



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

June 30, 2014

**PUBLIC ACCESS OPINION 14-005**  
**(Request for Review 2014 PAC 28485)**

FREEDOM OF INFORMATION ACT:  
Records Documenting Public Funds  
Paid to Entities Pursuant to Contracts For  
Performance of A Governmental Function  
Are Subject to Disclosure

Ms. Carla K. Johnson  
Associated Press  
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Suite 1000  
Chicago, Illinois 60605

Ms. Mehpara Angelina Suleman  
Freedom of Information Officer/Senior Counsel  
Illinois Department of the Lottery  
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Dear Ms. Johnson and Ms. Suleman:

This binding opinion is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons discussed below, this office concludes that the Illinois Department of the Lottery (Department) improperly redacted the financial terms from contracts it furnished to Ms. Carla K. Johnson in response to her FOIA request.

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## BACKGROUND

On February 27, 2014, Ms. Johnson, on behalf of the Associated Press, submitted a FOIA request to the Department seeking "a copy of the current Illinois Lottery marketing/advertising contract. I'm looking specifically for the pricing structure and the hourly rates."<sup>1</sup> On March 17, 2014, the Department furnished Ms. Johnson with copies of two contracts that Northstar provided to the Department with substantial portions redacted.<sup>2</sup> The Department's response indicated that Northstar claimed that the redacted information was exempt from disclosure pursuant to 7(1)(c) and 7(1)(g) of FOIA (5 ILCS 140/7(1)(c), (1)(g) (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013).<sup>3</sup> In addition, the Department indicated that portions of the contracts that Northstar marked as confidential may be exempt from disclosure pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013).<sup>4</sup>

On that date, Ms. Johnson filed a Request for Review with the Public Access Counselor stating, "I believe the public has a right to know how much money is spent to advertise the Illinois Lottery."<sup>5</sup> Ms. Johnson subsequently clarified for this office that she disputes only the redaction of financial terms such as the total amounts of the contracts, hourly billing rates, and commissions, if any, that the Department's private lottery manager, Northstar Lottery Group, LLC's (Northstar) contractors received for placing strategic advertisements in the

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<sup>1</sup>E-mail from Carla K. Johnson, Associated Press, to Tracy [L. Jacobson] (February 27, 2014).

<sup>2</sup>The first agreement, "Subcontract Agreement for Multi-Cultural Advertising & Integrated Communications Services," dated September 20, 2011, is a contract between the Department's private lottery manager, Northstar Lottery Group, LLC and subcontractor Wright-Islam Holdings, LLC, d/b/a Commonground Marketing (Commonground). The second agreement, "Subcontract for Creative Advertising Services," dated January 19, 2012, is a contract between Northstar and the subcontractors Downtown Partners Communications, Inc., (Downtown Partners) and Critical Mass (U.S.), Inc., (Critical Mass)." Under the agreements, the subcontractors agreed to provide Northstar with marketing and advertising services.

<sup>3</sup>Letter from Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery, to Carla K. Johnson, Associated Press (March 17, 2014).

<sup>4</sup>Letter from Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery, to Carla K. Johnson, Associated Press (March 17, 2014).

<sup>5</sup>E-mail from Carla K. Johnson, Associated Press, to Public Access Counselor (March 17, 2014).

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media.<sup>6</sup> Financial terms of the contracts such as pricing and hourly rates were redacted pursuant to sections 7(1)(a) and 7(1)(g) of FOIA. Additional information, which is not the subject of Ms. Johnson's Request for Review, was redacted pursuant to section 7(1)(c).<sup>7</sup> Because Ms. Johnson's Request for Review is limited to the financial terms of the contracts, this binding opinion will not address the applicability of section 7(1)(c).

On March 24, 2014, the Public Access Bureau forwarded a copy of the Request for Review to the Department and asked it to provide un-redacted copies of the contracts and a detailed factual and legal basis for each of the asserted exemptions.<sup>8</sup> On April 18, 2014, the Department furnished this office with copies of the responsive documents in its possession. However, the Department indicated that it does not possess complete copies of the contracts.<sup>9</sup> In a telephone conversation with an Assistant Attorney General in the Public Access Bureau, an attorney for the Lottery clarified that the Department did not receive all the exhibits and schedules included in the contracts.<sup>10</sup> The Department also provided this office with a copy of a letter from Northstar to the Department in which Northstar declined to furnish un-redacted copies of the contracts to this office or the Department, but provided detailed explanations for the applicability of the asserted exemptions.<sup>11</sup> Northstar's letter stated, in pertinent part:

Northstar cannot and will not provide un-redacted copies of the Agency [contractor] Agreements to the Department or the Public Access Bureau. The "Confidential Information" redacted

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<sup>6</sup>E-mail from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General, to Carla [K. Johnson] (June 10, 2014); e-mail from Carla K. Johnson, Associated Press, to Steve [Silverman] (June 10, 2014).

<sup>7</sup>Northstar specifically redacted "personal information such as first and last names, signatures, email addresses, the identification of key employees and other individually identifiable information of personnel[ ]". Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 4.

<sup>8</sup>Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (March 24, 2014).

<sup>9</sup>Letter from Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery, to Steve Silverman, Public Access Bureau (April 18, 2014).

<sup>10</sup>Telephone conversation between Steve Silverman, Assistant Bureau Chief, Public Access Bureau, and Mehpara Angelina Suleman, Senior Counsel, Illinois Department of the Lottery (June 24, 2014).

<sup>11</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014).

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by the Agencies is protected from disclosure by the Lottery Law, FOIA, the PMA [Private Management Agreement under which the State contracts Northstar to operate the Lottery] and the Agency Agreements. Moreover, Northstar owes an obligation to the Agencies to maintain the confidentiality of their Confidential Information. Finally, the Department owes an obligation to Northstar to do the same.<sup>12</sup>

The Department's response was forwarded to Ms. Johnson on April 21, 2014. She did not reply.

On May 16, 2014, the Public Access Bureau properly extended the period in which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.<sup>13</sup>

#### ANALYSIS

"It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." 5 ILCS 140/1 (West 2012). Under section 1.2 of FOIA (5 ILCS 140/1.2 (West 2012)), "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012)) 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."

Further, section 7(2) of FOIA (5 ILCS 140/7(2) (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013) provides:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

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<sup>12</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 3.

<sup>13</sup>Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Tracy L. Jacobson, Freedom of Information Office, Illinois Department of the Lottery, and Carla K. Johnson, Associated Press (May 16, 2014).

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The General Assembly enacted the Illinois Lottery Law (20 ILCS 1605/1 *et seq.* (West 2012)) to "establish within the State a lottery to be conducted by the State through the Department. The entire net proceeds of the Lottery are to be used for the support of the State's Common School Fund," subject to certain, specified exceptions. 20 ILCS 1605/2 (West 2012). The General Assembly further determined that "it is in the public interest for the Department to conduct the functions of the Lottery with the assistance of a private manager under a management agreement overseen by the Department." 20 ILCS 1605/2 (West 2012). This management agreement "shall act to promote and ensure the integrity, security, honesty, and fairness of the Lottery's operation and administration." 20 ILCS 1605/2 (West 2012).

Thus, section 2 of the Lottery Law expressly delegates to the Department the governmental function of operating a lottery to generate public funds, primarily for the benefit of the public schools, with the assistance of a private manager. Pursuant to this section, the Department contracted Northstar to be its lottery manager. Consequently, based on the plain language of section 7(2) of FOIA, all records in the possession of Northstar that directly relate to the operation of the Lottery are considered to be records of the Department, for purposes of FOIA. Because Northstar's contracts with its contractors to provide marketing and advertising services relate to Northstar's management of the Lottery, those records are subject to the disclosure requirements of FOIA to the same extent as are other records of the Department and must be produced unless exempted from disclosure under the Act.

#### **Section 7(1)(a) of FOIA**

The Department's response indicated that section 7(1)(a) of FOIA, which allows a public body to withhold "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law[,]" may exempt from disclosure information that Northstar marked confidential such as financial terms of the contracts. The Department's response to the FOIA request and Northstar's letter both referred to section 12 of the Lottery Law (20 ILCS 1605/12 (West 2012)) as the basis for asserting that the information was exempt from disclosure under section 7(1)(a). Section 12 of the Lottery Law provides:

The public inspection and copying of the records and data of the Department and the [Lottery Control] Board shall be generally governed by the provisions of the Freedom of Information Act except that the following shall additionally be exempt from inspection and copying:

- (i) information privileged against introduction in judicial proceedings;
- (ii) internal communications of the several agencies;

- (iii) information concerning secret manufacturing processes or confidential data submitted by any person under this Act;
- (iv) any creative proposals, scripts, storyboards or other materials prepared by or for the Department, prior to the placement of the materials in the media, if the prior release of the materials would compromise the effectiveness of an advertising campaign.

Northstar's letter to the Department indicated that its contractors identified various provisions of the marketing and advertising contracts as confidential, including financial terms such as annual and monthly fees, pricing, and compensation, and therefore redacted those provisions from the copies provided to Ms. Johnson.<sup>14</sup> Northstar contends that the financial terms of the contracts and other redacted information constitute "confidential data" within the meaning of section 12(iii) of the Lottery Law (20 ILCS 1605/12(iii) (West 2012)).<sup>15</sup>

As noted above, section 12 of the Lottery Law provides that FOIA generally governs the disclosure of records under the Lottery Law, but the Lottery Law also creates additional exceptions for the information referenced in subsections (i) through (iv). It is a "well-settled rule of statutory construction that exceptions in statutes are to be strictly construed[.]" *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 299 (2005). Further, "an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated - that is, such a proposed disclosure must be *specifically* prohibited." (Emphasis in original.) *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 816 (4th Dist. 2008).

Section 12(iii) of the Lottery Law does not expressly prohibit the disclosure of the financial terms of these contracts. Moreover, in this context, the financial terms of the contracts do not appear to constitute "confidential data" within the contemplation of that exemption. Although the phrase "confidential data" has not been defined for purposes of section 12(iii), where two words or phrases are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations, and give color and expression to each other.

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<sup>14</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 3.

<sup>15</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 4. The letter also indicated that Northstar redacted the creative advertising information pursuant to section 12(iv) of the Lottery Law (20 ILCS 1605/12(iv) (West 2012)). Because Ms. Johnson has clarified that she is not seeking creative advertising information, this binding opinion does not address the applicability of section 12(iv) of the Lottery Law.

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*Environmental Protection Agency v. Pollution Control Bd.*, 186 Ill. App. 3d 995, 999 (5th Dist. 1989). The phrases "secret manufacturing processes" and "confidential data" are both employed in section 12(iii); thus, it must be assumed that the phrase "confidential data" was intended by the General Assembly to mean something similar to the phrase "secret manufacturing processes." It clearly would not include the amount of public funds that the Department or its agent is willing to expend for hourly billing rates, commission fees, and other financial terms relating to the marketing and advertising services.

Moreover, article VIII, section 1(c) of the Illinois Constitution of 1970 provides that "[r]eports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." Section 2.5 of FOIA (5 ILCS 140/2.5 (West 2012)) correspondingly 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." Even if the financial terms of the contracts in question could be considered to be "confidential data," for purposes of section 12(iii) of the Lottery Law, the more specific disclosure requirements of section 2.5 of FOIA would prevail:

When a general statutory provision and a more specific one relate to the same subject, we will presume that the legislature intended the more specific statute to govern. [Citation.] We will also presume that the legislature intended the more recent provision to control. *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 346 (2008).

Section 2.5 of FOIA was enacted by Public Act 96-542, effective January 1, 2010; section 12(iii) of the Lottery Act was enacted by Public Act 78-20, effective July 1, 1974. Section 2.5 of FOIA is therefore the later expression of the General Assembly's intent. Further, the more recently enacted terms of section 2.5 relate to a single category of records, those concerning the obligation, receipt and use of public funds, whereas "confidential data" could include a number of categories of information. Accordingly, this office concludes that the Department has not sustained its burden of demonstrating that the redacted financial terms of the contracts are exempt from disclosure pursuant to section 7(1)(a) of FOIA based on section 12(iii) of the Lottery Law.

### Section 7(1)(g) of FOIA

Financial terms of the contracts also were redacted pursuant to section 7(1)(g) of FOIA, which exempts from disclosure:

Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested.

In *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 995 (1st Dist. 2007), the court stated that "[t]he term *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.) Northstar's letter asserted that its contractors furnished the redacted portions of the contracts under a claim of confidentiality and that disclosure of the requested information would cause competitive harm to the contractors by, among other things, enabling other entities to develop pricing models or proposals to compete for business.<sup>16</sup>

The contracts in question describe the cost and nature of marketing and advertising services commissioned and paid for by the Department through the PMA. Records documenting the publicly funded cost of services purchased by a State agency do not constitute trade secrets, or commercial or financial information, within the scope of section 7(1)(g). As noted above, this information directly relates to the use of public funds and, therefore, is expressly subject to disclosure pursuant to article VIII, section 1(c) of the Illinois Constitution of 1970 and section 2.5 of FOIA. Simply put, entities that contract to perform services for a governmental agency do not enjoy the same ability to withhold information that they do with respect to their private contracts. Moreover, Northstar has failed to show how the disclosure of this information would result in substantial competitive harm to its business or that of its contractors. An unsupported allegation of competitive harm would, in any circumstances, be inadequate to support a finding that the information is exempt under section 7(1)(g). Accordingly, this office concludes that the Department has not sustained its burden of

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<sup>16</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 5.



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demonstrating that the financial terms of the contracts are exempt from disclosure pursuant to section 7(1)(g) of FOIA.

### **Confidentiality Agreements and the PMA**

Northstar has also asserted that the confidentiality agreements it has entered into with its contractors prohibit the Department and Northstar from disclosing the redacted portions of the subcontracts and that the PMA requires the Department to seek a protective order to prevent the disclosure of the records. Contracts prohibited by law are void as *ultra vires*. *Dell v. City of Streator*, 193 Ill. App. 3d 810, 812 (3rd Dist. 1990). Likewise, a contract provision that violates public policy as expressed in a statute is unenforceable. *Fosler v. Midwest Care II, Inc.*, 398 Ill. App. 3d 563, 571 (2nd Dist. 2009); *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 57 (2004), alluding to *Schumann-Heink v. Folsom*, 328 Ill. 321, 330 (1927); see also *State ex. rel. Findlay Publishing Company v. Hancock County Board of Commissioners*, 80 Ohio St. 3d 134, 137, 684 N.E. 2d 1222, 1225 (Ohio 1997) ("A public entity cannot enter into enforceable promises of confidentiality regarding public records"); *Tribune-Review Publishing Company v. Westmoreland County Housing Authority*, 574 Pa. 661, 675, 833 A. 2d 120 (Pa. 2003) ("the confidentiality clause contained in this agreement is void as against public policy to the extent that it conflicts with the text and purpose of the [Open Records] Act. A public entity may not enter into enforceable promises of confidentiality regarding public records").

Section 1 of FOIA (5 ILCS 140/1 (West 2012)) declares it to be the "public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." As discussed above, the financial terms of the subcontracts do not fall within the scope of the asserted section 7(1)(a) and 7(1)(g) exemptions, and are expressly subject to disclosure pursuant to section 2.5 of FOIA. Therefore, to the extent that the confidentiality agreements concerning the contracts in question, if given effect, would allow the Department to circumvent the public policy effectuated by FOIA, they are unenforceable.

Even if the confidentiality agreements were given effect, compliance with this binding opinion would not breach those agreements. Northstar provided copies of its confidentiality agreements,<sup>17</sup> which broadly define "confidential information" to include, among other things, rates and other financial information. However, the definition excludes

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<sup>17</sup>See "Amended and Restated Non-Disclosure Agreement [(Critical Mass Agreement)]," dated May 9, 2012, between Northstar and Critical Mass and Downtown Partners and "Non-Disclosure Agreement [(Commonground Agreement)]," dated June 16, 2011, between Northstar and Commonground.

"information which \* \* \* is required to be disclosed pursuant to *a final binding order of a governmental agency* or court of competent jurisdiction, provided that the disclosing party has been given reasonable notice of the pendency of such an order and the opportunity to contest it."<sup>18</sup> (Emphasis added.) One of the agreements further provides that the parties agree to maintain the confidentiality of the information, "except for disclosure to the Department or *as required by the Illinois Freedom of Information Act*["]"<sup>19</sup> (Emphasis added.)

The Department has been provided with notice of the pendency of this Request for Review and has been given a meaningful opportunity to contest the assertion that the information is not exempt from disclosure. Accordingly, the issuance of a binding opinion by this office pursuant to section 9.5(f) of FOIA would constitute a "final binding order of a governmental agency" for purposes of the agreements' provisions governing disclosure. Therefore, the confidentiality agreements do not prohibit the disclosure of the requested financial information.

With respect to Northstar's assertion that the PMA prohibits the Department from disclosing the financial terms of the contracts, section 9.3.4 of the PMA provides:

**9.3.4 Legally Required Disclosures.** The Receiving Party may disclose the Confidential Information of the Disclosing Party to the extent disclosure is based on the good faith written opinion of the Receiving Party's legal counsel that disclosure is required by Regulatory Requirement; provided, however, that the Receiving Party shall give advance notice of such requested disclosure and a legal opinion to the Disclosing Party prior to any such disclosure and shall use commercially reasonable efforts to obtain a protective order or otherwise protect the confidentiality of the Disclosing Party's Confidential Information. Notwithstanding the foregoing, the Disclosing Party reserves the right to obtain a protective order or otherwise protect the confidentiality of such Confidential Information. For purposes of this **Section 9.3.4**, the Parties' in-house counsel or law department may act as their respective legal counsel.<sup>20</sup> (Underscoring and bold in original.)

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<sup>18</sup>See Critical Mass Agreement, §1(a); Commonground Agreement §1(a).

<sup>19</sup>See Critical Mass Agreement, §2.

<sup>20</sup>Illinois Lottery Private Management Agreement between the State of Illinois Department of Revenue and Northstar, dated January 18, 2011.

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As used in the PMA, the term "Regulatory Requirement" means "all federal, country, state, provincial, regional, territorial, local and other laws, rules and regulations, ordinances, interpretive letters and other official releases of or by any Governmental Authority, decrees, orders and codes (including any requirements for permits, certificates, approvals and inspections), as the same are promulgated, supplemented and/or amended from time to time, including laws that apply directly or indirectly to the delivery or receipt of Services under this Agreement."<sup>21</sup>

Section 9.3.4 does not prohibit the disclosure of the requested financial information. Rather, section 9.3.4 sets out a three-step procedure to be followed prior to the release of confidential information. First, the Department is to provide advance notice of the requested disclosure. Northstar's April 9, 2014, letter indicates that "[o]n March 12, 2014, the Department asked Northstar to produce to the Department copies of its marketing/advertising contracts" and that "[o]n March 13, 2014, Northstar provided the Department with *redacted* copies of its contracts with its two marketing/advertising subcontractors[.]"<sup>22</sup> (Emphasis in original.) Further, the same letter states that "[o]n March 28, 2014, the Office of the Attorney General, Public Access Bureau, determined that further inquiry was warranted and requested that the Department provide un-redacted copies of the Agency Agreements for the Public Access Bureau's confidential review" and the Department "asked whether Northstar would like to submit a response to the Public Access Bureau[.]"<sup>23</sup> Northstar's response was provided to this office. Based on the foregoing, the Department has provided Northstar with advance notice of both requested disclosures (Ms. Johnson's FOIA request and the Public Access Bureau's records request).

Second, the Department is to provide Northstar with its written opinion that disclosure is required. If the Department has not already done so, this binding opinion issued to the Department shall serve as the legal opinion that disclosure is required.

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<sup>21</sup>Illinois Lottery Private Management Agreement between the State of Illinois Department of Revenue and Northstar, dated January 18, 2011, Schedule 1.2.

<sup>22</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 1.

<sup>23</sup>Letter from Kim Barker Lee, Vice President, Legal and Regulatory Compliance, Northstar Lottery Group, to Tracy L. Jacobson, Freedom of Information Officer, Illinois Department of the Lottery (April 9, 2014), at 2.

Third, the Department is to use commercially reasonable efforts to obtain a protective order or, in the alternative, to otherwise protect the confidentiality of Northstar's confidential information. The Department asserted a number of exemptions in response to Ms. Johnson's original FOIA request. The Department has been an active and meaningful participant in the Request for Review process. It has submitted to this office requested documents and raised exemptions related thereto. It has submitted for this office's consideration the legal analysis prepared by Northstar. The Department has used reasonable efforts to "otherwise protect the confidentiality" of the confidential information. Consequently, the Department has complied with section 9.3.4 and may disclose the requested financial information.

### FINDINGS AND CONCLUSIONS

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

- 1) On February 27, 2014, Ms. Carla K. Johnson, on behalf of the Associated Press, submitted a FOIA request to the Illinois Department of the Lottery seeking a "copy of the current Illinois Lottery marketing/advertising contract. I'm looking specifically for the pricing structure and the hourly rates."
- 2) On March 17, 2014, the Department furnished Ms. Johnson with copies of two contracts between its private manager, Northstar Lottery Group, LLC and three entities with which Northstar contracted to provide marketing and advertising services for the Department: Downtown Partners Communications, Inc.; Critical Mass (U.S.), Inc.; and Wright-Islam Holdings, LLC, d/b/a Commonground Marketing. Substantial portions of those contracts were redacted pursuant to sections 7(1)(a), 7(1)(c), and 7(1)(g) of FOIA.
- 3) On March 17, 2014, the Public Access Counselor received Ms. Johnson's Request for Review disputing the redactions of the financial terms of the contracts. The Request for Review was timely and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)).
- 4) On March 24, 2014, the Public Access Bureau forwarded a copy of the Request for Review to the Department and requested un-redacted copies of the contracts in question and a detailed explanation of the legal and factual bases for the applicability of the exemptions under which the contracts were redacted.
- 5) On April 18, 2014, the Department furnished to this office copies of the contracts in its possession. The contracts were incomplete. The Department also provided a

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copy of a letter from Northstar to the Department in which Northstar asserted that the confidentiality agreements precluded Northstar from furnishing un-redacted copies of the contracts to the Department or to the Public Access Counselor. Northstar's letter also provided explanations for the applicability of the asserted exemptions.

6) On May 16, 2014, the Public Access Bureau extended the time to issue a binding opinion by 30 business days, to June 30, 2014. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) The Department asserted that the redacted information was exempt from disclosure under section 7(1)(a) of FOIA, which allows a public body to withhold "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Department based its assertion on its claim that the information was "confidential data submitted by any person under this Act" within the meaning of section 12(iii) of the Lottery Law.

8) The financial terms of the contracts do not constitute "confidential data" under section 12(iii) of the Lottery Law. Therefore, the Department has not sustained its burden of demonstrating that this information is exempt from disclosure pursuant to section 7(1)(a) of FOIA.

9) The Department further asserted that the redacted information was proprietary, privileged or confidential "trade secrets [or] commercial or financial information" which was therefore exempt from disclosure under section 7(1)(g) of FOIA. Because the redacted information documents the cost of services and article VIII, section 1(c) of the Illinois Constitution of 1970 and section 2.5 of FOIA provide that records related to the use of public funds by the State are subject to disclosure, the Department has not sustained its burden of demonstrating that the financial terms of the contracts constitute "trade secrets [or] commercial or financial information" within the meaning of section 7(1)(g) of FOIA.

10) Northstar's confidentiality agreements with its contractors contemplate the disclosure of records pursuant to a final binding order of a governmental agency; those confidentiality provisions do not provide a valid basis for withholding the financial terms of its publicly funded contracts.

11) In order to comply with its obligations under FOIA, the Department's agreement with Northstar or any other private management company must require the private management company to furnish Northstar with complete, un-redacted copies of all subcontracts.

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Therefore, it is the opinion of the Attorney General that the Department has improperly denied, in part, Ms. Johnson's Freedom of Information Act request in violation of the requirements of the Act. Accordingly, the Department is directed to take immediate and appropriate action to comply with this opinion by providing Ms. Johnson with all of the financial terms of the contracts, including the total amounts of the contracts, hourly billing rates, and commissions, if any, that Northstar's contractors received for placing strategic advertisements in the media.

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 2012). 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 Ms. Carla K. Johnson as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Very truly yours,

LISA MADIGAN  
ATTORNEY GENERAL

By:



Michael J. Luke  
Counsel to the Attorney General