18, 2010 and with regard to the *Tribune* on August 19, 2010.

On August 31, 2010, the University responded to our further inquiry letter and renewed its initial argument as to the disclosure of the information it previously denied pursuant to Section 7(1)(c) and addressed the Isaacson, Miller documents pursuant to Section 7(1)(g). Additionally, the University supplemented its response with 11 affidavits from employees from the University and other academic institutions,³ four affidavits from individuals with regard to the information relating to Isaacson, Miller,⁴ media clippings,⁵ a copy of No. 2010 PAC 6805, a previously-issued Pre-Authorization letter from this Office and a copy of the further review letter for No. 2010 PAC 7336.

On September 20, 2010 and September 28, 2010, this Office sent a 21-day extension letter to the University pursuant to Section 9.5(f). On September 29, 2010, Traci Nally, Senior Counsel, *News-Gazette*, *WDWS-AM* and *WHMS-FM* responded to the University's letter. On October 8, 2010, Don Craven, on behalf of the *Tribune*, submitted a response letter to the University's letter.

Determinations

Section 3(a) of FOIA (5 ILCS 140/3(a)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." Under Section 1.2 of FOIA (5 ILCS 140/1.2), "[a]ll records in the custody of a public body are presumed to be open to inspection and copying." This section further states that "[a]ny 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." (Emphasis added.)

³ With regard to information relating to the applicants, the University provided this Office with affidavits from the following individuals: Alvin Bowman, President, Illinois State University; Al Goldfarb, President, Western Illinois University; Sharon Hahs, President, Northeastern Illinois University; Michael J. Hogan, President, University of Illinois; Stanley Ikenberry, Former President, University of Illinois; Elaine Maimon, President, Governors State University; William Perry, President, Eastern Illinois University; John G. Peters, President, Northern Illinois University; Dr. Glenn Poshard, President, Southern Illinois University; Michele M. Thompson, Secretary, Board of Trustees, University of Illinois; Wayne Watson, President, Chicago State University. In addition to his affidavit, former President Stanley Ikenberry submitted the following five media clippings: "U of Maryland Narrows Field for President to 5," Washington Post, February 15, 1978; "4 Recommended for Presidency of Maryland University," February 18, 1978, "U- MD Offers Presidency to 5th on List; 4 Declined, Washington Post, March 22, 1978; "U-Md. Presidency Offered to Head of N.Y. University," unknown date.

⁴ With regard to information relating to the search firms, the University provided this Office with affidavits from the following individuals: Michael Baer, Isaacson, Miller, Jerry H. Baker, Baker and Associates; Kenneth Kring, Korn/Ferry International; Richard D. Legon, President, Association of Governing Boards of Universities and Colleges.

⁵ Articles from the August 8, 2010 edition of The Chronicle of Higher Education include: "Too Much Sunshine Can Complicate Presidential Searches," "How a Public Search Cost a Provost Her Job," and "A Presidential Search at Florida Atlantic: One Candidate's Experience."

Information relating to the Unsuccessful Applicants

In its response letter, the University asserts that disclosure of: (1) the name of the current employer at which any of the unsuccessful applicants are currently employed; (2) the address of on-campus travel agencies used to arrange airfare related to the University's Presidential search; or (3) any of the airports of departure related to the University's presidential search could lead to the disclosure of the identities of the unsuccessful applicants.

With respect to the disclosure of the identities of unsuccessful applicants for the Presidency position, this Office made the following determination in 2010 PAC 6805, a Pre-Authorization Request involving a FOIA request submitted to the University by *WLS-TV* for the same information. In that letter, we noted the following:

Applications for employment generally contain information that is personal in nature and the release of which would be objectionable to the reasonable person. Further, in many cases, the fact that an individual is seeking new employment for a position is information that a reasonable person would view as highly personal and the release of that information is likely to be viewed as objectionable by most individuals. Publication of an individual's application for a position can negatively impact that individual's current employment and the release of personal information about applicants may also negatively impact a public body's ability to attract qualified applicants for open positions. Accordingly, as a result of our review, we have determined that the University may properly decline to disclose under Section 7(1)(c) the names of applicants for the position of University President and the applications submitted by those individuals.

This Office renewed these findings in No. 2010 PAC 7336, 7704 and 7852 in support of our determination that disclosure of the names of the unsuccessful applicants would amount to an invasion of privacy pursuant to Section 7(1)(c). The University relies on the affidavits, media clippings and previous determination letters from this Office to support its argument that incidental information related to the University's search for the President is also exempt from disclosure pursuant to Section 7(1)(c).

Each affidavit submitted by officials from other academic institutions underlies the University's assertion that disclosure of identifying information such as the name and application of the unsuccessful applicant, the current employer of the unsuccessful applicant, the identity of the regional airport and the travel agency could cause harm for that specific applicant within his current place of employment and lead to the disclosure of that applicant's identity.

John G. Peters, President, Northern Illinois University, stated the following in his August 26, 2010 Affidavit:

The harm caused by directly releasing an applicant's name can also be caused by requiring a public body to release information, which, in context, would reveal the identities of applicants. For example such "identifying information" may consist of:

- An individual's title and current employer,
- The name of a very small regional airport near a single college or university
- The name of a larger airport combined with the exact travel mileage incurred and reimbursed, thereby identifying the college and university.

Disclosure of this information will inevitably reveal the precise identities of applicants, which is just as harmful as directly revealing those identities. Most Land-Grant universities are located in non-metropolitan areas. The pool of high level candidates from the group is quite small and well known in the academic community. A candidate flying out of the Lincoln, Nebraska airport, for instance, would immediately be identified.

William L. Perry, President, Eastern Illinois University, stated the following in his August 25, 2010 Affidavit:

The harm caused by directly releasing an applicant's name can also be caused by requiring a public body to release information which, in context, would reveal the identities of applicants.

Finally, Stanley Ikenberry, former President, University of Illinois, stated the following in his August 20, 2010 Affidavit:

The harm caused by directly releasing an applicant's name can also be caused by requiring a public body to release information, which in context, would reveal the identities of the applicants...Disclosure of this information would inevitably reveal the precise identities of applicants, which is just as harmful as directly revealing those identities.

As we noted in No. 2010 PAC 6805 and 2010 PAC 7336, 7704 and 7852, disclosure of the identities of unsuccessful applicants could adversely impact that applicant's position with their current employer. This finding, however, does not extend to all records relating to a public body's search for a candidate. Specifically, there exists a legitimate public interest in the scope of the University's search for a new President. Moreover, several of these records relate to the expenditure of public funds under Section 2.5 of FOIA that provides that "[a]ll records *relating* to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public." 5 ILCS 140/2.5 (Emphasis added.)

The Names of the Current Employers of Unsuccessful Applicants

This Office renews the findings in 2010 PAC 6805, 2010 PAC 7336, 7704 and 7852 in support of our conclusion that the disclosure of the identity of the unsuccessful applicants and their applications would constitute a highly unwarranted invasion of personal privacy and those documents are therefore exempt from disclosure under Section 7(1)(c).

With regard to the disclosure of the current employer of the unsuccessful applicant, we now find that the University has met its burden in demonstrating that the name of the current employer is exempt from disclosure pursuant to Section 7(1)(c).

In the University's May 11, 2010 Pre-Authorization Request to this Office, the University did not distinguish between the disclosure of the name of the applicant, the application and the applicant's current employer.

While this Office previously ruled on this matter in 2010 PAC 6805 as to the identities of the applicants and their applications, this Office had not made a finding specifically directed to the disclosure of the name of the current employer of an unsuccessful applicant. In another context, this Office has found that disclosure of an employer, absent certain circumstances, is not considered to be a matter of personal privacy. In 2010 PAC 7440, we noted the following with respect to the disclosure of an arrestee's employment:

Simply because information can be characterized as personal does not automatically make it exempt under Section 7(1)(c). The high standard under this subsection requires that the information seeking to remain exempt is highly sensitive and objectionable to the reasonable person. In this instance, the alleged offender is likely making his place of employment known to his coworkers, friends, family and possibly other members of the public. The Department has not furnished us with any unique information about the alleged offender's employment to think that the disclosure would be highly sensitive or objectionable to the reasonable person.

Similarly, the University provided no evidence in support of its Pre-Authorization Request with regard to how disclosure of the name of the current employer in this context constitutes an unwarranted invasion of personal privacy. Instead, this argument was subsumed by the University's argument against disclosure of the identities of the applicants and the applications. Therefore, we initially concluded that the University did not meet its burden in demonstrating how disclosure of the identity of the current employer by itself is considered highly personal or objectionable to the reasonable person.

In the August 31 letter, the University states that "only by undertaking a more fulsome fact-specific-analysis here will the PAC reach a decision that protects the privacy interests of private individuals who were involved in the University's presidential search."

Based on that letter and the University's supplemental documents, which include the affidavits and media clippings, we have determined that the University has met its burden that disclosure of the unsuccessful applicant's current employer could constitute a highly unwarranted invasion of personal privacy. The letter states that the final candidates for the President of the University were highly qualified and experienced individuals who held senior administrative positions at other colleges and universities, such as President and provost. The University also states that disclosure of the current employer could create a negative impact on that applicant's current employer. Because of the type of applicants that were considered for this position and the fact that they were not hired, there exists no legitimate public interest in disclosure of the employers of the unsuccessful applicants. And unlike the finding we made in 2010 PAC 7440, the University has supplied us with specific information about how the disclosure of the unsuccessful applicant's current employment would be highly sensitive or objectionable to the reasonable person. Therefore, the University may withhold the current employers of the unsuccessful applicants.

Regional Airports, the names of the airlines, the date of flight and the flight number

The requesters also seek the names of the airlines, departing airport, date of flight and flight number used by the unsuccessful applicants. The University seeks to withhold this information, specifically the identity of the regional airport that is within close proximity to only one university because, it is argued that such information points to a small geographical area and would almost lead to the identification of the university and the candidate.⁶

As explained by President Peters in his Affidavit, several "Land Grant"⁷ universities are of significant distance from large metropolitan areas and the disclosure of a small airport in Lincoln, Nebraska, for example, could reveal the identity of a particular candidate. Using President Peters' example, Lincoln, Nebraska is home to the University of Nebraska. President Peters argues that if an applicant boarded a flight from Lincoln, Nebraska to Chicago O'Hare, that applicant was likely employed by the University of Nebraska.

The first part of the analysis under Section 7(1)(c) is to determine if such information can be considered highly personal or objectionable to the reasonable person. Unlike the identity of the current employer of an unsuccessful applicant, an airport used by an applicant for a job interview cannot be characterized as personal in nature.

Additionally, a public body cannot characterize non-personal information as personal simply because the possibility that a diligent reporter could effectively piece together information

⁶ In an October 22, 2010 conversation with this a representative of this Office, University Relations Director Thomas Hardy acknowledged that the departing locations from airports within large metropolitan areas such as New York City, was disclosed to the requesters.

⁷ According to Webster's Dictionary, a Land-Grant university (also called land-grant colleges or land grant institutions) are institutions of higher education in the United States designated by each state to receive the benefits of the Morrill Acts of 1862 and 1890.

obtained through FOIA and from sources outside of FOIA in order to draw a reasoned inference based on available facts.

To the extent that disclosure could constitute a highly unwarranted invasion of personal privacy, this Office concludes there exists a legitimate public interest in the locations of the regional airport. If the University conducted a nationwide search for a new President, then there is a material difference in airfare from applicants who, for example, departed from College Station, Texas, Sioux Falls, South Dakota, Madison, Wisconsin or Athens, Georgia. There is also a material difference in price based on the airline used by the University. A flight on a commercial carrier is likely different in price than a flight on a smaller regional airline. Airfares are subject to price fluctuation on a variety of factors such as airline, destination, seat location, time, date and route. Therefore, we find that the airline, date of flight, flight number and departing airport are records that are within the scope of Section 2.5 and must be disclosed to the requesters.

Travel Agencies

Next, the requesters seek the names of the on-campus travel agency used to arrange the travel need of the applicants.

Under the Section 2.5 analysis, the University's utilization of an on-campus travel agency for the purposes of planning a flight for a potential applicant falls squarely within records relating to the obligation or expenditure of public funds. The University has not met its burden by demonstrating through clear and convincing evidence that disclosure of the on-campus travel agency could be linked to the identity of the unsuccessful applicant or that such information remains highly personal or objectionable to the reasonable person.

The University has not met its burden with regard to the name of the on-campus travel agency that arranged the unsuccessful applicant's travel. Therefore, the names of the travel agencies must be released.

Information Relating to the University's Search Firm

The University explains that a portion of documents submitted to the University by Isaacson, Miller is exempt under Section 7(1)(g).

Section 7(1)(g) of FOIA allows a public body to withhold a trade secret or commercial or financial information *only to the extent that disclosure would* cause competitive harm to the person or business, and then only insofar as the claim directly applies to the records requested. 5 ILCS 140/7(1)(g) (Emphasis added.) Pursuant to Section 7(1)(g), in order to show substantial competitive harm resulting from disclosure of information alleged to be exempt from FOIA as trade secrets or commercial or financial information, *the agency that is resisting request for disclosure 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 the competitive position would likely result from disclosure of information in the agency's records.

Cooper v. Department of the Lottery, 266 Ill.App.3d 1007, 1012 (1st Dist. 1994) (Emphasis added.)

The University has supplied this Office with an August 25, 2010 affidavit from Isaacson, Miller Vice-President Michael Baer. In his affidavit, Dr. Baer states:

As a result of receiving this information, I reviewed the language of FOIA concerning trade secrets, etc and reviewed the Isaacson, Miller documents. I also consulted with John Fahy, our Finance Officer and John Isaacson, the founder and President of the firm. Together we determined that although the overwhelming majority of the information contained in the Isaacson, Miller documents was not subject to the exemption, the "fee for services" figure was proprietary, and that disclosure of that amount would allow our competitors to "game their bids" in the future, and also would allow potential future clients to negotiate against this amount. Both of these dynamics would undercut our firm's ability to maintain a reasonable profit margin and its competitive advantage. In addition, because the "fee for services" amount is expressed in the Isaacson, Miller documents as a percentage of the first year salary, knowing that percentage would allow anyone to simply calculate the "fee for services" amount. Accordingly, that percentage also was deemed to be proprietary. Finally, to the extent that break-down of indirect expenses would allow the "fee for services" to be derived, these components were deemed proprietary. The total cost of our services was not proprietary, nor was any other aspect of the contractual arrangement. Accordingly, the total amount of the engagement was provided multiple times within the contract.

While Isaacson, Miller may face more competition if the requested information were disclosed, there is nothing to indicate in Dr. Baer's affidavit that *substantial harm* to the competitive position of Isaacson, Miller would be suffered if the 'fee for services' figure was disclosed. The fact that it might be used by competitors does not equate to substantial harm. Ultimately, the 'fee for services' was a figure that was incorporated into Isaacson, Miller's final cost to the University. If Section 7(1)(g) intended that a 'fee for services' assessed by a private firm to a public body was proprietary, privileged and confidential, as the University and Isaacson, Miller suggest, such a finding would render Section 2.5 superfluous. Therefore, the University is obligated to furnish the requesters copies of the unredacted portion of the agreement that contains the 'fee for services.'

Conclusions

In summary, this Office renews our findings that the identity of the unsuccessful applicants and their applications are exempt from disclosure pursuant to Section 7(1)(c). Additionally, we find that the University has met its burden in demonstrating that disclosure of the name of the current employer of the unsuccessful applicant could constitute a highly unwarranted invasion of personal privacy. Because that applicant has not been selected for the position, there exists no legitimate interest in disclosure of the current employer.

The University has failed to meet its burden in demonstrating that disclosure of the regional airport, flight number, airline, date of flight and the on-campus travel agency used during the search for the President would be highly personal or objectionable to the reasonable person and

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that a legitimate public interest exists in disclosure of this information. The fact that this information is ultimately related to the expenditure of public funds under Section 2.5 of FOIA subjects this information to disclosure.


Finally, the University has not met its burden in demonstrating that the 'fee services' incorporated into the University's contract with Isaacson, Miller would cause substantial harm to Isaacson, Miller under Section 7(1)(g). Additionally, we find that the 'fee services' relate to the expenditure of public funds and is subject to disclosure pursuant to Section 2.5 of FOIA.

Therefore, the University is obligated to disclose the above referenced information to the *Tribune*, *WDWS-AM*, *WHMS-FM* and the *News-Gazette*. This correspondence shall serve to close this matter. Should you have any questions, please contact me at (312) 814-5383.

Sincerely,

Cara Smith
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