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By email

Matt Hartman
Assistant Attorney General
Public Access Bureau
Office of the Attorney General

CC: Metra, by email

January 23rd, 2020

Dear Assistant Attorney General Hartman,

Regarding FOIA request for review 2019 PAC 61179, in accordance with 5 ILCS 140/9.5(d), as the requester, this my reply to Metra's response.

Having read Metra's response, I request that you:

1. Issue a binding opinion that Metra cannot automatically deem a FOIA request submitted using an application like Muckrock to be commercial solely because such an application was used.
2. Issue a binding opinion that Metra wrongly withheld the emergency preparedness plan document, and that Metra should release the document with truly exempt portions redacted.
3. Issue no opinion regarding the test questions withheld under 5 ILCS 140/7(1)(q), given that I specifically stated in my request for review that I sought review only of Metra's withholding of the emergency preparedness plan.

Requester Status

Metra's last minute attempt to derail my request by recategorizing it is a facile and arbitrary abuse of FOIA, and the very definition of special pleading.

Metra points to Section 2 of FOIA in suggesting Muckrock is a commercial use requester. Section 2 specifically states that "news media and non-profit" organizations, provided the request is made for one of a fairly long list of reasons, several of which I could truthfully say this request was, are not commercial. My understanding is that Muckrock is a non-profit organization, and I believe they would call themselves news media. This seems entirely beside the point, however, as I made the request, and not Muckrock. I'm not affiliated with Muckrock, except as somebody who pays a small fee to use their web application. I

cannot really make any argument on their behalf, only as myself, a private individual who happened to use their web application. I simply wish to avoid having my personal request tarred by an overzealous agency for that reason.

I use Muckrock because it provides a convenient web application that allows me to send requests to agencies, track the status of those requests, conveniently receive agency responses by email or mail, and then make freely available to the public all of the above. While Metra may provide a rudimentary online FOIA reading room on their website, across the country many agencies do not. (Oddly, Metra seems concerned that requests published freely online could be stumbled upon by a commercial user, but again Metra itself publishes many requests and responses online.) As a requester, when formulating a request I find it invaluable to see not only released documents, but to see in full how agencies acknowledged, responded to, or denied previous requests. I would like other requesters to have those same advantages when formulating their requests.

Metra made much of the verbiage that Muckrock automatically appends to emails sent from their web application, but managed to avoid quoting the portion that states the “request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above”, which is to say me, Joseph Durso.

I note with particular amusement that the body of Metra’s emails were all seemingly appended a message from something called “Mimecast”, stating that message may have been archived by that service. This was followed by what I would call an advertisement for Mimecast, which appears to be a commercial service, complete with a call to action. Is it “patently indisputable” that I’ve been talking to Mimecast and not Metra this whole time? *Is this even legal? Has Metra been paid to advertise for this service?*

The headers of Metra’s email responses to me earlier in the request process indicated that something called “Microsoft SMTP Server” was involved in the email transmission. Was it Microsoft who responded to the request? Presumably they profited from selling “Microsoft SMTP Server” to Metra. Again looking at the email headers, Metra appears to use ATT as their internet service provider. Should I have CC’d that company on my review request? Had I sent in my request from a Gmail address, would it be reasonable to conclude that Google sent the request because Google owns the URL “gmail.com”?

My point here is not to make some specific legal point, so much as to point out that this is an absurd argument, and seems mostly like a deflection from the substantive question of whether the record requested is rightfully exempt from release.

Exemption of Emergency Preparedness Plan

Again I will point out that the exemption Metra cites exempts records “only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public”.

Am I to believe that the public release of the portion of the plan that fulfills the requirements of 49 CFR 239.101(a)(2)(IV), which requires that plans provide that newly hired personnel receive training on the contents of the plan within 90 days, is going to jeopardize anyone's safety, or somehow reduce the effectiveness of that portion? How could it possibly? What of the portion of the plan that fulfills the requirement of 49 CFR 239.101(a)(6)(IV), which requires that the plan provides for the "scheduled maintenance and replacement of first-aid kits, on-board emergency equipment, and on-board emergency lighting"? Really? Once again, I do not dispute that some portions of the plan may be rightfully exempt under the statute, but it seems implausible that the whole thing is. Exempt portions should be redacted and the rest released. If classified national security information pertaining to the most sensitive military and intelligence matters can be handled this way without causing harm or breaking anything, Metra's glorified phone tree, instructions to stay away from suspicious packages, and bridge evacuation information surely can be too.

Thank you,

/s/ Joseph Durso