2021 IL App (1st) 192073

No. 1-19-2073

Second Division
April 13, 2021

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LUCY PARSONS LABS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 18 CH 15005
THE CITY OF CHICAGO MAYOR'S OFFICE,	)	Honorable Anna M. Loftus Judge, presiding.
Defendant-Appellee.	)	

JUSTICE COBBS delivered the judgment of the court, with opinion.
Justices Lavin and Pucinski concurred in the judgment and opinion.

OPINION

¶ 1 This appeal arises from a request for records submitted by plaintiff, Lucy Parsons Labs (LPL), under Illinois's Freedom of Information Act (Act) (5 ILCS 140/1 *et seq.* (West 2018)). LPL is a self-described "collaboration between data scientists, transparency activists, artists, [and] technologists working at the intersection of digital rights and on-the-street issues." As relevant to this case, LPL sought from defendant, the City of Chicago Mayor's Office (City), a copy of the City's "action plan" (Plan) regarding the public response to the verdict in the highly publicized

murder trial of former Chicago police officer Jason Van Dyke. The City denied the request, and LPL filed a complaint in the circuit court, seeking an order to compel production of the Plan. After a hearing on the parties' cross-motions for summary judgment, the circuit court granted summary judgment for the City, finding the entirety of the Plan exempt from disclosure under section 7(1)(v) of the Act (*id.* § 7(1)(v)). LPL now appeals, arguing that the circuit court erred in finding the entire Plan exempt. For the following reasons, we agree with LPL and therefore remand to the circuit court for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On October 9, 2018, LPL submitted a request under the Act for "[a] copy of the [C]ity's 'action plan' created for Friday October 5, 2018 regarding public response to the verdict in the trial of Jason Van Dyke." The request referenced a report from the *New York Times* that the City had developed a 150-page action plan for "managing unrest in the case of an acquittal." The City denied LPL's request, citing section 7(1)(v) of the Act. The City explained that it denied the request because the Plan was "designed to respond to a potential attack upon the community's population, including but not limited to details regarding the deployment of specialized resources, call numbers, critical staff positioning and procedures for the handling and preparedness for operations and emergency procedures." The City also stated that "[r]eleasing this information could enable terrorists and criminals to know in advance where police, fire and other valuable [C]ity resources will be," thereby allowing such people to "effect a strategy in advance for undermining or otherwise targeting public safety efforts."

¶ 4 On December 3, 2018, LPL filed a complaint in the circuit court, seeking an order requiring the City to produce the action plan. The City filed an answer, again contending that the Plan was exempt from disclosure under section 7(1)(v).

¶ 5 The parties filed cross-motions for summary judgment. Attached to the City's motion were affidavits from two Chicago Police Department officials involved in drafting the Plan: Anthony Riccio, the First Deputy Superintendent, and Jill Stevens, the Commanding Officer of the Special Events and Liaison Unit. Riccio and Stevens averred that the plan "consists of information regarding the tactical operations of the event" such as "the deployment of specialized resources, call numbers, critical staff positioning, and procedures for handling and preparedness of operations and emergency situations." According to Riccio and Stevens, the plan also "describes assembly areas, command posts, and 'hot spots,' " which are areas that may need additional resources or personnel during large scale events. Riccio and Stevens further averred that making such information public would endanger public safety by allowing "terrorists and criminals to know in advance where police, fire and other valuable [C]ity resources will be located." Lastly, Riccio and Stevens stated that the Plan should not be released even after the Van Dyke verdict because much of the information in the Plan was likely to be reused for future events.

¶ 6 In response, LPL argued that (1) section 7(1)(v) did not apply to the action plan because it was "not an anti-terrorism plan" and (2) to the extent that section 7(1)(v) applied, the City had not shown that "every single word on every page of the action plan is exempt under [s]ection 7(1)(v)." Specifically, LPL contended that, even if the Plan contained some exempt information about security and emergency tactics, the City was still required to produce any nonexempt contents of the Plan, such as "any general background information, introduction, or summary." LPL also argued that "[a]ny table of contents or index," "[a]ny headers or titles generally describing the content of sections," and "[a]ny sections defining words and explaining what various terms such as 'command posts' or 'hot spots' mean are not exempt."

¶ 7 After a hearing on the parties' cross-motions, the circuit court granted summary judgment for the City, ruling that "the plan as a whole is exempt" under section 7(1)(v) and that the City therefore had "no duty to redact" exempt information and produce nonexempt information. The court issued a written order dismissing the case on September 19, 2019.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 The issue on appeal is whether the requested Plan is exempt from production as a whole under section 7(1)(v) of the Act or whether only a portion of the Plan is exempt such that the City was required to redact any exempt material and produce the rest.

¶ 11 Whether a document is exempt from disclosure under the Act is a matter of statutory construction subject to *de novo* review. *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 404 (2009). *De novo* review is also the standard because this appeal arises from an order granting summary judgment. *Id.* Summary judgment is warranted only where it is clear that—after reviewing the pleadings, depositions, and affidavits on file in the light most favorable to the nonmoving party—there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 766 (2009).

¶ 12 "The purpose of the [Act] is to open governmental records to the light of public scrutiny." *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989). Under the Act, public records are presumed to be open and accessible, and the relevant public body "shall make [them] available to any person" upon request subject only to the exceptions provided in sections 7 and 8.5 of the Act. 5 ILCS 140/3(a) (West 2018); see *id.* §§ 7, 8.5. The Act is to be liberally construed in favor of disclosure, and the exceptions must be construed narrowly so as not

to defeat the statutory purpose of governmental transparency. *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 25. Where, as here, the requesting party challenges the denial of a request in court, the public body bears the burden of demonstrating that the requested records fall within the claimed exception through clear and convincing evidence. *Stern*, 233 Ill. 2d at 406.

¶ 13 The relevant exception in this case is contained in section 7(1)(v) of the Act, which applies to

> "[v]ulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but 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. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations." 5 ILCS 140/7(1)(v) (West 2018).

¶ 14 We find that the City met its burden in establishing that some parts of the requested Plan were exempt under section 7(1)(v). For example, Riccio and Stevens averred that the Plan was created to respond to a potential attack on the community and included such things as "the deployment of specialized resources, call numbers, critical staff positioning, and procedures for handling and preparedness of operations and emergency situations." This is core information exempt under section 7(1)(v).

¶ 15 However, the City's position that the presence of this information necessarily makes the entire Plan exempt is untenable. When interpreting the Act, like any statute, we begin with its plain language. *Special Prosecutor*, 2019 IL 122949, ¶ 23. Critically, the plain language of section 7(1)(v) states that response plans are exempt for disclosure, "*but 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." (Emphasis added.) 5 ILCS 140/7(1)(v) (West 2018). Thus, section 7(1)(v) plainly contemplates that some information in a response plan might be exempt, but only to the extent necessary to ensure public safety and the success of the plan.

¶ 16 Nevertheless, the City argues that the phrase "to the extent that" in section 7(1)(v) should read as "where," thus "limit[ing] the scope of section 7(1)(v) to security plans, but only where disclosure would jeopardize a plan's efficacy or a person's safety."[1] Essentially, the City proposes replacing "to the extent that" with "if." However, we decline to rewrite the statute in this way or depart from the plain meaning by adding a limitation not intended by the legislature. See *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009) ("It is a cardinal rule of statutory construction that we cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations, or conditions not expressed by the legislature.").

¶ 17 Additionally, although we need not resort to other cannons of statutory construction where, as here, the language of the statute is clear and unambiguous, we note that the City's interpretation of section 7(1)(v) would render the "but only to the extent" clause meaningless. *Policemen's Benevolent Labor Committee v. City of Sparta*, 2020 IL 125508, ¶¶ 14 ("In interpreting a statute, a court should not render any part meaningless or superfluous."). It is difficult to imagine any

[1] This argument was contained in the City's sur-reply, which we granted the City leave to file on March 22, 2021.

security measures or response plan for an attack where publicly disclosing the details of resource and personnel deployment beforehand would not undermine either the effectiveness of the plan or the safety of those who implement it. Thus, under the City's construction, response plans will effectively be exempt wholesale in every case, notwithstanding the "but only to the extent" clause in the statute.

¶ 18 On the other hand, our interpretation that the information in a response plan is exempt only to the extent it is critical to the overall safety and effectiveness of the plan not only conforms to the plain language of section 7(1)(v) but also to the fundamental principle that courts should construe the Act liberally in favor of transparency and apply the exemptions to disclosure narrowly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 423-24 (2006). Additionally, even if we were to find the language of the "but only to the extent" clause to be ambiguous, we would still resolve all doubts in favor of disclosure in light of the public policy underlying the Act. *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶ 23.

¶ 19 Having determined that the requested Plan is likely a mix of both exempt and nonexempt information, we conclude that the circuit court erred in granting summary judgment for the City. Our supreme court has explained that "the mere 'commingling' of exempt and nonexempt material does not prevent a public body from disclosing the nonexempt portion of the record." *Stern*, 233 Ill. 2d at 412. Rather, the Act itself provides that, when a requestor seeks a record that contains both exempt and nonexempt information, "the public body may elect to redact the information that is exempt" and "shall make the remaining information available for inspection and copying." 5 ILCS 140/7(1) (West 2018). Notably, the public body's duty to redact the exempt information and produce the nonexempt information remains even where the redactions would leave the requestor with nothing useful. *Heinrich v. White*, 2012 IL App (2d) 110564, ¶¶ 19, 24 (reversing the grant

of summary judgment for the defendant and remanding to determine whether the requestor still wanted the redacted records where the information in the requested records was largely, but not entirely, exempt). While this may well be the case here, we agree with LPL that the City has not met its burden to show that redaction of the Plan should not be required. Summary judgment was therefore unwarranted at this stage.

¶ 20 Our disposition is consistent with the somewhat analogous case of *Kelly v. Village of Kenilworth*, 2019 IL App (1st) 170780. There, this court interpreted section 7(1)(d) of the Act, which, similar to the structure of section 7(1)(v), exempts records created for law enforcement purposes "but only to the extent" that disclosure would interfere with enforcement proceedings or obstruct an ongoing investigation. 5 ILCS 10/7(1)(d) (West 2018). We found that although the records in question pertained to an ongoing investigation, the statute did not support the defendant's "generic approach" of claiming total exemption, even where "at least a significant portion of their investigative files would interfere with law enforcement proceedings or obstruct and ongoing criminal investigation." *Kelly*, 2019 IL App (1st) 170780, ¶ 39. Consequently, we reversed the grant of summary judgment in the defendant's favor and remanded so that the defendant could either (1) prove that redacting the "thousands of documents" in question was unduly burdensome or (2) "make the extensive redactions required by section 7(1)(d)." *Id.* ¶¶ 39, 50.

¶ 21 Accordingly, we reverse the circuit court's grant of summary judgment and remand so that the City may redact from the Plan any information that "could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public," and then produce whatever remains unless another exemption applies. We also note that, while not required in every case, the circuit court has the option of reviewing the Plan *in camera* to determine

which redactions are necessary and which information is nonexempt. 5 ILCS 140/11(f) (West 2018) (stating that the court "shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act"); *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470-71 (2003) ("*[I]n camera* review by the circuit court is the most effective way for the public body to objectively demonstrate that the exemption claimed does, in fact, apply.").

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we reverse the circuit's grant of summary judgment for the City and remand for further proceedings not inconsistent with this opinion.

¶ 24 Reversed and remanded.

No. 1-19-2073

Cite as:	*Lucy Parsons Labs v. City of Chicago Mayor's Office*, 2021 IL App (1st) 192073
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-CH-15005; the Hon. Anna M. Loftus, Judge, presiding.
Attorneys for Appellant:	Joshua Burday, Matthew Topic, and Merrick Wayne, of Loevy & Loevy, of Chicago, for appellant.
Attorneys for Appellee:	Celia Meza, Acting Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Stephen G. Collins, Assistant Corporation Counsel, of counsel), for appellee.

2021 IL App (1st) 200574

FIFTH DIVISION
MARCH 31, 2021

No. 1-20-0574

CHARLES GREEN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CH 17646
	)	
THE CHICAGO POLICE DEPARTMENT,	)	Honorable
	)	Alison C. Conlon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.
Justice Hoffman concurred in the judgment and opinion.
Presiding Justice Delort dissented, with opinion.

OPINION

¶ 1 This case arises out of plaintiff-appellee Charles Green's 2015 request, pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)), to the Chicago Police Department (CPD) for all closed complaint register files (CR files) concerning all Chicago police officers. When the CPD failed to respond to his request, Mr. Green filed suit in the circuit court of Cook County, seeking, *inter alia*, an order directing the CPD to produce the requested files. While Mr. Green's lawsuit was pending in the circuit court of Cook County, an injunction was also in place in that court, prohibiting the CPD from releasing any CR files over four years old from the date of any FOIA request. The trial court continued Mr. Green's lawsuit while the injunction that prohibited the release of any files over four years old was being litigated. This court ultimately vacated the injunction in 2016.

¶ 2 In 2018, following the vacatur of the injunction, Mr. Green and CPD filed cross motions for summary judgment in the circuit court of Cook County related to Mr. Green's pending complaint seeking to obtain the CR files after the CPD ignored his initial FOIA request. On January 10, 2020, the trial court granted Mr. Green's motion for summary judgment, denied the CPD's motion, and ordered the CPD to turn over all CR files dated 1967-2011. (The court had previously ordered the CPD to turn over the CR files dated 2011-2015.)

¶ 3 On appeal, the CPD argues that (1) the trial court lacked jurisdiction to order it to produce files that were subject to an injunction at the time that they were requested and (2) the court erred in rejecting its belated claim that producing 48 years of closed CR files would be unduly burdensome. For the following reasons, we reverse the judgment of the circuit court of Cook County.

¶ 4 BACKGROUND

¶ 5 In 1986, Mr. Green was convicted of four counts of murder, aggravated arson, residential burglary, home invasion, armed robbery, and armed violence, arising out of a quadruple homicide. Mr. Green, who was 16 years old at the time of the crimes, was sentenced to life imprisonment. Following Mr. Green's conviction, the lead detective who had investigated the homicide was found to have coerced inculpatory statements from arrestees and abused those in custody on several occasions. There was no specific finding related to this detective regarding Mr. Green. Mr. Green was released from custody in 2009 after numerous appeals, but his conviction stands.

¶ 6 On November 18, 2015, Mr. Green, through counsel, sent a FOIA request to the CPD, seeking "any and all closed complaint register files that relate to Chicago Police Officers." When the CPD did not respond to this request, Mr. Green filed suit in the circuit court of Cook County

on December 4, 2015. In his complaint, Mr. Green alleged that the CPD violated FOIA by failing to produce the requested documents or otherwise respond to his request. He sought, *inter alia*, an order requiring the CPD to produce the requested records with any exempted material redacted.

¶ 7 The CPD answered Mr. Green's complaint and admitted that it had not responded to Mr. Green's initial FOIA request. The CPD also asserted two affirmative defenses, arguing (1) that several documents or portions of documents encompassed in Mr. Green's request were exempt from production because they contained private or personal information and (2) that it was barred from producing CR files over four years old pursuant to an injunctive order in an unrelated case that was in place at the time of Mr. Green's FOIA request.

¶ 8 The injunctive order to which the CPD referred in its answer to Mr. Green's lawsuit, arose out of litigation between the Fraternal Order of Police (FOP), the City of Chicago (City), and the CPD. That litigation was prompted by an August 2014 FOIA request to the CPD by the Chicago Tribune (Tribune) and the Chicago Sun-Times (Sun-Times). The Tribune and the Sun-Times requested a list of names of police officers who had received at least one complaint dating back to 1967, along with the CR number of the complaint. The City informed the FOP that it intended to release the requested information. In response, the FOP sought to enjoin the City from producing CR files dating back to 1967 pursuant to any FOIA requests. The FOP cited a provision in the collective bargaining agreement between the City and the FOP, requiring the City to destroy CPD files over four years old.

¶ 9 A preliminary injunction was entered in December 2014 that prohibited the release of a list of police officers against whom there were complaints that were over four years old as of the date of the Tribune and Sun-Times's FOIA request. A second preliminary injunction was entered in

May 2015. That injunction more broadly prohibited the City and the CPD from releasing *any* CR files more than four years old as of the date of *any* FOIA request. The issue of whether the City had violated the collective bargaining agreement by not destroying CPD CR files that were more than four years old was brought to arbitration while the injunction was still in effect. And one year later, an arbitrator ruled that the City had violated the collective bargaining agreement by preserving outdated CR files and disciplinary records. The arbitrator ordered the City to purge its records of all police misconduct investigations and discipline that were more than five years old.

¶ 10 The City appealed both the December 2014 and the May 2015 preliminary injunctions. This court vacated both injunctions as against public policy. *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, ¶¶ 35-40. Subsequently, this court also vacated the arbitration award that had ordered the files destroyed, finding it to be against public policy. *City of Chicago v. Fraternal Order of Police*, 2019 IL App (1st) 172907, ¶¶ 37-40. That decision was later affirmed by our supreme court. *City of Chicago v. Fraternal Order of Police, Chicago Lodge No. 7*, 2020 IL 124831, ¶¶ 43-44.

¶ 11 For case management purposes and due to the pending FOP litigation, the trial court had consolidated Mr. Green's instant lawsuit with the FOP case that sought to enjoin the release of files older than four years. That consolidation lasted until January 10, 2018, at which time the court set a schedule for dispositive motions in the instant case. In March 2018, the CPD moved for partial summary judgment, arguing that Mr. Green was only entitled to the CR files that were not subject to the injunction. Specifically, it argued that it should only have to produce CR files dated after 2011, or four years prior to Mr. Green's 2015 request. In its motion, the CPD also acknowledged

that when it failed to respond to the request within five business days pursuant to FOIA, it "waived its right to deny Plaintiff's request on the grounds that it was unduly burdensome."

¶ 12 On July 25, 2018, the trial court denied the CPD's motion for summary judgment, despite finding that the CPD did not wrongfully fail to produce the CR files dated 1967-2011 at the time they were requested. The trial court further ordered the parties to confer with each other to determine a schedule for production of the CR files dated from 2011-2015, as those files were not subject to the injunction. Then, in September 2018, the trial court ordered the CPD to produce the CR files dated 2011-2015 by December 31, 2018.

¶ 13 Between July 2018 and February 2019, the parties filed cross-motions for summary judgment. During this time, the CPD did not turn over any CR files dated 2011-2015. At an April 5, 2019, hearing on the parties' pending motions, including a motion by Mr. Green to compel the CPD to produce the files dated 2011-2015, the CPD stated that it was working on creating an online data portal for the files dated 2011-2015 but was still in the process of reviewing and redacting relevant files.

¶ 14 With regard to the issue of production of the 1967-2011 files, the trial court agreed that the CPD could not be sanctioned for withholding the files dated 1967-2011, since, at the time they were requested, the CPD was prohibited from releasing them by the injunctions that were then in place. Nevertheless, the trial court held that once the injunctions were lifted, there was no reason why Mr. Green should be required to submit a new FOIA request to access the files. Instead, the court again ordered the parties to work together to determine a schedule for producing the CR files dated 1967-2011. The trial court did not rule on the parties' cross motions for summary judgment

at that time, stating it needed more details on the "practicalities," but indicated it would probably grant both parties' motions in part.

¶ 15 Over the next eight months, the parties filed several motions. The CPD filed a motion to reconsider the trial court's ruling of April 5, which ordered the parties to work together to determine a schedule for production of the files dated 1967-2011. Mr. Green moved twice to compel compliance with the court's April 5, 2019, order, invoking the court's contempt power, in light of the CPD's failure to comply with the trial court's previous December 31, 2018, deadline for production of the CR files dated 2011-2015.

¶ 16 The trial judge who had issued the April 5, 2019, order retired from the bench in the midst of the proceedings. On January 10, 2020, the trial court, with a new judge presiding, issued an order disposing of all pending motions in the case. In that order, the trial court held that the April 5 order contained sufficient findings to resolve the parties' cross motions for summary judgment. To that end, the court entered summary judgment in favor of Mr. Green and against the CPD, describing it "as a ministerial act." The court further denied CPD's motion for reconsideration. Finally, the court granted, in part, Mr. Green's motion to compel after finding that the CPD willfully and intentionally failed to comply with the court's order to produce the files dated 2011-2015. The trial court imposed a $4000 civil penalty against the City. The trial court ordered CPD to produce these files dated 1967-2011 by December 31, 2020, without specifying the rate at which they were to be produced. On the other hand, with respect to the CR files dated 2011-2015, the court ordered CPD to produce them at a rate of at least 3000 files per month until production was complete.

¶ 17 On March 16, 2020, the trial court granted the CPD's motion for a finding that there was no just reason for delaying appeal of the January 10, 2020, order, which granted Mr. Green's motion for summary judgment and denied the CPD's motion for summary judgment. The trial court stayed production of the CR files dated 1967-2011 pending the outcome of this appeal.

¶ 18 ANALYSIS

¶ 19 We note that we have jurisdiction to review this matter, as the CPD filed a timely notice of appeal following the trial court's finding that there was no just reason for delaying appeal of its January 10, 2020, order. See Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016); R. 303 (eff. July 1, 2017).

¶ 20 This appeal concerns only the order granting summary judgment in favor of Mr. Green and directing the CPD to produce the CR files dated 1967-2011. In order to prevail on a motion for summary judgment, the moving party must show there is no genuine issue of material fact and it is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2018). We review the trial court's grant of summary judgment *de novo*. *Gary v. City of Calumet City*, 2020 IL App (1st) 191812, ¶ 26.

¶ 21 The dispositive issue on appeal in this case, is whether the trial court had jurisdiction to order the production of the 1967-2011 records after it determined that the CPD did not improperly withhold those records at the time they were requested. Resolution of this issue turns on section 11 of FOIA, which allows any person who is denied access to public records by a public body to file suit for injunctive or declaratory relief. 5 ILCS 140/11(a) (West 2018). (Significantly, the failure to timely respond to a FOIA request is considered a denial. *Id.* § 3(d).) Section 11(d) goes on to vest the trial court with "jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person

seeking access." *Id.* § 11(d). From this, it follows that the court may only order production of public records if they are "improperly withheld." See *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 57.

¶ 22 At the outset, we must determine the point in time at which a court should evaluate the propriety of a public body's decision to withhold documents. The question is whether the decision should be evaluated at the time the FOIA request is denied or at some later stage of litigation, depending on the circumstances. Courts confronting this issue have overwhelmingly considered whether the documents requested were improperly withheld *at the time the decision to withhold was made*. For example, in *Bonner v. United States Department of State*, 928 F.2d 1148, 1149 (D.C. Cir. 1991), the plaintiff filed a FOIA request with the United States State Department.[1] The State Department produced a number of the requested documents in full but released 1033 documents with partial redactions based on FOIA exemptions. *Id.* To test the validity of the redactions, the parties agreed to a sampling procedure in which the plaintiff would choose 63 out of the 1033 partially redacted documents for which the State Department would prepare an index summarizing the withheld information in those documents and the reason for the withholding. *Id.* When the State Department provided the index to the plaintiff, it addressed only 44 of the 63 documents, because, during the time between the plaintiff's FOIA request and the preparation of the index of representative documents, 19 of the 63 documents were no longer classified and could be released in full. *Id.* The plaintiff argued, in relevant part, that given that approximately one-third of the sample documents were declassified, one-third of the partially-redacted documents

[1]Because of the similarity of the Illinois FOIA and the federal FOIA, Illinois courts frequently look to federal case law in construing the Illinois FOIA. See *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 55.

that were *not* part of the sample must also have become declassified during that time period and could also be released in full. *Id.* at 1153. The Court of Appeals agreed but held that it would not require the State Department to " 'follow an endlessly moving target,' " and reprocess the 1033 partially redacted documents to determine which ones were no longer classified. *Id.* (quoting *Meeropol v. Meese*, 790 F.2d 942, 959 (D.C. Cir. 1986)). The court explained that requiring an agency to "adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing." *Id.* at 1152.

¶ 23 Similarly, in *Lesar v. United States Department of Justice*, 636 F.2d 472, 479 (D.C. Cir. 1980), the defendant initially withheld certain classified documents otherwise responsive to the plaintiff's FOIA request, but by the time the plaintiff appealed the lower court's decision, some of those withheld documents were declassified. The Court of Appeals rejected the plaintiff's argument that it was entitled to those subsequently declassified documents, holding that it would assess the agency's decision to withhold the documents under the circumstances that existed at the time the decision was made. *Id.* at 480; see also *American Civil Liberties Union v. National Security Agency*, 925 F.3d 576, 601 (2d Cir. 2019) (rejecting plaintiff's argument that it should order agency to reprocess documents based on new disclosures that postdated agency's initial FOIA decision on basis that *FOIA decision should be evaluated as of time it was made*). Those cases provide clarity for our determination in the case before us. Specifically, the propriety of a response must be judged *at the time the decision denying the FOIA request was made.*

¶ 24 Having determined that we should evaluate the CPD's response to Mr. Green's FOIA request at the time it was made, we next consider whether the 1967-2011 CR files were improperly withheld as of November 2015. In May 2015, an injunction was issued enjoining and ordering the

CPD "in connection with *any* Freedom of Information Act requests, not to release any Complaint Register Files (CR Files) more than four years old as of the date of the request." Given that the CPD implicitly denied Mr. Green's FOIA request in November 2015—when it failed to respond to the request—the CPD maintains that, therefore, it did not improperly withhold the CR files prior to November 2011. We agree.

¶ 25 The supreme court in *In re Appointment of Special Prosecutor* examined the relationship between a FOIA request that was at odds with a court-ordered injunction. In that case, our supreme court, relying on *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980), held "where a circuit court with personal and subject-matter jurisdiction issues an injunction, the injunction must be obeyed, however erroneous it may be, until it is modified or set aside by the court itself or reversed by a higher court." *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 64. Therefore, our supreme court concluded that "a lawful court order takes precedence over the disclosure requirements of FOIA." *Id.* ¶ 66.

¶ 26 In this case, it is undisputed that the trial court had personal and subject matter jurisdiction over the parties to the injunction. Accordingly, the CPD was required to obey the May 2015 injunction and could not release the 1967-2011 CR files when requested by Mr. Green in November 2015. It is immaterial that the injunction was subsequently vacated because, as discussed *supra* ¶¶ 22-24, we evaluate the public body's decision to withhold documents *at the time the body responded to the request*. Because the CPD did not improperly withhold the 1967-2011 CR files at the time of its (implicit) response, we conclude that the trial court improperly ordered the CPD to produce those files in 2020, pursuant to the original FOIA request.

¶ 27 For his part, Mr. Green argues that the injunction was void and did not have to be obeyed. But this argument rests on an erroneous reading of our decision in *Fraternal Order of Police*, 2016 IL App (1st) 143884. In that case, we overturned the May 2015 injunction. We held that there was no legal basis to issue an injunction prohibiting the release of CR files over four years old from the date of a FOIA request, as the collective bargaining agreement mandating such destruction of records over four years old violated FOIA and Illinois public policy. *Id.* ¶ 55. That ruling is *not* tantamount to a finding that the injunction was void. See *In re M.W.*, 232 Ill. 2d 408, 414-15 (2009) (void order is one entered by court lacking jurisdiction). Therefore, we reject Mr. Green's argument that the injunction was void and, thus, did not prohibit the CPD from releasing the requested files.

¶ 28 Because we conclude that the trial court erred in ordering the CPD to produce the 1967-2011 CR files pursuant to the original request, we need not determine whether the court also erred in refusing to allow the CPD to belatedly raise FOIA's undue burden exemption.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 31 Reversed.

¶ 32 PRESIDING JUSTICE DELORT, dissenting:

¶ 33 This case concerns what a court should do when a public body denies a Freedom of Information Act (FOIA) request, but the public body is under a court order to not release the requested records. As our supreme court explained in *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 66, "a lawful court order takes precedence over the disclosure requirements of FOIA." Thus, a public body may refuse disclosure of the documents when a court order bars their

release. This case presents a question not resolved in *In re Appointment of Special Prosecutor*, which is whether a requestor has a remedy if a court is in the midst of hearing a lawsuit seeking release of public records and the injunction upon which the public body had relied has now been vacated. The majority concludes that because the public body did not "improperly withhold" the documents in first instance (see 5 ILCS 140/11(d) (West 2018)), the circuit court erred in requiring the City to release records to Green. While everyone agrees that there is no longer any court order in place barring disclosure of the public records Green seeks, he must now start over with a new FOIA request and return to the "back of the line." This not only delays the disclosure of documents to Green, it allows the City to assert exemptions that it failed to raise in the first instance. I respectfully disagree with this result.

¶ 34 The Illinois FOIA contains a detailed, explicit declaration of legislative intent. See *id.* § 1. This declaration explains that it is the public policy of Illinois that: (1) "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"; and (2) "access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. 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." *Id.* It further states:

> "Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of

> government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expediently and efficiently as possible ***." *Id.*

¶ 35 When construing a statute, a court "may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another." *Board of Education of the City of Chicago v. Moore*, 2021 IL 125785, ¶ 20 (citing *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago*, 2012 IL 112566, ¶ 15). As our supreme court has recently explained:

> "We note at the outset that the primary goal in construing a statute is to ascertain and give effect to the legislature's intent, and the best indicator of that intent is the language of the statute itself. [Citation.] But a court will not read language in isolation; it will consider it in the context of the entire statute. [Citation.] It is also proper to consider not only the language of the statute but the reason for the law, the problem sought to be remedied, the goals to be achieved, and the consequences of construing the statute one way or another. [Citation.] Additionally, we must presume that the legislature did not intend to produce absurd, inconvenient, or unjust results." *Carmichael v. Laborers' & Retirement Board Employees' Annuity & Benefit Fund*, 2018 IL 122793, ¶ 35.

¶ 36 When it denied Green's request, the City of Chicago correctly honored the injunction barring release of the records in question. However, by the time the circuit court heard Green's lawsuit, the injunction had been vacated, and it no longer barred City from releasing the records.

The City admits that it failed to respond to Green's FOIA request, and its failure to do so is rather inexplicable. Had the circuit court ruled in favor of the City, it would have, in essence, revived an injunction from another case that was no longer in force or effect. That result would have been directly at odds with the explicit purposes of FOIA, which favor "expedient[ ] and efficient[ ]" disclosure. 5 ILCS 140/1 (West 2018). It would also violate the principle, outlined in *Carmichael*, that a statute should not be construed to obtain an absurd result.

¶ 37 While Illinois courts generally look to cases involving the federal Freedom of Information Act when construing the parallel state law (see *supra* ¶ 22 n.1), that rule is not inflexible. Unlike the Illinois FOIA, the federal FOIA does not contain a declaration of legislative purpose, much less one as robust as the one contained in section 1 of the Illinois FOIA. Compare 5 ILCS 140/1 (West 2018) with 5 U.S.C. § 552 (2018). While federal courts have looked to the legislative history of the federal FOIA to discern that Congress intended to promote disclosure by enacting the federal FOIA (see, *e.g.*, *Milner v. Department of the Navy*, 562 U.S. 562, 565 (2011)), they were not construing a law with an expansive declaration of intent such as that contained in the Illinois FOIA. Therefore, I do not find authorities such as *Bonner*, *American Civil Liberties Union*, or *Lesar* to be conclusive as to the issue presented here. See *supra* ¶¶ 22-23.

¶ 38 Construing the "improperly withheld" language in FOIA in light of its guiding principles promoting disclosure of public records leads me to the conclusion that Green was entitled to a remedy under FOIA. Therefore, I do not believe that the circuit court erred in requiring the City to disclose the records in question. I would affirm the judgment below and require the City to disclose the records which Green seeks.

No. 1-20-0574

Cite as:	*Green v. Chicago Police Department*, 2021 IL App (1st) 200574
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 15-CH-17646; the Hon. Alison C. Conlon, Judge, presiding.
Attorneys for Appellant:	Mark A. Flessner, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Elizabeth Mary Tisher, Assistant Corporation Counsel, of counsel), for appellant.
Attorneys for Appellee:	Jaime Orloff Feeney, of Ropes & Gray LLP, and Jared Kosoglad, of Jared S. Kosoglad, P.C., both of Chicago, for appellee.

2021 IL App (1st) 200225

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois, First District,
FIFTH DIVISION.

Ian H. FISHER, Esq., Plaintiff-Appellant,

v.

The OFFICE OF the ILLINOIS ATTORNEY GENERAL, BY its Attorney General, Kwame RAOUL, Defendant-Appellee.

No. 1-20-0225

Opinion filed: March 12, 2021

Appeal from the Circuit Court of Cook County. No. 19 CH 6649, Honorable Raymond W. Mitchell, Judge, presiding.

OPINION

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.

***1** ¶ 1 The plaintiff, Ian H. Fisher, Esq., appeals from an order of the circuit court of Cook County, which denied his motion for summary judgment and granted summary judgment in favor of the defendant, the Office of the Illinois Attorney General (OAG), on its cross-motion. On appeal, the plaintiff argues that the circuit court erred in finding that the records he requested from the OAG pursuant to the Illinois Freedom of Information Act (FOIA or the Act) (**5 ILCS 140/1** *et seq.* (West 2018)) were exempt from disclosure. For the reasons that follow, we affirm.

¶ 2 The following factual recitation is derived from the pleadings, motions, and exhibits of record.

¶ 3 In the fall of 2012, the OAG filed a *parens patriae* action against several Cathode Ray Tube (CRT) manufacturers, alleging that they conspired to fix prices on certain products resulting in overcharges to Illinois consumers. See *The State of Illinois v. Hitachi, Ltd., et al.*, No. 12-CH-35266 (Cir. Ct. Cook County). Between July 2016 and March 2018, the OAG entered into settlement agreements with all of the manufacturers for a total of nearly $50 million. Each settlement agreement states that the agreement will not become final until such time as the circuit court enters a final judgment providing, *inter alia*, that the settlement funds be distributed to eligible claimants "within the discretion of the Illinois Attorney General" and each of the CRT manufacturers are dismissed with prejudice. As of yet, the circuit court has not entered such an order.

¶ 4 On November 20, 2017, the circuit court entered an order on a joint motion for approval of a notice plan. In its order, the court approved the contents of the settlement notices prepared by the OAG, preliminarily approved of the publication notice plan, and authorized the OAG to use settlement funds to pay Kurtzman Carson Consultants (KCC) to implement the notice plan and administer the claims process. Subsequently, KCC published the settlement notice to the public.

¶ 5 The plaintiff in the instant case represents several clients that submitted claims as part of the CRT settlement. Each of the plaintiff's clients filled out the claim form indicating that they purchased the CRT products in Illinois during the relevant time frame and either resided in Illinois or were incorporated or headquartered in Illinois. After several communications with KCC, the plaintiff was informed that the majority of his clients' claims did not meet the eligibility requirement because they did not purchase the CRT products "for use" in Illinois. When the plaintiff asked KCC about the requirement that the CRT product must have been purchased for use in the state, KCC responded: "Per the AG's direction, and as referenced in the Notice, eligible purchases must be for use in the state of Illinois." The plaintiff next contacted the OAG directly, arguing that the "use" requirement was contrary to the language of the settlement agreements, the claim form, the purpose of the Illinois Antitrust Act, and relevant case law construing the Illinois Antitrust Act and similar state laws. On February 22, 2019, the OAG responded to the plaintiff, rejecting his contentions.

***2** ¶ 6 On April 8, 2019, the plaintiff submitted a FOIA request to the OAG, seeking certain records related to the CRT settlement. Relevant to this appeal, the plaintiff requested the following records:

> "All communications between the Office of the Attorney General and the Class Settlement Administrator, KCC Class Action Services LLC, concerning the eligibility

requirements for the submission of claims for the Class Settlement in the Illinois CRT Settlement.

All communications with the Office of the Attorney General concerning whether a claimant in the Illinois CRT Settlement is required to establish that a CRT or CRT Product was either used in Illinois or purchased for use in Illinois.

All communications from the Office of the Attorney General to the Class Settlement Administrator, KCC Class Action Services LLC, instructing that one or more claims in the Illinois CRT Settlement be denied or found deficient."

¶ 7 The OAG denied the plaintiff's request for records, citing section 7(1)(f) of the Act, also known as the deliberative process exemption. Section 7(1)(f) of the Act exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated ***." (**5 ILCS 140**/7(1)(f) (West 2018)). In its denial letter, the OAG stated that the responsive records "consist of communications between this office and outside consultants written for the purpose of planning courses of action with regard to assessing claims. These records are predecisional."

¶ 8 On May 31, 2019, the plaintiff filed a two-count complaint, seeking declaratory and injunctive relief based upon the OAG's denial of his FOIA request. In count I, he sought an order declaring that (1) he had a right to the production of the requested records pursuant to section 2(c) of the Act (**5 ILCS 140**/2(c) (West 2018)); (2) the requested records do not fall within the disclosure exemption listed under section 7(1)(f) of the Act (**5 ILCS 140**/7(1)(f) (West 2018)); and (3) he is entitled to reasonable attorney fees and costs. In count II, he sought an order declaring that the OAG violated the Act by withholding the requested records, enjoining the OAG from further withholding the records, and granting attorney fees and costs pursuant to section 11(i) of the Act.

¶ 9 On August 1, 2019, the OAG filed its answer and affirmative defenses to the plaintiff's complaint, asserting that the responsive records are exempt from disclosure under section 7(1)(f) of the Act (**5 ILCS 140**/7(1)(f) (West 2018)). The OAG also asserted that some of the responsive records were prepared "for purposes of responding to attempts by certain parties to intervene" in the CRT litigation and are therefore exempt from disclosure under section 7(1)(m) of the Act, which exempts from disclosure "materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body ***." **5 ILCS 140**/7(1)(m) (West 2018).

¶ 10 On October 7, 2019, the OAG filed an index of the responsive records, pursuant to the plaintiff's motion made under section 11(e) of the Act (**5 ILCS 140**/11(e) (West 2018)). Thereafter, the OAG filed its amended affirmative defenses in which it now asserted that all responsive communications were exempt from disclosure under both sections 7(1)(f) and 7(1)(m) of the Act. As to section 7(1)(m) of the Act, the OAG now asserted that the responsive records were exempt because they "include materials prepared by [the OAG] or by KCC for [the OAG] for purposes of evaluating claims for the settlement proceeds, addressing challenges by claimants to KCC's initial determinations, and developing a final distribution plan after all claims are audited that [the OAG] will present for final approval to the court ***."

*3 ¶ 11 Both parties then moved for summary judgment. The plaintiff argued that he was entitled to summary judgment because the requested records did not fall within the deliberative process exemption as they were neither inter or intra-agency material, nor predecisional and deliberative agency material. He also argued that the requested records do not fall within section 7(1)(m) of the Act because he requested only communications between the OAG and KCC, not "materials" that the OAG asked KCC to prepare.

¶ 12 The OAG filed a cross-motion for summary judgment, arguing that the responsive records were exempt from disclosure under both sections 7(1)(f) and 7(1)(m) of the Act. In support of its cross-motion, the OAG attached two affidavits: one from Blake Harrop, the lead prosecuting attorney for the CRT litigation, and one from Andrew Perry, the senior project manager for KCC.

¶ 13 Harrop averred that KCC was retained "to evaluate claim forms and other material submitted by claimants in support of their claims and to provide to the OAG its opinions, analysis, and recommendations as to the validity of the claims in light of the eligibility requirements established by the OAG." Harrop acknowledged that the "vast majority" of claims did not require the OAG's day-to-day involvement, but he explained that KCC regularly advised the OAG regarding the status of the claims process and the OAG became directly involved when an issue arose, or a claimant objected to KCC's initial determination. Harrop also stated

that "[i]t has always been the understanding between OAG and KCC that whether to accept or deny a claim and, if accepted, the allowed amount of the claim were subject to final determination by the OAG." Perry averred that KCC performed the following functions for the OAG as claims administrator: reviewed claim forms, applied criteria to detect possible fraud, evaluated the reasonableness of a claimant's techniques to estimate the number of CRT products purchased, handled telephone and email inquiries from claimants and audited claims. Perry explained that KCC makes the "initial determination about whether a claim should be paid," but "the OAG has the discretion to make changes to KCC's recommendation."

¶ 14 On January 28, 2020, the circuit court entered an order denying the plaintiff's motion for summary judgment and granting summary judgment in favor of the OAG on its cross motion. In its written decision, the court concluded that responsive records were exempt from disclosure under section 7(1)(f) of the Act. Specifically, the court found that "KCC was retained to provide analysis and recommendations in furtherance of the OAG's objective to distribute settlement proceeds," and therefore, the responsive documents were intra-agency material. The court rejected the plaintiff's argument that the material was not predecisional, finding instead that "KCC's work for the OAG and all of the communications resulting therefrom relate to a pending decision regarding to whom to distribute the settlement proceeds." The court also rejected his argument that KCC's work was a "ministerial application of objective [eligibility] criteria," noting that it was belied by the affidavits attached to the OAG's motion, which described the deliberative functions that KCC performed. Having found that the OAG properly withheld the materials under section 7(1)(f) of the Act, the court concluded that it did not need to determine whether the responsive records were also exempt under section 7(1)(m) of the Act. This appeal followed.

*4 ¶ 15 On appeal, the plaintiff argues that the circuit court erred when it found that the records he requested were exempt under the Act. He, therefore, asks this court to reverse the circuit court's order granting the OAG's cross-motion for summary judgment and enter judgment in his favor.

¶ 16 Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 720 ILCS 5/2-1005(c) (West 2018). When, as here, the parties file cross-motions for summary judgment, "they concede the absence of a genuine issue of material fact, agree that only questions of law are involved, and invite the court to decide the issues based on the record." *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 11, 398 Ill.Dec. 13, 43 N.E.3d 923. Notwithstanding, the "filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28, 365 Ill.Dec. 497, 978 N.E.2d 1000. Our review of the circuit court's ruling on a motion for summary judgment is *de novo*. *Stevens*, 2015 IL 118652, ¶ 11, 398 Ill.Dec. 13, 43 N.E.3d 923.

¶ 17 FOIA is based upon the policy that persons must be given complete access to information "regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees * * *." **5 ILCS 140**/1 (West 2018); *American Federation of State, County and Municipal Employees, AFL–CIO (AFSCME) v. County of Cook*, 136 Ill. 2d 334, 341, 144 Ill.Dec. 242, 555 N.E.2d 361 (1990). Like its federal counterpart, FOIA requires full disclosure unless the desired information is exempted under clearly delineated statutory language. *Lieber v. Southern Illinois University*, 279 Ill. App. 3d 553, 560, 216 Ill.Dec. 227, 664 N.E.2d 1155 (1996); see also *U.S. Department of Defense v. Federal Labor Relations Authority et al. (FLRA)*, 510 U.S. 487, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994). When the government claims an exemption, it must prove that the exemption applies by clear and convincing evidence. **5 ILCS 140**/11(f) (West 2018).

¶ 18 In the instant case, the OAG initially denied the plaintiff's request claiming that the responsive records were exempt from disclosure under section 7(1)(f) of the Act. In its amended affirmative defenses, the OAG asserted that the responsive documents were exempt from disclosure under both sections 7(1)(f) and 7(1)(m) of the Act. The court below found that the documents were exempt under section 7(1)(f) of the Act and, therefore, did not reach the issue of whether they were also exempt under section 7(1)(m) of the Act. We address first the OAG's contention that the responsive documents are exempt under section 7(1)(f) of the Act.

¶ 19 Section 7(1)(f) of the Act states that the government is entitled to withhold "preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated ***." **5 ILCS 140**/7(1)(f) (West 2018). This

provision is "the equivalent of the 'deliberative process' exemption found in section 552(b)(5) of the federal Freedom of Information Act, which exempts from disclosure inter- and intra-agency predecisional and deliberative material." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 247, 279 Ill.Dec. 56, 799 N.E.2d 859 (2003). The deliberative process exemption expresses the public policy favoring the confidentiality of predecisional materials and "is intended to protect the communication process and encourage frank and open discussion among agency employees before a final decision is made." *Id.* at 248, 279 Ill.Dec. 56, 799 N.E.2d 859. Thus, in order to be exempt under this provision, the responsive materials must be both (1) inter or intra agency and (2) predecisional and deliberative.

***5** ¶ 20 As to the first requirement, that the materials must be either inter or intra agency, there is no dispute that the communications between the OAG and KCC are not inter-agency materials, as KCC is an outside consultant and not a government agency. However, communications between government agencies and an outside consultant may be considered intra-agency material for the purposes of the deliberative process exemption if the outside consultant's analyses and recommendations "played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248, 279 Ill.Dec. 56, 799 N.E.2d 859 (2003) (quoting *Department of the Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 10, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001)). For communications with outside consultants to qualify as "intra-agency," the consultant may not represent independent interests of its own apart from those of the agency. *Harwood*, 344 Ill. App. 3d at 248, 279 Ill.Dec. 56, 799 N.E.2d 859.

¶ 21 The plaintiff maintains that the requested materials are not intra-agency material because KCC was hired by the OAG to perform an administrative function, not to provide expert advice. The OAG responds that the plaintiff's contentions ignore the affidavits it attached in support of its cross-motion for summary judgment, averring that KCC provided it with analysis and recommendations regarding to whom to distribute the settlement proceeds, which it will ultimately use to create the final settlement distribution plan. We agree with the OAG.

¶ 22 To demonstrate that the requested records fall within an exemption, and to assist the court in making its determination, a public body must provide a detailed explanation for claiming an exemption, specifically addressing the requested documents in a manner allowing for adequate adversarial testing. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 13, 366 Ill.Dec. 640, 980 N.E.2d 733. "The trial court shall require the agency to create as full a public record as possible concerning the nature of the documents and the justification for nondisclosure without compromising the secret nature of the information." *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 542, 139 Ill.Dec. 554, 548 N.E.2d 1110 (1989). Furthermore, a public body can satisfy its burden only by providing objective indicia that an exemption applies under the circumstances. See *Illinois Education Ass'n v. Illinois Board of Education*, 204 Ill. 2d 456, 470, 274 Ill.Dec. 430, 791 N.E.2d 522 (2003).

¶ 23 Pursuant to section 11(f) of the Act, the circuit court "shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act." **5 ILCS 140**/11(f) (West 2018); *Illinois Education Ass'n.*, 204 Ill. 2d 456, 469, 274 Ill.Dec. 430, 791 N.E.2d 522 (2003). Our supreme court has interpreted this section to mean "the circuit court need not conduct in camera review where the public body meets its burden of showing that the statutory exemption applies by means of affidavits." *Illinois Education Ass'n.*, 204 Ill. 2d at 469, 274 Ill.Dec. 430, 791 N.E.2d 522. "Affidavits submitted by an agency are accorded a presumption of good faith." (Internal quotations omitted.) *BlueStar Energy Servs., Inc. v. Illinois Com. Comm'n*, 374 Ill. App. 3d 990, 997, 313 Ill.Dec. 153, 871 N.E.2d 880 (2007). Affidavits will not suffice, however, "if the public body's claims are conclusory, merely recite statutory standards, or are too vague or sweeping." *Illinois Education Ass'n.*, 204 Ill. 2d at 469, 274 Ill.Dec. 430, 791 N.E.2d 522.

¶ 24 After reviewing the OAG's supporting affidavits, we conclude that they are not conclusory or vague and are, therefore, sufficient to carry its burden of proving that the responsive records are intra-agency materials. Harrop stated in his affidavit that the OAG could have handled all aspects of the claims process internally, but it instead hired KCC to initially evaluate submitted claims and provide its "opinions, analyses, and recommendations as to the validity of the claims in light of the eligibility requirements established by the OAG." According to Harrop, KCC regularly discusses matters relating to the settlement claims with the OAG, including issues that arise with particular claims. Perry further elaborated on KCC's role in the claims process, stating in his affidavit that KCC "reviewed claim forms, applied criteria

to detect possible fraud, evaluated the reasonableness of a claimant's techniques to estimate the number of CRT products purchased, handled telephone and email inquiries from claimants, and audited claims." We conclude, therefore, that KCC performed essentially the same function in the OAG's deliberative process as the OAG would have performed if it had chosen to perform the preliminary review of each claim. We also conclude that, in performing this function, KCC represented only the interests of the OAG. Accordingly, the responsive materials constitute intra-agency material for the purposes of the deliberative process exemption.

*6 ¶ 25 The plaintiff nevertheless contends that the "contract" between the OAG and KCC, along with several comments made by the OAG and KCC in the CRT litigation, refutes the OAG's "after-the-fact attempts to shoehorn" its relationship with KCC into the deliberative process exemption. According to him, the contract confirms that KCC was nothing more than "a third party hired to perform an administrative function." He also points out that both the OAG and KCC made certain prior statements suggesting that KCC alone was responsible for determining a claimant's eligibility. Essentially, the plaintiff's argument is that the OAG's affidavits should be viewed with suspicion. We find the plaintiff's contentions in this regard unavailing.

¶ 26 To begin, we reiterate that affidavits are assumed to be in good faith. *BlueStar Energy Servs., Inc.*, 374 Ill. App. 3d at 997, 313 Ill.Dec. 153, 871 N.E.2d 880. Moreover, contrary to the plaintiff's contentions, there is nothing in either the contract or in the prior statements it cites that is at odds with the affidavits of Harrop and Perry. For example, the contract states, under scope of services, that KCC will "ensure that all settlement agreement requirements have been satisfied and approve or deny individual class claims" and then "provide the appropriate parties with the approved claimants list, including the distribution calculations for each claim." The contract also states that KCC would notify claimants whose claims were rejected. Put simply, this general description of KCC's services does not conflict with the affidavits. Both the contract and the affidavits acknowledge that KCC would be responsible for initially determining a claimant's eligibility based on the requirements supplied by the OAG, which the OAG would then use to help it prepare a final distribution plan to submit to the circuit court. The affidavits merely provide a more detailed look at how KCC went about performing that function.

¶ 27 The plaintiff also argues that, even if the communications between KCC and the OAG are intra-agency material, they still fall outside of the deliberative process exemption because they do not contain predecisional and deliberative material. "[T]o qualify for the deliberative process exemption, a document must be both predecisional in the sense that it is actually antecedent to the adoption of an agency policy, and deliberative in the sense that it is actually related to the process by which policies are formulated." *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶ 28, 424 Ill.Dec. 758, 109 N.E.3d 872.

¶ 28 According to the plaintiff, the withheld records do not contain predecisional material because the OAG already made its final decision regarding to whom to distribute the settlement proceeds when it entered into the settlement agreements and published the settlement notice. He also contends that the determination as to whether specific claimants meet the eligibility requirements set forth in the notice is an administrative decision, not a deliberative one. The OAG responds that publication of the settlement notice did not end its deliberative process because it still needed to determine which claimants satisfied the eligibility requirements and what amount each claimant was owed. According to the OAG, that deliberative process is not final until it submits a distribution plan to the circuit court for approval, per the terms of the settlement agreements. The OAG also responds that the plaintiff's contention that determining whether claimants are eligible is an administrative decision, not a deliberative one, ignores the affidavits of Harrop and Perry. We once again agree with the OAG.

¶ 29 Each of the individual settlement agreements state that the terms of the agreement are not final until such time as the circuit court enters a final judgment providing, *inter alia*, that the settlement funds be distributed to eligible claimants "within the discretion of the Illinois Attorney General" and each of the CRT manufacturers are dismissed with prejudice. As Harrop stated in his affidavit, the OAG has not yet submitted the final distribution plan to the court. Consequently, no final determination has been made regarding which claimants met the eligibility requirements and what amount they are owed. We conclude, therefore, that the requested communications between the OAG and KCC are predecisional because they are antecedent to the OAG adopting and submitting a final distribution plan to the circuit court.

*7 ¶ 30 We also find that the responsive records are deliberative material because the communications between the OAG and KCC are related to the process by which the OAG formulates its policies. According to the settlement agreements, the OAG is responsible for developing a plan to distribute the settlement funds to eligible claimants. Although the published notice set forth requirements for participation in the settlement, the final distribution plan necessarily requires a determination as to which claimants satisfied those requirements and what amount they are owed. Rather than evaluate each of the claims on its own, the OAG retained a third party, KCC, to make an initial determination subject to its approval. To that end, KCC reviewed claims and then made recommendations to the OAG, involving the OAG directly only when there was an issue, or a claimant objected to the initial determination. We conclude, therefore, that the records responsive to the plaintiff's request are part of the OAG's process for creating its final distribution plan in the CRT litigation. Accordingly, the OAG properly withheld the records under section 7(1)(f) of the Act.

¶ 31 Having so determined, we need not address whether the records were also exempt from disclosure under section 7(1)(m) of the Act.

¶ 32 Based on the foregoing analysis, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.

Justices Cunningham and Rochford concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2021 IL App (1st) 200225, 2021 WL 948641

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2021 IL App (1st) 192268-U

Appellate Court of Illinois, First District,
SECOND DIVISION.

Rodney LOVE, Plaintiff-Appellant,

v.

CITY OF CHICAGO and Ralph Price, Defendants-Appellees.

No. 1-19-2268
|
March 9, 2021

Appeal from the Circuit Court of Cook County. No. 16 CH 317, The Honorable Eve M. Reilly, Judge Presiding.

ORDER

JUSTICE PUCINSKI delivered the judgment of the court.

***1** ¶ 1 *Held:* Where the plaintiff failed to present claims of error that were supported by well-reasoned argument, relevant legal authority, and citations to the record, there was no basis on which to reverse the trial court's grant of summary judgment in favor of defendants on plaintiff's complaint alleging violations of the Illinois Freedom of Information Act.

¶ 2 This matter arises from plaintiff, Rodney Love's, complaint for declaratory and injunctive relief. In that complaint, plaintiff alleged that defendants, the City of Chicago ("City") and Ralph Price, general counsel for the Chicago Police Department ("CPD"), violated the Illinois Freedom of Information Act ("FOIA") (**5 ILCS 140/1** *et seq.* (West 2014)) by failing to respond to two requests he submitted to the CPD. The trial court granted summary judgment in favor of defendants on plaintiff's claims, and plaintiff now appeals. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In January 2016, plaintiff filed his complaint in this matter. In that complaint, plaintiff alleged that he had submitted two FOIA requests—one in September 2015 and one in October 2015—to the CPD, requesting all information and evidence related to the murder of Lyphus Pouncy, for which plaintiff was prosecuted and convicted. At the time that plaintiff filed his complaint, defendants had not responded to plaintiff's requests.

¶ 5 Plaintiff's two FOIA requests appear to be substantially identical, and in a reply plaintiff filed to defendants' answer, plaintiff acknowledged that the two requests were the same, except that the October 2015 request also included an additional paragraph that requested any plea deals or contracts made by someone named Christopher Young during plea negotiations.

¶ 6 In September 2016, defendants filed a motion for summary judgment, arguing that they had, since the filing of plaintiff's complaint, produced the requested records and, therefore, plaintiff's claims had been rendered moot. In support, defendants attached the affidavit of John McDonald. In that affidavit, McDonald, a civilian Freedom of Information Officer with the CPD, averred that after receiving plaintiff's request, he identified the "RD [Record Division] numbers" associated with the Pouncy murder: HH 632040 (the arrest/case report file) and HH 610681 (the area file). McDonald requested and received the area file from the Detective Division of the CPD, which included forensic report information. McDonald also requested and received from the CPD Records Division the arrest/case report file. McDonald also ordered photographs from the CPD Forensics Services Photo Lab Unit. That Unit verified that the requested photographs had been located, but McDonald was still awaiting delivery of the photographs at the time of his affidavit. He forwarded all of the responsive documents to the City's Law Department. According to the motion for summary judgment, McDonald forwarded a total of 119 pages to the Law Department. Upon receipt, the Law Department made redactions to those records pursuant to FOIA and then sent all 119 pages to plaintiff on September 8, 2016.

***2** ¶ 7 In response to defendants' motion for summary judgment, plaintiff argued that McDonald's affidavit was insufficient, because it did not state how many pages he forwarded to the Law Department. He also argued that defendants failed to produce an affidavit from defense counsel or someone else that attached the documents that were produced to plaintiff. Accordingly, plaintiff argued that his

claims were not moot because defendants had not fulfilled their obligations with respect to his FOIA requests.

¶ 8 The trial court agreed with plaintiff, concluding that McDonald's affidavit did not comply with Supreme Court Rule 191(a) in that it did not attach the documents on which McDonald relied, namely, the documents that McDonald believed to be responsive to plaintiff's FOIA requests. For that reason, the trial court struck McDonald's affidavit and denied defendants' motion for summary judgment without prejudice to filing an amended motion for summary judgment that provided an update on the outstanding photographs and attached a proper affidavit.

¶ 9 In October 2017, defendants filed a second motion for summary judgment, again arguing that plaintiff's claims had been rendered moot by defendants' production of documents to plaintiff. In support, defendants attached the affidavits of Sarah Brown, Wioletta Muzupappa, and Philip Santell.

¶ 10 In her affidavit, Brown, a civilian Public Information Officer with the CPD, averred that upon reviewing plaintiff's FOIA requests, she observed that plaintiff's requests were for records related to the murder case of Pouncy and plaintiff's arrest for that murder. Based on her experience as a FOIA officer, Brown determined that most of the records sought by plaintiff would be located in the investigative file maintained by the Bureau of Detectives. Using the RD number assigned to the murder case—HH610681—and the system the CPD uses to track FOIA requests, Brown learned that the records associated with HH610681 had been previously requested by a different FOIA officer. Nevertheless, to ensure completeness of the response to plaintiff's requests, Brown started the record gathering process anew. Brown requested the full investigative file for HH610681 from the Bureau of Detectives and the photographs from the Photographic Unit. Officer Wioletta Muzupappa with the Bureau of Detectives sent the full investigative file associated with HH610681. Due to their age, the photographs needed to be printed from negatives and, as of the date of Brown's affidavit, had not yet been received from the Photographic Unit. Brown then went through each paragraph of plaintiff's requests and averred that responsive documents to most of plaintiff's specific requests would be found in the produced investigative file. The only exceptions were requests that were so vague that Brown could not conduct searches for responsive documents, the photographs Brown had requested and not yet received, and documents related to plea deals, with which the CPD is not involved and possessed no responsive records.

¶ 11 With respect to plaintiff's requests for " 'CR' complaint reports,"[1] Brown observed that plaintiff did not provide any specific information regarding whose CR files were sought. Usually, without names, the CPD was unable to process such requests. Using the CPD's FOIA request tracking system, however, Brown was able to locate a previous FOIA request plaintiff had made that listed 13 names. Brown compared those 13 names against names found in the investigative file on the Pouncy murder and found that the names matched. As a result, Brown retrieved the CR records that had been sent to plaintiff in response to his previous FOIA request.

*3 ¶ 12 Brown forwarded the investigative file to the Law Department for redaction of FOIA exempt material. She did not remove any documentation from the file before sending it to the Law Department. Brown averred that a copy of the CPD's FOIA response to plaintiff was attached to her affidavit.

¶ 13 In her affidavit, Wioletta Muzupappa, a CPD officer assigned to the Bureau of Detectives, averred that she was contacted by Brown regarding plaintiff's FOIA request. From Brown, Muzupappa learned that the RD number assigned to plaintiff's case was HH610681. Using that number, Muzupappa determined that the file was stored at headquarters. She then pulled the file from headquarters storage. Upon examination of the file, she determined that it was the file plaintiff had requested. She forwarded the entire file to Brown. She received a copy of the file after Assistant Corporation Counsel Philip Santell had redacted FOIA exempt materials. Other than the redacted information, the records attached to Muzupappa's affidavit were a true and accurate copy of the records that she had pulled and provided to Brown.

¶ 14 In his affidavit, Santell averred that he received the investigative file and previous FOIA request response from Brown. He reviewed those documents and made redactions pursuant to applicable FOIA exemptions. On October 11, 2017, he mailed to plaintiff a cover letter explaining the redactions and a copy of the records he had received from the CPD. Attached to his affidavit were copies of the records and cover letter he mailed to plaintiff.

¶ 15 According to defendants' second motion for summary judgment, the documents provided to plaintiff in response to his FOIA requests on October 11, 2017, totaled 152 pages. Those 152 pages did not include the photographs requested

by plaintiff, as they had not yet been received as of the time the second motion for summary judgment was filed. Defendants represented, however, that they would provide those photographs to plaintiff as soon as they were ready.

¶ 16 In response to the second motion for summary judgment, plaintiff argued that Brown's affidavit stated that the photographs were not completed, Muzupappa's affidavit did not state that the redacted file she received from Santell was the entire file that she sent to Brown, and that Santell's affidavit did not state that Santell sent the entire file except for redacted information to plaintiff and it did not identify what information was withheld and for what reason. Plaintiff also argued that he was only provided four years' worth of CR/RL[2] records, fingerprint and other forensic evidence reports were missing, the pages of the documents attached to the affidavits were not numbered, text messages and emails were not provided, defendants improperly redacted names in the records, and the photographs provided were in black and white and not color.

¶ 17 In their reply in support of their second motion for summary judgment, defendants argued, among other things, that at the time defendants responded to plaintiff's FOIA requests, there was in effect an injunctive order in another case that prevented defendants from releasing CR records that were more than four years old. In the reply, defendants also noted that on December 13, 2017, after they had been developed, color copies of the requested photographs were produced to plaintiff.

*4 ¶ 18 On August 10, 2018, the trial court granted defendants' second motion for summary judgment in part and denied it in part. In doing so, the trial court broke the documents requested by plaintiff into four categories: (1) investigative and prosecutorial documents, (2) electronic documents relevant to the murder and subsequent investigation, (3) lineup photographs used in the investigation, and (4) all "CR/RL records" for officers and detectives who worked on the Pouncy case. With respect to the requested investigative and prosecutorial documents, the trial court, after reviewing the submitted affidavits and conducting an *in camera* review of the documents, concluded that the CPD conducted a reasonable search, as reflected in the affidavits, and tendered the requested materials to plaintiff. Accordingly, the trial court granted summary judgment in favor of defendants on these materials.

¶ 19 Regarding the electronic materials, the trial court observed that plaintiff had not contested the production of these materials by defendants and, instead, simply speculated that there might exist additional materials that had not been produced. The trial court noted that plaintiff's speculation did not create a genuine issue of material fact and, having reviewed the produced materials, concluded that defendants had met their burden for summary judgment on these records.

¶ 20 With respect to the lineup photographs, the trial court noted that after the filing of plaintiff's response to the second motion for summary judgment, color photographs had been produced to plaintiff. Since then, plaintiff had not filed anything else to contest his receipt of the photographs. Therefore, the trial court concluded that no issue or claim remained that precluded summary judgment in favor of defendants on the photographs.

¶ 21 Finally, with respect to the CR and RL records, the trial court noted that the injunctive order defendants cited as the basis for not turning over records more than four years old had been reversed in July 2016. Given that and the fact that defendants did not articulate any other grounds for retaining any older CR and RL records, the second motion for summary judgment was denied as to them.

¶ 22 In May 2019, defendants filed a third motion for summary judgment. In that motion, defendants asserted that they had provided all additional responsive documents to plaintiff's requests for CR/RL records. In support, they attached the affidavit of Peter Edwards, a sergeant with the CPD, who was assigned as a supervisor of the FOIA section of the CPD. In that affidavit, Edwards averred that he was contacted by the City's Law Department regarding plaintiff's FOIA request and learned that the only outstanding issue was the CR records. After reviewing plaintiff's FOIA requests, which requested CR records pertaining to plaintiff's murder investigation, Edwards gathered plaintiff's identifying information and identifying information related to the Pouncy murder. Using that information and his knowledge that CR records are kept and maintained by the CPD Bureau of Internal Affairs ("BIA"), Edwards requested responsive records from the BIA. After receiving records from the BIA, Edwards reviewed those records to determine whether they were records requested by plaintiff. He observed that the names, dates, and locations matched. He then forwarded the responsive records to the Law Department.

¶ 23 Defendants asserted that after making redactions pursuant to FOIA, the responsive records, which totaled 88 pages, were then sent to plaintiff on May 9, 2019. Defendants also asserted that "it is unclear what Plaintiff means by the use of the phrase 'repeater list' and what document Plaintiff seeks."

¶ 24 In response to the third motion for summary judgment, plaintiff argued that defendants continued to refuse to turn over responsive documents, defendants were acting in bad faith, and the affidavits defendants submitted during the proceedings violated Supreme Court Rule 191(a). Plaintiff also argued that Santell did not submit an affidavit stating that he only received 88 pages or that after redacting information, plaintiff was only entitled to 88 pages. Plaintiff further argued that defendants did not submit a supporting affidavit describing what constituted a detailed search or where defendants searched for responsive documents. More specifically, plaintiff argued that Edwards's affidavit did not identify what the BIA searched for, what was given to him, or what he specifically requested from the BIA. Plaintiff also argued that defendants still had not tendered certain documents. Finally, plaintiff argued that defendants failed to tender an index of records on RD 632040 and improperly redacted certain information.

*5 ¶ 25 On October 7, 2019, the trial court entered an order granting defendants' third motion for summary judgment. The written order did not provide the reasons for the trial court's decision, and the record on appeal does not contain a transcript of the hearing on the third motion for summary judgment.

¶ 26 Plaintiff then instituted this appeal.

¶ 27 ANALYSIS

¶ 28 Plaintiff pursues this appeal *pro se*. Although it is clear that plaintiff seeks reversal of the trial court's granting of defendants' third motion for summary judgment, plaintiff's specific claims of error and the legal basis for those claimed errors is not as readily apparent. Nevertheless, to the best of our ability, we address each of the contentions that we are able to identify in plaintiff's brief. None of them, however, warrant reversal in this matter.

¶ 29 FOIA cases are often and appropriately decided on motions for summary judgment. *Better Government Association v. City of Chicago*, 2020 IL App (1st) 190038, ¶ 9. Under section 2-1005(b) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005(b) (West 2018)), summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Our review of the trial court's ruling on a motion for summary judgment is *de novo*. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456, 459 (2003).

¶ 30 Under section 3(a) of FOIA (**5 ILCS 140**/3(a) (West 2014)), "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." When a public body receives a proper request for information under FOIA, it is required to respond to that request unless one of the narrow statutory exceptions set forth in FOIA applies. *Illinois Education Association*, 204 Ill. 2d at 463. Whether a public body has conducted an adequate search for responsive records is determined by a standard of reasonableness that is dependent on the facts of each case. *Better Government Association*, 2020 IL App (1st) 190038, ¶ 31. The pivotal issue in such an inquiry is not whether relevant, responsive documents exist, but whether the public body's search was reasonably calculated to discovery those relevant, responsive documents. *Id.* The public body is not required to perform an exhaustive search of every possible location, but it must construe the FOIA request liberally and search those places that are reasonably likely to contain relevant, responsive documents. *Id.*

¶ 31 The initial burden of establishing the adequacy of the search belongs to the public body. *Id.* at ¶ 32. The public body typically meets that burden by "submitting reasonably detailed affidavits setting forth the type of search it performed and averring that all locations likely to contain responsive records were searched." *Id.* Once such affidavits have been submitted by the public body, the burden then shifts to the requester to produce countervailing evidence that the search was not adequate. *Id.*

¶ 32 Having set out the applicable law and standards, we turn now to the first contention that we discern in plaintiff's brief on appeal: that "defendants never provided complaint registers and repeater lists." With the exception of two cited cases, the quoted language is the entirety of plaintiff's argument on this issue. Accordingly, the thrust of plaintiff's

contention in this respect is unclear. We do not know whether plaintiff contends that defendants did not conduct an adequate search for CR and RL records, that defendants improperly withheld certain complaint registers and repeater lists, or that defendants or the trial court erred in some other respect.

*6 ¶ 33 The two cases cited by plaintiff do not aid in clarifying plaintiff's contention. In *Watkins v. McCarthy*, 2012 IL App (1st) 100632, this Court addressed the question of whether CR records are subject to disclosure under FOIA and concluded they were. In *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, the court reversed the injunction, cited by defendants in their reply in support of their third motion for summary judgment, that had prevented the disclosure of CR records that were more than four years old. Taken together, these cases stand for the proposition that CR records are subject to disclosure under FOIA. There is no dispute here, however, regarding whether CR records are subject to disclosure.

¶ 34 We observe that, despite plaintiff's contention that defendants "never" produced CR records, the record affirmatively belies such a contention. The affidavits submitted by defendants in support of their second motion for summary judgment indicate that, on October 11, 2017, because plaintiff did not include officer names in his FOIA requests at issue here, defendants mailed CR records to plaintiff based on 13 officer names that were included in a separate FOIA request from plaintiff and that matched names that appeared in the investigative file related to the Pouncy murder. In addition, after the trial court ruled that defendants were required to produce CR records that were more than four years old, defendants conducted a second search for CR records, this time using identifying information related to the Pouncy murder. This search produced another CR record file, which was produced to plaintiff on May 9, 2019.

¶ 35 We observe that plaintiff has made no contention that defendants' searches for CR records were inadequate. Nor did plaintiff produce any counterevidence in the trial court that would call into question the adequacy of defendants' searches for CR records. We also observe that despite defendants expressing confusion regarding what "RL records" or "repeater lists" are, plaintiff never clarified the term, either in the trial court or on appeal here. Absent clarification, we cannot say whether defendants produced any RL records, nor can we say that defendants erred in failing to produce a category of documents plaintiff did not define. Based on all of this, we cannot agree that reversal is warranted based on plaintiff's claim that he was never provided with CR or RL records.

¶ 36 Plaintiff's next contention on appeal is that he "stated the reasons in the third summary judgment but this was never answered by the defendants or the judge on 8-10-18." We first note that August 10, 2018, is the date that the trial court entered its order granting defendants' second motion for summary judgment in part and denying it in part. Because defendants had not yet filed their third motion for summary judgment at that point, neither defendants nor the trial court could have addressed the "reasons" raised by plaintiff in the proceedings on the third motion for summary judgment. Giving plaintiff the benefit of the doubt, however, we assume that the reference to the August 10, 2018, order was a mistake and that plaintiff intended to reference the trial court's order granting defendants' third motion for summary judgment.

¶ 37 Plaintiff's contention in this respect fails for a number of reasons. First, plaintiff does not explain what he means by his contention that he "stated the reasons in the third summary judgment." We can only assume that he is referring to the arguments that he raised in opposition to defendants' third motion for summary judgment. Of course, plaintiff raised many arguments in response to defendants' third motion for summary judgment, and he does not clarify whether he intends to invoke some or all of those contentions here on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (requiring that the argument section of appeals briefs "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 804 (2009) ("The failure to assert a well-reasoned argument supported by legal authority is a violation of Supreme Court Rule 341(h)(7) [citation], resulting in waiver."); *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986) ("A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research."). In any case, plaintiff is not permitted to incorporate by reference arguments made in the trial court. See *People v. Guest*, 166 Ill. 2d 381, 414 (1995) (concluding that arguments the defendant made in the trial court and attempted to incorporate by reference in his appeal were not properly raised under Supreme Court Rule 341 and, therefore, were waived).

*7 ¶ 38 Second, it is also unclear what plaintiff means when he argues that defendants and the trial court never "answered" his reasons, *i.e.*, whether he is claiming that they did not provide responses to his contentions that were satisfactory or that they did not respond at all. To the extent that plaintiff intended the former, we are unable to address this contention, because, as stated above, plaintiff does not identify which "reasons" he is referring to, and he does not make any argument or cite any legal authority establishing that the trial court's and defendants' responses to his contentions were inadequate. Likewise, to the extent that plaintiff intended the latter, we are unable to afford him any relief on that basis. Defendants did, in fact, file a reply to plaintiff's response to the third motion for summary judgment. Although the trial court did not issue a written order explaining its decision to grant the third motion for summary judgment, it was under no obligation to do so. See S. Ct. R. 366(b)(3)(i) ("No special findings of fact, certificate of evidence, propositions of law, motion for a finding, or demurrer to the evidence is necessary to support the judgment or as a basis for review."); *Stony Island Church of Christ v. Stephens*, 54 Ill. App. 3d 662, 668 (1977) ("Orders of the circuit court need not include findings of fact or conclusions of law. [Citations.] On the contrary, we are obliged to extend all reasonable presumptions in favor of the judgment or order appealed from."). Moreover, because plaintiff did not include in the record on appeal a transcript of the hearing on defendants' third motion for summary judgment, we have no way of knowing whether the trial court provided any explanation for its ruling at the hearing. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.").

¶ 39 Plaintiff's third contention is as follows: "Plaintiff['s] lawsuit began asking for two FOIA requests. #RD632-040, and RD#610-681. Defendants stated that Plaintiff only had 150 pgs of RD#610-681. Defendants never produce[d] an index of records for RD#632-040." We first observe that, based on our review of the record, the RD numbers plaintiff refers to are not numbers assigned to his respective FOIA requests, but are, instead, numbers assigned to files in the Records Division of the CPD. Thus, it is not, as plaintiff's contention might imply, the case that defendants responded to one but not the other of plaintiff's FOIA requests. As previously discussed, the parties agree that the two FOIA requests at issue in this matter were virtually identical. Accordingly, there is no dispute that defendants' responses were joint responses to both requests.

¶ 40 That aside, we note that plaintiff's statement that there were only 150 pages on RD 610-681 does not actually suggest any error. For example, plaintiff does not contend on appeal that there were additional, unproduced documents related to RD 610-681, nor does he contend that defendants' search for documents related to RD 610-681 was inadequate. Accordingly, this is not a basis on which we will reverse the trial court's judgment.

¶ 41 Plaintiff also states that defendants never produced an index of record for RD 632-040. He does not, however, contend that defendants were under an obligation to do so or cite any authority in support of such a proposition. Even so, plaintiff's contention fails. Pursuant to section 11(e) of FOIA (**5 ILCS 140**/11(e) (West 2014)), "[o]n motion of the plaintiff, *** the court shall order the public body to provide an index of the records *to which access has been denied.*" (Emphasis added.) The record in this case does not contain any evidence that, other than the redaction of exempt material within documents, plaintiff has been denied access to any records. Accordingly, we see no basis on which to conclude that defendants were required to provide plaintiff with an index of records.

¶ 42 Finally, we observe that, in his conclusion, plaintiff asks that we reverse the trial court's grant of summary judgment in favor of defendants and that we grant plaintiff an *in camera* inspection of records. Plaintiff does not, however, identify which records require an *in camera* inspection. In addition, *in camera* inspections, when necessary, are to be conducted by the trial court, not plaintiff. See **5 ILCS 140**/11(f) (West 2014) ("*[T]he court* *** shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act." (Emphasis added.)). Accordingly, even if we were to conclude that reversal of the trial court's judgment in this matter was required, granting plaintiff an *in camera* inspection would not be an appropriate form of relief.

*8 ¶ 43 We have addressed all of the contentions that we are able to discern in plaintiff's brief on appeal. To the extent that plaintiff intended to make claims of error that we have not identified or addressed, we deem any such contentions waived, because they are not clearly stated

or supported by argument and relevant authority. Under Supreme Court Rule 341(h)(7), an appellant's brief is required to contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Where a party fails to provide a well-reasoned argument supported by legal authority, that party waives that contention. *Sakellariadis*, 391 Ill. App. 3d at 804. Moreover, "[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research." *Thrall Car Manufacturing Co.*, 145 Ill. App. 3d at 719.

¶ 44 We recognize that plaintiff is acting *pro se*. For that reason, we have endeavored to identify all potential contentions raised in his brief and to address them to the fullest extent possible under the circumstances. Nevertheless, a *pro se* litigant is held to the same standards as a litigant represented by a licensed attorney. *Williams v. Department of Human Services Division of Rehabilitation Services*, 2019 IL App (1st) 181517, ¶ 30. Accordingly, plaintiff is not, due to his *pro se* status, relieved of his obligation under Supreme Court Rule 341(h)(7) to clearly state his contentions and the reasons for them, supported by citations to the record and relevant authority. See *id.* ("Williams *pro se* status does not excuse him from the burden of providing this court with a cohesive argument supported by legal precedent.").

¶ 45 Despite our conclusion here, we recognize that plaintiff may have been asking for specific material and documents for which he did not know the correct name. The way that FOIA is written makes it very difficult for anyone requesting material or documents to rely on the complete cooperation of the public body at issue. This is because internal names and acronyms for data, documents, information, and material may be so obscure or technical that it would be unlikely that anyone outside of that public body would know the proper terms necessary to make a specific request. To paraphrase the famous quote from former Secretary of Defense Donald Rumsfeld, a person making a FOIA request will have known knowns and some known unknowns, but there may also be some unknown unknowns within the public body that will ultimately defeat a FOIA request, unless the public body is actively involved and completely determined to be transparent.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 48 Affirmed.

Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (1st) 192268-U, 2021 WL 886122

Footnotes

1 From the record, it appears that CR (complaint register) records are disciplinary records for CPD officers.

2 Plaintiff also refers to "RL records" as "repeater list" records, but neither the briefs nor the record offer any insight as to what RL or repeater list records are.

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Only the Westlaw citation is currently available.
United States District Court, S.D. Illinois.

Joseph WILKINS, Plaintiff,

v.

Lillian OVERALL, Defendant.

Case No. 16-cv-01324-SPM

Signed 03/04/2021

Attorneys and Law Firms

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MEMORANDUM AND ORDER

MCGLYNN, District Judge:

***1** On February 18, 2021, the Court issued an order denying the Motion to File Documents Under Seal filed by Plaintiff Wilkins. (*See* Docs. 169, 189). In the motion to seal, Plaintiff asked the Court to seal two documents: Plaintiff's Motion for Partial Summary Judgment as to Defendant Lillian Overall and Wexford Health Sources Inc.'s Medical Guidelines ("Medical Guidelines") filed as Exhibit L to the Motion for Partial Summary Judgment. Plaintiff stated these documents contain information designated by third-party Wexford Health Sources, Inc. ("Wexford"), employer of Defendant Overall, as "Confidential and Subject to Protective Order" under the Protective Order in place in this action and that he took no position as to whether the information in these documents met the standard to receive protection pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure. Defendant Overall did not file a response to the motion. The Court did not find good cause to seal either document and denied the motion. (Doc. 189).

Pending before the Court is a motion requesting the Court to reconsider the order denying the motion to seal filed by Defendant Overall. (Doc. 191). Defendant argues that good cause exists to seal the Medical Guidelines as they are proprietary trade secrets.

Legal Standards

I. Reconsideration

Under Rule 54(b), the Court may revise any order adjudicating fewer than all the claims at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Motions to reconsider an order under Rule 54(b) are judged largely by the same standards as motions to alter or amend a judgment under Rule 59(e), "to correct manifest errors of law or fact or to present newly discovered evidence." *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987) (citation omitted). "Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). *See also Ahmed v. Ashcroft*, 388 F. 3d 247, 249 (7th Cir. 2004).

II. Sealing Portions of the Judicial Record

As the Court has stated, motions to seal are disfavored. (*See* Doc. 189, p. 1). "The parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F. 3d 943, 944 (7th Cir. 1999). Therefore, there is a presumption that "[d]ocuments that affect the disposition of federal litigation" should be open to public view. *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010). *See Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002). This presumption supports public confidence in the judiciary by enabling oversight and facilitating the understanding of judicial decisions. *See Gonzales v. Home Nursery Inc.*, No. 14-cv-1140-MJR-DGW, 2016 WL 6705447, at *1 (S.D. Ill. Sept. 22, 2016) (citing *Goessel v. Boley Int'l, Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013)). Public interest in the judicial process, however, can be overridden if the movant demonstrates "good cause for sealing a part or the whole of the record[.]" *Citizens*, 178 F. 3d at 945. The Seventh Circuit has "insisted that litigation [is to] be conducted in public to the maximum extent consistent with respecting trade secrets, the identities of undercover agents, and other facts that should be held in confidence." *Hicklin Eng'g, L.C. v. Bartell*, 439 F. 3d 346, 348 (7th Cir. 2006), abrogated on other grounds by *RTP LLC v. Orix Real*

Estate Capital, Inc., 827 F.3d 689, 692 (7th Cir. 2016). Thus, "[e]ven in cases involving substantial countervailing privacy interests such as state secrets, trade secrets, and attorney-client privilege, courts have opted for redacting instead of sealing the order or opinion." *Mitze v. Saul*, 968 F.3d 689, 692 (7th Cir. 2020).

Analysis

***2** In the motion, Defendant argues that the Partial Motion for Summary Judgment and the Medical Guidelines contain proprietary trade secrets about treating patients within the correctional setting, which is sufficient grounds for filing the materials under seal. (Doc. 191, p. 3). Defendant contends that information contained in the Medical Guidelines has long been held to constitute trade secrets deserving of protection via protective orders and "even shielded from disclosure under the Illinois Freedom of Information Act." (*Id.* at p. 3). She supports this argument by citing to *Sergio v. Illinois Department of Corrections,*[1] an Illinois state case, in which the Seventh Judicial Circuit held that the Medical Guidelines were exempt from disclosure under the Illinois Freedom of Information Act ("FOIA"), **5 ILCS 140**/7(g), because of their proprietary nature. (*Id.*) (citing *Sergio, v. Ill. Dep't of Corr.*, 2015-MR-683 (Ill. Cir. Ct. Nov. 14, 2017)). Finally, Defendant argues that the Court has already ruled that good cause exists to seal the document, when it recognized the proprietary nature of the information sought in discovery and entered a protective order in this case. (*Id.* at p. 2).

Following the filing of the Motion for Reconsideration, Plaintiff filed a response iterating that he takes no position as to whether the information in the documents at issue meet the standard for protection under Rule 26(c)(1). (Doc. 192). Defendant then filed a reply, stating that since the filing of the Motion for Reconsideration, she obtained additional documentation not available at the time the motion was filed. Therefore, exceptional circumstances exist for the filing of a reply brief. (Doc. 193). She has provided the affidavit of Joe Ebbitt, Director of Risk Management, HIPAA Compliance, and Legal Affairs for Wexford. (Doc. 193-1, p. 1-3). Ebbitt states that the information in the Medical Guidelines include detailed protocols, procedures, and forms that provide unique and concrete methodologies that enable Wexford personnel to deliver effective medical care to inmates in the unique and challenging environment presented by public correctional facilities. He confirms that the Medical Guidelines in this case are substantially similar to those at issue in the *Sergio* case before the Illinois court.

Defendant's motion does not meet the limited function of a motion for reconsideration, which is to "to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale*, 90 F.3d at 1269. Rather, Defendant incorrectly uses the Motion for Reconsideration to put forth arguments and present evidence that could have been presented prior to the ruling on the Motion to File Documents Under Seal. *See United States v. Resnick,* 594 F. 3d 562, 568 (7th Cir. 2010) (holding that a motion for reconsideration is not a vehicle for introducing new evidence or advancing "arguments that could and should have been presented" prior to the court's ruling).

It is not clear why Defendant did not put forth any arguments prior to the Court ruling on the Motion to File Documents Under Seal. Defendant's argument that the Court has already found good cause to seal parts of the record because the documents were submitted pursuant to the Court's Protective Order is mistaken. There are significant differences between documents disclosed through discovery and documents that are actually filed with the Court and become part of the judicial record. "While the public has a presumptive right to access discovery materials that are filed with the court ... the same is not true of materials produced during discovery but not filed with the court." *Bond v. Utreras,* 585 F. 3d 1061, 1073 (7th Cir. 2009). *See also Baxter Int'l,* 297 F. 3d at 545 (stating that "[s]ecrecy is fine at the discovery stage, before the material enters the judicial record"). "[P]retrial discovery, unlike the trial itself, is usually conducted in private. *Citizens,* 178 F. 3d at 944. Accordingly, the "showing of 'good cause' that is adequate to protect discovery material from public disclosure cannot alone justify protecting such material after relied upon by the parties to advance their arguments and claims in court." *Little v. Mitsubishi Motor Mfg. of America,* No. 04-1034, 2006 WL 1554317, at *2 (C.D. Ill. June 5, 2006) (citing *Poliquin v. Garden Way*, 989 F.2d 527, 533 (1st Cir. 1993)). *See also Citizens,* 178 F. 3d at 945 (holding that a judge "may not rubber stamp a stipulation to seal the record"). As stated in the Protective Order, the Court is to make an "individualized determination of whether any such document[s] or information can be filed under seal." (Doc. 149, p. 3).

***3** Additionally, the Court does not find that the affidavit of Joe Ebbitt submitted by Defendant is newly discovered evidence for the purpose of reconsideration. Joes Ebbitt states

that he provided a similar affidavit in the *Sergio* case, which was ruled on over three years ago, and Defendant has not explained why the information was "not available" at the time the Motion for Reconsideration was filed.

Nevertheless, the Court finds that reconsideration is still warranted. *See Sims v. EGA Products, Inc.,* 475 F. 3d 865, 870 (7th Cir. 2007) (Cudahy, R., concurring) ("nonfinal orders are generally modifiable"). Pursuant to the information provided by Defendant, which is not in dispute, the policies contained in the Medical Guidelines were developed by Wexford at substantial monetary expense using a team of industry experts. These policies are unique and tailored to the provision of medical care in correctional facilities. As observed by the Illinois circuit court, they "go into great detail on how to provide treatment to individuals who are incarcerated[.]" *Sergio,* 2015-MR-683. Wexford uses the Medical Guidelines to gain an advantage in competing with other private healthcare companies that also contract with states to provide healthcare to inmates, and disclosure of the policies would cause competitive harm. In light of this information, Defendant has sufficiently demonstrated that Exhibit L, the Medical Guidelines, contains information that qualify as trade secrets and that Wexford will incur undue harm if the information remains accessible to the public. *See 3M v. Pribyl,* 259 F. 3d 587, 595 (7th Cir. 2001) (holding that "[a] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret"); *SmithKline Beecham Corp. v. Pentech Pharm., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (maintaining a document under seal where public disclosure of the information would effectively afford other firms an unearned competitive advantage).

Accordingly, the Court concludes that good cause exists to seal Exhibit L, the Medical Guidelines. Good cause, however, "does not extend to those portions of the records so relevant to [a party's argument or] claim that they have been cited or quoted by the parties in other documents." *Chapman v. Raemisch,* No. 05-C-1254, 2009 WL 425813 at *7 (E.D. Wisc. Feb. 20, 2009). *See also Cty. Materials Corp. v. Allan Block Corp.,* 502 F. 3d 730, 739 (7th Cir. 2007) ("[s]ecrecy persists only if the court does not use the information to reach a decision on the merits") (internal citations and quotations omitted). Therefore, the Court will direct Plaintiff to refile redacted versions of page 6 and page 7 of the Medical Guidelines (Doc. 169-2), which are referenced by Plaintiff in his dipositive motion.

Disposition

For the reasons stated above, the Court **GRANTS** the Motion for Reconsideration and **VACATES** the Order denying the Motion to File Documents Under Seal. (Doc. 189). The Motion to File Documents Under Seal is **GRANTED in part**. (Doc. 169). The Motion for Partial Summary Judgment filed by Plaintiff will remain unsealed. The Clerk of Court is **DIRECTED** to **SEAL** Exhibit L, the Medical Guidelines (Doc. 169-2). Plaintiff is **DIRECTED** to refile, as exhibits to the Motion for Partial Summary Judgment, Doc. 175, the following: (1) page 6 of Doc. 169-2, with all the information redacted *excluding the first paragraph under "Classification V;"* and (2) page 7 of Doc. 169-2, with all the information redacted *excluding all of paragraph D, "Oral Surgery."*

***4 IT IS SO ORDERED.**

All Citations

Slip Copy, 2021 WL 824954

Footnotes

1 Defendant indicates that the Sangamon County case caption contains a typographical error, and the correct spelling of the plaintiff's surname is "Serio." (Doc. 193, p. 2 n. 1).

2021 IL App (4th) 190228-U

Appellate Court of Illinois, Fourth District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Kevin T. HEARD, Defendant-Appellant.

NO. 4-19-0228

FILED February 17, 2021

Appeal from the Circuit Court of Sangamon County, No. 02CF665, Honorable Rudolph M. Braud Jr., Judge Presiding.

ORDER

JUSTICE HARRIS delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court did not err in dismissing defendant's second petition for relief from judgment (735 ILCS 5/2-1401 (West 2016)).

¶ 2 In January 2005, defendant, Kevin T. Heard, pleaded guilty to criminal sexual assault (720 ILCS 5/12-13 (West 2000)). After his conviction, defendant pursued multiple forms of relief, including relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)), all of which the trial court dismissed. In 2019, defendant filed a second section 2-1401 petition for relief from judgment, which the court dismissed. Defendant appeals, arguing the court erred in dismissing his second section 2-1401 petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 1, 2002, the State charged defendant with home invasion (720 ILCS 5/12-11(a)(6) (West Supp. 2001)) and aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2000)), which the State later amended to criminal sexual assault (720 ILCS 5/12-13 (West 2000)).

¶ 5 At a status hearing on April 28, 2003, defense counsel requested, and was granted, a continuance to "pursu[e] a DNA expert" to review certain of the State's evidence. At the next several status hearings, defense counsel obtained additional continuances, each time reporting a delay was required to allow defendant's retained expert to complete her review of the State's evidence. In November 2004, defense counsel finally reported defendant was ready to proceed to trial.

¶ 6 At a hearing on January 7, 2005, defendant entered a negotiated plea of guilty. In exchange for defendant's guilty plea to criminal sexual assault, the home invasion charge, as well as charges in another case, would be dismissed, and defendant would receive a 10-year prison sentence. The trial court accepted defendant's plea and sentenced him in accordance with the parties' agreement.

¶ 7 On March 15, 2012, defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). In his petition, defendant claimed defense counsel provided ineffective assistance by "l[ying] to the [trial court] concerning independent DNA analysis that he 'never' ordered to be completed." The trial court advanced defendant's petition to the second stage of postconviction proceedings, and the State filed a motion to dismiss. The court later granted the State's motion, finding defendant's allegations did not support a claim of ineffective assistance of counsel. On appeal, this court affirmed, rejecting defendant's sole contention that appointed counsel was required to comply with the provisions of Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) prior to her withdrawal as defendant's attorney. *People v. Heard*, 2014 IL App (4th) 120833, 8 N.E.3d 447.

¶ 8 In September 2014, defendant filed a motion for leave to file a successive postconviction petition. In his proposed petition, defendant again alleged defense counsel provided ineffective assistance by "l[ying] to the [trial court] concerning independent DNA analysis that he 'never' ordered to be completed." Subsequently, the trial court denied defendant's motion for leave, finding defendant lacked standing to file a postconviction petition because he was no longer imprisoned. We affirmed the court's denial of the motion. *People v. Heard*, No. 4-14-0899 (2017) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

*2 ¶ 9 On April 4, 2018, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). In his petition, defendant alleged "newly discovered evidence," which had been "fraudulently concealed" from him, supported the claim of ineffective assistance of counsel he previously raised in his postconviction petitions. Specifically, defendant alleged that in September 2016, he issued a Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)) request to the office of the Sangamon County Public Defender requesting "[a] copy of any document in [his defense counsel's] file of the independent DNA lab that [defense counsel] used to conduct tests of the DNA evidence in [defendant's case]." According to the petition, in response to his request, defendant received a letter from the public defender's office indicating their records of defendant's case did not include any "notes or documentation in reference to an independent DNA laboratory retained as a defense consultant." The State later filed a motion to dismiss defendant's petition, which the trial court granted.

¶ 10 On February 14, 2019, defendant filed a second section 2-1401 petition for relief from judgment, which was identical to his initial section 2-1401 petition. A month later, the trial court dismissed defendant's petition, finding it was improper because "it [was] not filed within the two year time limit after the entry of judgment" and "the doctrine of estoppel applie[d]."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues the trial court erred in dismissing his second section 2-1401 petition for relief from judgment as untimely. We review the trial court's dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 14 Section 2-1401 of the Code of Civil Procedure "provides a statutory procedure permitting vacatur of final judgments and orders after 30 days from their entry." *People v. Coleman*, 206 Ill. 2d 261, 288, 794 N.E.2d 275, 292 (2002) (citing 735 ILCS 5/2-1401(a) (West 1998)). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8. The statute does not provide a defendant an indefinite opportunity to challenge the trial court's judgment however. "A section 2-1401 petition filed more than two years after the challenged judgment cannot be considered absent a clear showing that the person seeking relief was under a legal disability or duress or the grounds for relief were fraudulently concealed." *People v. Pinkonsly*, 207 Ill. 2d 555, 562, 802 N.E.2d 236, 241 (2003) (citing 735 ILCS 5/2-1401(c) (West 2002)).

¶ 15 In the present case, defendant does not dispute that he failed to file his second section 2-1401 petition within two years of the trial court's 2005 judgment. Instead, he argues the two-year limitation should be tolled because defense counsel "fraudulently concealed" his own failure to obtain an independent review of the State's DNA evidence and defendant did not learn of defense counsel's failure until 2016 when he issued a FOIA request to the office of the Sangamon County Public Defender. We find this argument is without merit.

¶ 16 "[F]raudulent concealment sufficient to toll the two-year limitation period of [section 2-1401(c)] requires affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief." (Internal quotation marks omitted.) *Coleman*, 206 Ill. 2d at 290-91. In *Coleman*, our supreme court stated as follows:

> "To make a successful showing of fraudulent concealment, the defendant must allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period." (Internal quotation marks omitted.) *Id.* at 290.

*3 ¶ 17 Here, defendant has failed to make a successful showing of fraudulent concealment. Defendant does not identify any affirmative act or representation by *his opponent* which would toll the two-year limitation period. The only actions defendant argues constituted fraudulent concealment are those of defense counsel, whose actions cannot constitute fraudulent concealment for purposes of tolling the section 2-1401 time limitation period. See *People v. Baskin*, 213 Ill. App. 3d 477, 485, 572 N.E.2d 1067, 1072 (1991) ("Fraudulent concealment under section 2-1401(c) which will toll the two year limitation period contemplates affirmative actions by one's opponent or by the court, not one's own attorney."). Moreover, as pointed out by the State, the record

demonstrates defendant knew of defense counsel's alleged failure to secure DNA testing as early as 2012, when he filed his first postconviction petition. Clearly, defendant was aware of the DNA testing issue almost seven years prior to filing his second section 2-1401 petition, refuting his claim of fraudulent concealment. Accordingly, defendant has failed to establish the two-year limitation period should be tolled due to fraudulent concealment and the trial court's order dismissing defendant's second section 2-1401 petition as untimely was not error.

¶ 18 Even assuming, *arguendo*, that defendant's section 2-1401 petition was not untimely, we would still affirm the trial court's dismissal because defendant raised the same allegations of ineffective assistance of counsel in prior proceedings. "Consistent with the strong judicial policy favoring finality of judgments, our courts have held that a section 2-1401 petition is not to be used as a device to relitigate issues already decided or to put in issue matters which have previously been or could have been adjudicated." (Internal quotation marks omitted.) *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 110, 920 N.E.2d 547, 555-56 (2009); see also *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000) ("Points previously raised at trial and other collateral proceedings cannot form the basis of a section 2-1401 petition for relief."). The ineffective assistance of counsel claim raised by defendant in his second section 2-1401 petition is identical to the claim he raised in both of his unsuccessful postconviction petitions and his unsuccessful, initial section 2-1401 petition. Critically, the trial court considered defendant's ineffective assistance of counsel claim in defendant's initial postconviction petition and rejected it on its merits. Therefore, because defendant was not permitted to relitigate the issue, the court's dismissal of his second section 2-1401 petition was proper.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the trial court's judgment.

¶ 21 Affirmed.

Presiding Justice Knecht and Justice Holder White concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (4th) 190228-U, 2021 WL 646812

End of Document

2021 IL App (1st) 200424-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, First District,
SECOND DIVISION.

Nolan WATSON, Plaintiff-Appellant,

v.

Kimberly FOXX, in her official capacity as State's Attorney of Cook County, Defendant-Appellee (Kimberly M. Foxx, in her official capacity as State's Attorney of Cook County, Assistant State's Attorney Paul Castiglione, and the Office of the State's Attorney of Cook County, Defendants).

No. 1-20-0424

|

February 16, 2021

Appeal from the Circuit Court of Cook County. No. 2016 CH 10481, The Honorable David B. Atkins, Judge Presiding.

ORDER

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

*1 ¶ 1 *HELD*: Trial court's order dismissing plaintiff's complaint for costs and civil penalties under FOIA was proper, as the circumstances presented show plaintiff was not entitled to them pursuant to sections 11(i) or (j).

¶ 2 Plaintiff-appellant Nolan Watson (plaintiff) appeals *pro se* from the trial court's grant of a motion to dismiss his complaint filed by defendant-appellee the office of the State's Attorney of Cook County.[1] He contends that the trial court impermissibly denied him his "entitled award of costs, civil penalties, plus the complete records requested" related to a Freedom of Information Act (FOIA or Act) (**5 ILCS 140**/1 *et seq.* (West 2014)) cause of action he originally filed in 2015. He asks that we award him costs and civil penalties against the State's Attorney's office in the amount of $18,831.91, and that we order the production to him of various "full" (unredacted) records, communications, copies, and transcripts. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 As noted, this is not the first time this matter has been brought to our Court. See *Watson v. Kimberly M. Foxx, in her official capacity as State's Attorney of Cook County, et al.*, Nos. 1-18-2313 & 1-19-0707 (cons.) (Jan. 21, 2020) (unpublished summary order pursuant to Illinois Supreme Court Rule 23(c)(1) (eff. April 1, 2018)).

¶ 5 In November 2015, plaintiff filed a complaint against the State's Attorney's office alleging that it failed to properly and adequately comply with a request he made on May 7, 2015 under FOIA for copies of discovery, common law records, line-up records and police and State's Attorney's interrogation and investigation records of witnesses and victims involved in five criminal cases against him, pursuant to which he was convicted of varying degrees of sexual offenses.[2] Following transfer of the cause to the Circuit Court of Cook County, the trial court granted plaintiff's request to file an amended complaint, which he did in April 2017.

*2 ¶ 6 In July 2017, the trial court entered an order in the matter providing that, by August 21, 2017, the State's Attorney's office was to supply the plaintiff with documents from his criminal files subject to any exemptions or redactions appropriate under FOIA and to supply the court with a list of documents for which it would be claiming exemptions or redactions. It also ordered a status date of August 28, 2017.

¶ 7 On August 21, 2017, the State's Attorney produced copies of all 2,867 pages of record to plaintiff contained in the criminal files he sought in his FOIA request, subject to redactions and exclusions recorded in an exemption log, by certified mail, return receipt requested. On August 28, 2017, the trial court ordered the State's Attorney's office to provide it with electronic copies of the records it had turned over to plaintiff that contained redactions, along with a privilege log by September 8, 2017. The State's Attorney's office did so on August 29, 2017, providing the trial court with a disc containing a copy of all unredacted records as well as a copy of the redacted records produced to plaintiff, along with its

exemption log identifying and explaining the redactions and those documents it had withheld from him in their entirety.

¶ 8 Almost one year later, on August 22, 2018, plaintiff filed a *pro se* "Motion for Fees, Costs, and Equitable Damages Civil Penalties," wherein he asked the trial court to award him $15,461.29 in fees, costs, and civil penalties he calculated for items including copies, materials, postage, *pro se* lawyer fees, and preparation fees pertaining to his 2015 FOIA request. He also cited several "occurrences" in his motion wherein he alleged the State's Attorney's office "intentionally and knowingly" refused to disclose records it was otherwise supposed to, ignored the mandates of FOIA, and withheld his property, to wit, the records he sought. On August 30, 2018, the trial court held a previously scheduled case management conference, at which plaintiff did not appear. The court set a briefing schedule with respect to plaintiff's cause.

¶ 9 On September 4, 2018, the State's Attorney's office filed a motion to dismiss both the plaintiff's complaint and his motion for fees pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)), arguing that the cause was moot because the State's Attorney's office had provided him with all documents from his criminal files subject only to redactions allowed under FOIA. The State's Attorney's office also asked the court to conduct an *in camera* inspection of the documents withheld in its privilege log to determine whether the documents qualified for the exemptions claimed and that, therefore, it had complied with plaintiff's FOIA request.

¶ 10 Before the trial court could address the State's Attorney's motion to dismiss, plaintiff filed a notice of appeal on September 11, 2018, with respect to the "circuit court's dismissal made on 8/30/18," stating he had to do so because he did not know the outcome of the court proceedings of August 30 since he had not appeared. That appeal was docketed in our Court as case No. 1-18-2313.

¶ 11 Meanwhile, plaintiff went on to file a brief in opposition to the State's Attorney's motion to dismiss. Therein, he asserted that the State's Attorney's office had made multiple misrepresentations in its motion and that an actual controversy still existed requiring resolution by the trial court, *i.e.*, an award of fees. On November 8, 2018, the trial court took the State's Attorney's motion to dismiss under advisement.

*3 ¶ 12 On March 7, 2019, the trial court granted the State's Attorney's motion to dismiss and denied plaintiff's motion for fees. In its written order, the court held that the State's Attorney's office was correct in its mootness argument, as the record showed that the State's Attorney had produced the requested records subject only to appropriate redaction, that plaintiff did not dispute he had received them, and that plaintiff failed to provide a persuasive "interest of justice" argument that would require disclosure of otherwise exempt documents, which he failed to even specify. The court further held that plaintiff's demands for fees were inappropriate, since the State's Attorney's office "did in fact produce the documents shortly after the inception of this case, and [p]laintiff raises no facts suggesting a failure to do so in bad faith." Accordingly, the court dismissed plaintiff's cause with prejudice in its entirety.

¶ 13 On March 26, 2019, plaintiff filed a motion for reconsideration of the trial court's order of March 7, 2019. In that motion, he argued that the trial court had been divested of jurisdiction to enter that order based on the fact that he had filed a notice of appeal on September 11, 2018 in our Court, and therefore the March 7, 2019 order was void. However, before his own motion for reconsideration could be heard, plaintiff, on April 3, 2019, filed a notice of appeal of the trial court's March 7, 2019 order. That appeal was docketed in our Court as case No. 1-19-0707 and was consolidated with plaintiff's other pending cause, case No. 1-18-2313.

¶ 14 On January 21, 2020, this Court entered a summary order under Rule 23(c)(1) dismissing plaintiff's consolidated appeal as untimely pursuant to Rule 303(a)(2) because the trial court had not yet ruled on plaintiff's motion to reconsider its order of March 7, 2019. In our decision, we reminded the parties that, although plaintiff's notice of appeal was presently premature, it would "become effective" when an order disposing of the motion to reconsider was entered by the trial court or, alternatively, if plaintiff filed in the trial court a document affirmatively indicting that he was withdrawing or abandoning his motion for reconsideration. We further noted that, if one of these things occurred, then plaintiff could properly return to our Court with either a petition for rehearing and motion to supplement the record showing that the impediment to jurisdiction had been removed, or plaintiff could file a new notice of appeal once the impediment to appellate jurisdiction had been removed.

¶ 15 On February 11, 2020, the trial court entered an order denying plaintiff's motion to reconsider its order of March

7, 2019. In that order, the trial court noted that plaintiff had raised only one basis for reconsideration of the trial court's grant of the State's Attorney's motion to dismiss his cause, namely, that the grant was improper because the court lacked jurisdiction based on his notice of appeal filed in our Court on September 11, 2018 seeking to appeal "the circuit court's dismissal of 8/30/18," which he stated he was "forced" to file because he could not attend the status hearing on that date. The court explained that on August 30, 2018, contrary to any insistence by plaintiff, it had not dismissed his claim but, instead, had only entered a briefing schedule; it had not entered any substantive rulings nor a final and appealable order. The court noted that plaintiff filed his September 11 notice of appeal anticipatorily in the event the court had dismissed his cause on August 30 which, again, it had not.

¶ 16 Following this ruling by the trial court, and with the impediment to appellate jurisdiction removed, plaintiff timely filed a new notice of appeal from the trial court's March 7, 2019 order granting the State's Attorney's motion to dismiss his cause and denying his motion for fees, and from its February 11, 2020 order denying his motion to reconsider that order. Accordingly, plaintiff has now procedurally perfected the instant appeal in our Court and we are called to address its merits.

¶ 17 ANALYSIS

*4 ¶ 18 On appeal, plaintiff contends that the trial court "impermissibly denied [him] his entitled award of costs, civil penalties, plus the complete records requested." Essentially, he asserts that he deserves this recompense because the State's Attorney's office "intentionally and in bad faith" initially ignored his FOIA request and delayed in producing the records he requested. He further asserts that the trial court "made a mistake" in dismissing his cause, as his monetary request was mandated to be awarded under "Section 11(i) of the FOIA," which "divested the circuit court of any discretion to deny [his] entitled award of costs" and "civil penalties were mandated." Upon our review of the record, we disagree.

¶ 19 Again, plaintiff appeals from the trial court's grant of the State's Attorney's section 2-619(a)(9) motion to dismiss. While a motion to dismiss pursuant to section 2-619(a)(9) admits the legal sufficiency of the complaint, it raises affirmative matters either internal or external from the complaint that would defeat the cause of action. See 735 ILCS 5/2-619(a)(9) (West 2018). An "affirmative matter" is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999). The affirmative matter must either appear on the face of the complaint or be supported by affidavits or other evidentiary materials of record. See *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 377 (2003). Once a defendant meets this burden, the plaintiff's right to recover is barred. See *Van Meter*, 207 Ill. 2d at 370.

¶ 20 A section 2-619(a)(9) motion provides a means to dispose not only of issues of law but also issues of easily proved fact, and a trial court may in its discretion properly decide questions of undisputed fact upon hearing such a motion. See *Consumer Electric Co. v. Cobelcomex, Inc.*, 149 Ill. App. 3d 699, 703-04 (1896); see also *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008) ("[t]he purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation"); *Villanueva v. Toyota Motor Sales, U.S.A., Inc.*, 373 Ill. App. 3d 800, 802 (2007) (complaint is properly dismissed under this section if barred by affirmative matter and this matter defeats claim and avoids its legal effect); *Martinez v. Gutmann Leather, LLC*, 372 Ill. App. 3d 99, 101 (2007) (section 2-619(a)(9) allows for dismissal on basis of easily proven facts). We review appeals from dismissals pursuant to section 2-619(a)(9) on a *de novo* basis. See *Van Meter*, 207 Ill. 2d at 368; *Griffith v. Wilmette Harbor Ass'n, Inc.*, 378 Ill. App. 3d 173, 180 (2007).

¶ 21 Under the circumstances of the instant cause, we find, contrary to plaintiff's insistence, that the issue of whether the State's Attorney's office is liable to him for the violations of FOIA he alleges in his complaint comprises an easily proven factual and legal issue proper for resolution by a section 2-619(a)(9) motion without further hearing.

¶ 22 We begin with applicable general legal principles. Under FOIA, our citizens are entitled to full and complete information regarding governmental affairs consistent with the terms of the Act, and this includes the government's obligation to provide public records upon appropriate request as expediently and efficiently as possible in compliance with that Act. See **5 ILCS 140**/1 (West 2018); *Walker v. Bruscato*, 2019 IL App (2d) 170775, ¶ 35. Accordingly, when a public body, such as the State's Attorney's office here, receives a proper request for information under FOIA, it must comply with that request, unless one of the statutory exemptions set forth in section 7 of the Act applies. See *In re Appointment*

of Special Prosecutor, 2019 IL 122949, ¶ 25; accord *Illinois Educational Ass'n v. Illinois State Bd. of Education*, 204 Ill. 2d 456, 463 (2003); **5 ILCS 140**/3(a) (West 2018). The burden of proving that the documents sought under FOIA falls within one of its statutory exemptions lies with the public body. See **5 ILCS 140**/1.2 (West 2018); *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 408 (1997).

***5** ¶ 23 First and foremost, we find that this appeal is moot. An appeal is moot when the issues have ceased to exist and there is no longer any actual controversy between the parties. See *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1999); accord *Engle v. Foley and Lardner, LLP*, 393 Ill. App. 3d 838, 847-48 (2009). Such is the case when a plaintiff has received that which he sought. See *Engle*, 393 Ill. App. 3d at 848. This is particularly true with respect to FOIA claims: the mootness doctrine applies once the requested records under FOIA have been produced. See *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, ¶ 12; *Duncan*, 304 Ill App. 3d at 782.

¶ 24 In the instant cause, plaintiff has received the records he sought. As the trial court's March 7, 2019 order confirms, the State's Attorney's office produced the records four months after plaintiff requested them, subject only to appropriate redaction under FOIA. Plaintiff never disputed, in the entire procedural posture of this cause, that he had received them. He does not do so now, either. As plaintiff admittedly received the records he sought, any controversy between the parties under FOIA has ceased to exist. See *Turner*, 2019 IL App (3d) 170819, ¶¶ 12-13 (where the plaintiff received the information he requested under FOIA, no controversy remains and a trial court may properly dismiss his cause of action under section 2-619(a)(9) of the Code); *Duncan*, 304 Ill. App. 3d at 782 ("Once an agency produces all the records related to a plaintiff's [FOIA] request, the merits of a plaintiff's claim for relief, in the form of production of information, becomes moot"); accord *Walker*, 2019 IL App (2d) 170775 (where the plaintiff received the records requested under FOIA, no cause of action under FOIA remained).

¶ 25 Apart from this, the crux of plaintiff's claim on appeal appears to be his contention that the trial court erred in granting the State's Attorney's motion to dismiss because questions of fact remained, namely, his assertion that the State's Attorney's office ignored his requests and delayed in giving him the records he sought "intentionally and in bad faith" which mandated the trial court, without any discretion, to institute civil penalties under FOIA. As the legal basis for his claim, plaintiff cites sections 11(i) and (j) of the Act. He then presents six "occurrences" of alleged bad faith on the part of the State's Attorney's office and claims that the Act mandated the trial court impose a total award of $18,831.91 against it and in his favor, including $17,500 in civil penalties as well as sums for copies, postage, "materials," and "preparation."

¶ 26 Section 11(i) provides that "if a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding," a trial court "shall award such person reasonable attorney's fees and costs." In conjunction with this provision, section 11(j) states that "if the court determines that a public body willfully and intentionally failed to comply with [FOIA], or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence." Under these provisions, which both use the term "shall," if a FOIA plaintiff prevails below in the trial court, or if that court determines that the public agency acted willfully and intentionally in bad faith to withhold records requested, the court must award the plaintiff attorney's fees and civil penalties; FOIA clearly mandates this. See, *e.g.*, *Norman v. U.S. Bank Nat'l Ass'n*, 2020 IL App (1st) 190765, ¶ 30, citing *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 16 (use of word "shall" in statute generally indicates mandatory obligation); *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 49. Accordingly, we understand why plaintiff cites to these sections in support of his claim on appeal. However, that is where any agreement with plaintiff ends, based on the record before us.

***6** ¶ 27 First, with respect to plaintiff's claim under section 11(i) for attorney fees, the record is clear that, since the inception of his FOIA request in this cause, plaintiff proceeded, at all times, *pro se*. There is no provision in the Act that allows a trial court to order a public body to reimburse a FOIA plaintiff for the time he devoted to prosecuting a FOIA action *pro se*. Plaintiff fails to refer us to any such provision or to any viable caselaw in support of his request under section 11(i). The simple fact is this: as a *pro se* litigant, plaintiff here did not incur any attorney fees. Accordingly, since he did not incur any attorney fees, he cannot recover such fees under FOIA and section 11(i) does not offer him the relief he insists he is due in this regard. See *Brazas v. Ramsey*, 291 Ill. App. 3d 104, 110 (1997) (nonlawyer *pro se* FOIA litigant did not incur attorney fees and therefore was not entitled to such an award under section 11(i)); accord *Hamer v. Lentz*, 132 Ill. 2d 49, 62-63 (1989) (this is true

also for attorneys who prosecute their own FOIA actions *pro se*); accord *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, ¶ 25 (FOIA plaintiff, a not-for-profit legal organization, did not incur attorney fees where it was represented by two of its salaried employees in FOIA proceeding, and therefore it was not entitled to an award of attorney fees).[3]

¶ 28 Similarly, for it to have been mandatory for the trial court to award plaintiff civil penalties in response to his assertions that the State's Attorney's office ignored his requests and intentionally failed to comply with them, section 11(j) first requires a determination by the trial court that the State's Attorney's office acted willfully and intentionally, in bad faith. See *Rock River Times*, 2012 IL App (2d) 110879, ¶ 49 (penalty is mandated under section 11(j) "[o]nce the trial court finds a willful and intentional failure to comply with the FOIA, or that the party acted in bad faith"); **5 ILCS 140**/11(j) (West 2018). Yet, again, in the instant cause, the trial court specified, in its March 9, 2017 order, that any demand by plaintiff for civil penalties was inappropriate precisely because, not only did the State's Attorney's office "in fact produce the documents [plaintiff sought] shortly after the inception of this case," but also because there were "no facts suggesting a failure to [produce] in bad faith." Clearly, then, there was no determination by the trial court that the State's Attorney's office here willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith in response to plaintiff's records request. The court found no violation of FOIA, let alone that any conceived violation was deliberately done by design or with a dishonest purpose by the State's Attorney's office here. Without such a determination, section 11(j) was not triggered and, contrary to plaintiff's insistence, there is no applicable statutory mandate imposable upon the trial court to award him civil penalties.

¶ 29 Additionally, and quite significant to the issue raised by plaintiff here, we note that our Court reviews the trial court's credibility determinations under the manifest-weight-of-the-evidence standard. See *Rock River Times*, 2012 IL App (2d) 110879, ¶ 48; see also *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 364 (2007) (whether a party acted willfully is a question of fact to be determined by the trier of fact). This includes, specifically and particularly, a trial court's factual finding of whether a defendant in a FOIA cause of action has failed to comply with the Act and/or acted in bad faith. See *Rock River Times*, 2012 IL App (2d) 110879, ¶ 48 (review of factual finding that school willfully and intentionally failed to comply with FOIA under manifest-weight-of-the-evidence standard). Therefore, while a trial court is mandated to impose civil penalties under section 11(j) of FOIA once it finds willful and intentional failure to comply or bad faith, it must first make that finding; its decision in that regard, which is fact-based, is to be reviewed in light of the manifest weight of the evidence presented. See, *e.g.*, *Rock River Times*, 2012 IL App (2d) 110879. Ultimately, a reviewing court will not overturn a trial court's factual finding unless it is against the manifest weight of the evidence, which occurs only when the opposite conclusion is clearly apparent or when the finding is unreasonable, arbitrary, or not based on the evidence. See *Best v. Best*, 223 Ill. 2d 342, 350 (2006); accord *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 60.

*7 ¶ 30 In the instant cause, as we have noted throughout this decision, the trial court below made a specific finding that the State's Attorney's office did not act in bad faith in any way in dealing with plaintiff's FOIA request. Applying a manifest-weight-of-the-evidence standard of review to that determination, we find no reason to disturb it. In other words, the opposite conclusion, namely, that the State's Attorney's office acted in bad faith here, is not at all apparent from the record nor is the trial court's finding unreasonable, arbitrary, or not based on the evidence. To the contrary, upon our review of the record, the trial court's determination was proper. Not only did plaintiff not make any specific allegation of willful or intentional violation of FOIA by the State's Attorney's office, but the record shows that the State's Attorney's office complied with FOIA, as was required. It provided the records to plaintiff which he sought, which encompassed almost 3,000 pages, by certified mail; it did so shortly after plaintiff asked for them (approximately 4 months); and it gave copies of the records (redacted and unredacted) to the trial court for evaluation, along with a log of the redactions and exemptions it claimed and the explanations for such, for the court's review. The trial court reviewed these and found them to be appropriate. Based on all this, we find no evidence of willful and intentional noncompliance with plaintiff's FOIA request on the part of the State's Attorney's office, and we specifically find nothing that would merit the overturning of the trial court's determination pursuant to the manifest-weight-of-the-evidence standard that, likewise, there was none.

¶ 31 The recent case of *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, is instructive. In *Turner*, the plaintiff filed a FOIA request with the police department seeking his criminal records. The department provided him with redacted portions of the records he sought, pursuant to FOIA exemptions it believed were applicable. Later,

the plaintiff filed a complaint seeking civil penalties and costs. During the pendency of that litigation, the department acknowledged that it had inadvertently missed some of the plaintiff's records requested, and it served these on him. Additionally, upon a request by the plaintiff for review of the records and redactions cited, the department provided an explanation for these to the trial court. Eventually, after review, the trial court granted the department's motion to dismiss the plaintiff's complaint for penalties and costs with prejudice. See *Turner*, 2019 IL App (3d) 170819, ¶¶ 3-5.

¶ 32 On appeal, the plaintiff argued that he was entitled to civil penalties and costs under section 11(j) of FOIA because the department had acted willfully and intentionally during the treatment of his request. See *Turner*, 2019 IL App (3d) 170819, ¶ 8. However, the reviewing court held that, not only did his complaint lack any allegation of willful and intentional violation of FOIA on the part of the department but, more critically, there simply was no evidence of willful and intentional noncompliance with his request. See *Turner*, 2019 IL App (3d) 170819, ¶¶ 21-22. Rather, the department had provided the unredacted documents to the trial court, which had viewed them and determined that the exemptions the department claimed were applicable. Accordingly, as there was no willful and intentional failure on the part of the department to comply with FOIA requirements, there could be imposition of any civil penalties or costs warranted by section 11(j). See *Turner*, 2019 IL App (3d) 170819, ¶ 22.

¶ 33 The instant cause is very similar to *Turner* and merits the same result. As we have already discussed, the evidence before the trial court did not support a conclusion that the State's Attorney's office, which sifted through almost 3,000 pages of documents from 5 different criminal cases requested by plaintiff here and provided him with what he requested (save applicable FOIA exemptions) within 4 months, somehow acted willfully and intentionally and failed to comply with FOIA or otherwise acted in bad faith. Without evidence to counter the trial court's determination in this respect, let alone sufficient evidence to meet the manifest-weight-of-the-evidence standard we are required to follow here, a civil penalty under section 11(j) is not warranted to be awarded to plaintiff or imposed against the State's Attorney's office.

¶ 34 Finally, for the completeness of the record here, we take a moment to address the six "occurrences" plaintiff lists in his brief that, in his view, demonstrated bad faith on the part of the State's Attorney's office and merited civil penalties. We do so only briefly and for the sake of clarity, having already reached our decision, as supported by caselaw.

***8** ¶ 35 First, plaintiff insists that the State's Attorney's office failed to respond to his FOIA request and/or delayed in processing it. However, as the record demonstrates, the State's Attorney's office did respond to his request and provided him with all the records he sought except for those that were exempt from production or required redaction. Plaintiff does not dispute this and does not show that the State's Attorney's office improperly withheld any records. Second, plaintiff insists that the State's Attorney's office utilized "known impermissible non-exemptions" to "prey on the weaknesses of prison inmates" like himself. However, he does not point to what these "impermissible non-exemptions" are. Conversely, the record shows that the trial court below examined the State's Attorney's office's log of redactions and claimed exemptions and was provided, as well, with the full records, and found no improprieties. Similarly, plaintiff insists as another "occurrence" that the State's Attorney's office intentionally and knowingly refused to disclose all records contained in his criminal files, but again fails to mention what exactly any of these might be, other than (as we gather) some he presumes must exist.

¶ 36 Next, he cites the existence of a conversion claim that should be resolved in his favor because, as he insists, the State's Attorney's office did not provide him with grand jury transcripts or witness medical records from his criminal cases, which are his "property." However, grand jury materials are exempt under FOIA (see *Walker*, 2019 IL App (2d) 170775, ¶ 21), as are medical records from witnesses at trial, which constitute "private information" (see **5 ILCS 140**/7(1)(b), (e-9) (West 2018) (this information is categorically exempt from disclosure)). Likewise, there is no merit to his last two cited "occurrences," one in which he claims the State's Attorney's office owes him compensation for placing him "in a position of danger" by "making him vulnerable" to "relentless targeting" in the form of "emotional distress, chronic depression, anxiety, PTSD, sleep deprivation, headaches, etc.," and the other in which he insists the State's Attorney's office made misrepresentations in its motion to dismiss before the trial court that such costs were not recoverable. Plaintiff presents absolutely no caselaw, and we have found none, that would award him for the mental distress he claims. Rather, and as we have discussed at length, statutorily, plaintiff is only potentially entitled under FOIA to attorney fees (section 11(i)) and civil penalties (section 11(j)). This is what the State's Attorney's office argued below, and we

fail to see how this can be classified as a misrepresentation or how plaintiff, in light of the clear statutory language of FOIA, would be entitled to such other "costs" not contemplated by the statute. Ultimately, none of the six "occurrences" plaintiff cites in his brief merits the reversal of the trial court's dismissal order herein nor the award of penalties against the State's Attorney's office he now seeks.

¶ 37 CONCLUSION

¶ 38 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 39 Affirmed.

Justices Lavin and Cobbs concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2021 IL App (1st) 200424-U, 2021 WL 614066

Footnotes

1 In a prior decision issued by this Court with respect to this same matter, we noted that the defendants named in plaintiff's complaint were Anita Alvarez, in her capacity as the State's Attorney of Cook County, Assistant State's Attorney Paul Castiglione, and the Office of the State's Attorney of Cook County. We further noted that Kimberly Foxx succeeded Anita Alvarez as State's Attorney of Cook County on December 1, 2016, and we allowed a motion to correct the caption and substitute her as a defendant in this cause. Plaintiff has refiled this same appeal against, again, Anita Alvarez, but has this time included Kimberly Foxx, as well. Similar to our notations then, we caption this cause accordingly and, again, for ease of reference, we refer to defendants as the "State's Attorney's office." See *Watson v. Kimberly M. Foxx, in her official capacity as State's Attorney of Cook County, et al.*, Nos. 1-18-2313 & 1-19-0707 (cons.) (2020) (unpublished summary order pursuant to Illinois Supreme Court Rule (Rue) 23(c)(1) (eff. April 1, 2018)).

2 The records plaintiff sought under FOIA were those related to five criminal cases instituted against him labeled "04CR7326, 04CR7327, 04CR7328, 04CR7329, and 04CR7330." As a result of these, plaintiff is currently serving an aggregate term of 40 years in prison imposed in 2006 following jury convictions on two counts of aggravated criminal sexual assault of a minor. He pled guilty in four additional cases involving sexual offenses against four other minors and received prison terms to run concurrently with the sentences imposed from his convictions. He filed three appeals in this Court regarding his criminal trial. We affirmed the jury convictions on direct appeal (*People v. Watson*, 2011 IL App (1st) 080315-U); we affirmed the trial court's summary dismissal of his postconviction petition as frivolous and patently without merit (*People v. Watson*, 2012 IL App (1st) 092249-U); and we affirmed the trial court's denial of leave to file a successive postconviction petition (*People v. Watson*, 2014 IL App (1st) 121163-U). We also note for the record that in his brief on appeal, plaintiff insists he was "never convicted for crimes against minors, each of the alleged victims in each of his cases were adults." This is in direct contradiction to the records, facts, and holdings issued in each of his criminal appeals noted here.

3 We note that plaintiff's claim under section 11(i) is extremely underdeveloped in his brief on appeal. That is, while he cites this statutory section and demands recovery pursuant to it, he provides no real argument in his brief. As the record demonstrates, he did argue for such recovery in more detail in his original and amended complaints, wherein he asserted he deserved $200 for his "legal" work. However, here and below, he cites no legal work that would justify such a consideration, even were we to consider it now. Ultimately, without any citation to any legal authority to the contrary, and without the existence of any statute or agreement demanding otherwise, plaintiff clearly cannot prevail on a claim of attorney fees under section 11(i) of the Act. See, *e.g.*, *Ritter v. Ritter*, 381 Ill. 549, 552-53 (1943) (without an authorizing statute or agreement, a trial court cannot order one litigant to pay litigation expenses incurred by another, as in Illinois, each party is responsible for his own).

2021 IL App (3d) 190557

Appellate Court of Illinois, Third District.

Paul GRIFFIN, Plaintiff-Appellee,

v.

The VILLAGE OF NEW LENOX POLICE PENSION FUND, the Board of Trustees of the Village of New Lenox Police Pension Fund and the Village of New Lenox, Defendants-Appellants.

Appeal No. 3-19-0557

Opinion filed January 5, 2021

Synopsis

Background: Police officer sought review of decision of police pension board to deny his request for line-of-duty disability pension and to award him benefits for not-on-duty disability pension instead. The Circuit Court, Will County, John C. Anderson, J., reversed board's decision. Board appealed.

Holdings: The Appellate Court, Holdridge, J., held that:

[1] applicable standard of review of board's decision was clearly-erroneous standard, and

[2] officer was not disabled by act of duty so as to qualify him for line-of-duty pension.

Reversed.

West Headnotes (9)

[1] **Municipal Corporations** Review of decisions

Public Employment Compensation, pensions, and benefits

Police pension board's decision to deny police officer's request for line-of-duty disability pension and, instead, award benefits for not-on-duty disability pension involved examination of legal effect of given set of facts, thereby constituting mixed question of fact and law, and therefore applicable standard of review of board's decision was clearly-erroneous standard; board's determination involved whether officer incurred injury during performance of "act of duty," "act of duty" was legal term that required board's interpretation, and whether "act of duty" involved special risk required board to make factual determination. 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

[2] **Administrative Law and Procedure** Decision reviewed

In administrative review cases, Appellate Court reviews the decision of the administrative agency, not the decision of the circuit court.

[3] **Administrative Law and Procedure** Standard of review in general

In administrative review cases, the applicable standard of review depends upon whether the issue presented is one of fact where the manifest weight standard applies, one of law where the de novo standard applies, or a mixed question of fact and law where the clearly erroneous standard applies.

[4] **Municipal Corporations** Disability pension or compensation

Public Employment Law enforcement personnel

In determining whether a police officer qualifies under the pension code for a line-of-duty disability pension because he was injured in or resulting from the performance of an "act of duty," a police officer is not always performing an "act of duty" within the meaning of the

pension code just because he is "on duty." 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

[5] **Municipal Corporations** Disability pension or compensation

Public Employment Law enforcement personnel

Under the pension code, there has to be something more than just being "on duty" for a police officer to receive a line-of-duty pension. 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

[6] **Municipal Corporations** Disability pension or compensation

Public Employment Law enforcement personnel

An "act of duty," for purposes of determining whether a police officer who has been injured while on duty qualifies under the pension code to receive a line-of-duty pension, is not restricted to protecting the public, responding to a disturbance, engaging in patrol duties, or addressing public safety hazards. 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

[7] **Municipal Corporations** Disability pension or compensation

Public Employment Law enforcement personnel

Police officer, who slipped off curb and injured knee while getting into vehicle after testifying in court, was not exposed to special risks not ordinarily assumed by a citizen in the ordinary walks of life, and therefore officer was not disabled by an act of duty so as to qualify him for line-of-duty pension; officer was merely walking from courthouse to his vehicle with papers in hand following his subpoenaed testimony, he was not looking for crimes, no one contacted him on his department phone or radio to respond to any emergency call or service, and he completed all of his duties related to testifying at time he slipped. 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

[8] **Municipal Corporations** Disability pension or compensation

Public Employment Law enforcement personnel

Crux of the issue in cases to determine whether a police officer incurred injury during an "act of duty" and thus qualifies under the pension code to receive a line-of-duty pension is the capacity in which the officer was serving at the time of the injury and whether that capacity involved special risks. 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

[9] **Municipal Corporations** Disability pension or compensation

Public Employment Law enforcement personnel

For purposes of determining whether a police officer incurred injury during an "act of duty" and thus qualifies under the pension code to receive a line-of-duty pension, the act of wearing a service revolver, handcuffs, and a police radio does not involve special risks not ordinarily assumed by a citizen in the ordinary walks of life. 40 Ill. Comp. Stat. Ann. 5/3-114.1(a), 5/5-113.

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Circuit No. 18-MR-3225, Honorable John C. Anderson, Judge, Presiding.

Attorneys and Law Firms

Keith A. Karlson and Raymond G. Garza, of Karlson Garza LLC, of Palos Heights, for appellants.

Thomas W. Duda, of Palatine, for appellee.

OPINION

JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.

*1 ¶ 1 The plaintiff, Paul Griffin, applied to the Board of Trustees of the Village of New Lenox Police Pension Fund (Board) for a line-of-duty disability pension pursuant to section 3-114.1 of the Illinois Pension Code (Code) (40 ILCS 5/3-114.1 (West 2016)). Alternatively, the plaintiff requested a not-on-duty disability pension pursuant to section 3-114.2 of the Code (*id.* § 3-114.2). The Board denied his request for a line-of-duty disability pension but granted him a not-on-duty disability pension. The plaintiff sought administrative review of the Board's decision before the circuit court, naming the Village of New Lenox Police Pension Fund, the Board, and the Village of New Lenox as defendants. The court reversed the Board's decision.

¶ 2 I. BACKGROUND

¶ 3 The following factual recitation is taken from the evidence presented before the Board on June 20, 2018, and the Board's decision and order dated October 22, 2018.

¶ 4 A. The Plaintiff's Testimony

¶ 5 In December 2002, the plaintiff was appointed as a probationary patrol officer for the New Lenox Police Department and received a regular appointment in December 2003. Prior to this employment, he worked for several other municipalities as a police officer. Around November 2011, the plaintiff was promoted to detective. This role required him to handle criminal investigations, make and assist with arrests, respond to emergency traffic accidents, assist officers when dispatched, use necessary force to disarm suspects, testify in a courtroom setting, and assist in the preparation of cases for prosecution.

¶ 6 On September 7, 2016, the plaintiff was working from 8 a.m. until 4 p.m. He was wearing his service revolver, handcuffs, and police radio. The plaintiff reported to the police department at 8 a.m. His supervisor informed him that he was to testify before a grand jury pursuant to a subpoena at the county courthouse. The plaintiff drove his vehicle assigned by the police department with his partner, Jeff Furlong, to testify. He parked the vehicle and carried paperwork, police reports, and a subpoena related to his testimony into the courtroom while Furlong waited for him. After testifying, the plaintiff and Furlong exited the building and walked toward the vehicle to return to the police department. While getting into the vehicle, the plaintiff slipped off the curb, hyperextended his knee, and grabbed the door to prevent himself from falling. The plaintiff immediately felt pain in the front and rear of his left knee but returned to the police department.

¶ 7 Following the injury, the plaintiff's knee continued to hurt, and he reported the incident to his supervisor. The next day, he made an appointment with his medical provider because his pain was worse and he could hardly walk. The plaintiff was advised to take ibuprofen and ice his knee. He returned to work on light duty. The plaintiff continued to seek medical treatment where he received a cortisone injection, arthroscopic surgery for a meniscus tear, and an eventual knee replacement in August 2017. He was unaware of any permanent light duty assignment with the police department. The plaintiff resigned from his position with the police department on October 10, 2017. He admitted that he resigned during an internal investigation unrelated to his testimony and injury that occurred on September 7, 2016.

*2 ¶ 8 The plaintiff testified that, as a detective, he was required to perform all duties of a patrol officer, even when driving to and from assigned court appearances. However, at the time of his injury, he was not looking for crimes, no one contacted him on his department phone or radio to respond to any emergency call or service, and he completed all of his duties related to the grand jury at the time he slipped. The plaintiff agreed that, at the time of his injury, he was simply walking back to the car to return to the police station and do some more paperwork. He admitted that any citizen could testify at a courthouse and bring paperwork, and it was not unique to police officers.

¶ 9 B. Medical Evidence

¶ 10 The plaintiff was examined by three physicians in accordance with section 3-115 of the Code (*id.* § 3-115). First, Dr. Junaid Makda, a board-certified orthopedic surgeon, examined the plaintiff on March 8, 2018. He stated that the plaintiff reported he was returning to his car from the courthouse while carrying documents in his hand, his vehicle was parked by a curb, and his foot slipped/tripped over the curb when he entered his vehicle, which caused him to hyperextend his knee and grab the car door to prevent himself from falling. He opined that the plaintiff was permanently disabled. Dr. Makda also stated that the disability was a direct result of a permanent aggravation of a preexisting condition (osteoarthritis of the left knee).

¶ 11 Second, Dr. Leon M. Huddleston, a board-certified physical medicine and rehabilitation physician, examined the plaintiff on March 12, 2018. He stated that the plaintiff reported he was leaving the courthouse when he misstepped on a curb and hyperextended his left knee. Dr. Huddleston opined that the plaintiff was permanently disabled. He found that the plaintiff's explanation of how the disability occurred was consistent with his findings. Dr. Huddleston further opined that the plaintiff had preexisting degenerative changes (osteoarthritis) in the left knee that were aggravated by the September 7, 2016, accident. He noted that the plaintiff will have difficulty stooping and bending because of limited range of motion and pain in the knee.

¶ 12 Last, Dr. Daniel G. Samo, an occupational and environmental medicine physician, examined the plaintiff on March 15, 2018. He opined that the plaintiff was disabled. He noted that, prior to the September 7, 2016, injury, the plaintiff had been fully functioning and asymptomatic in regard to his underlying preexisting degenerative knee condition. However, the September 7, 2016, injury caused the plaintiff to become symptomatic.

¶ 13 C. The Board's Findings

¶ 14 The Board found that the plaintiff was disabled as a result of the September 7, 2016, injury. However, it denied his request for a line-of-duty disability pension and awarded him benefits for a not-on-duty disability pension instead. The Board found that the plaintiff failed to meet his burden that he was injured by any act of duty involving special risk not encountered by an ordinary citizen. Specifically, it noted (1) numerous citizens walk to and from buildings with paper in their hands every day, (2) the plaintiff was not on patrol or responding to a call when he misstepped, (3) he had motive to be dishonest in his testimony because he would be unable to return to work if the Board denied him benefits, (4) he only applied for disability benefits after learning he was under investigation and would likely be discharged, and (5) he was less than credible.

¶ 15 D. The Circuit Court's Decision

¶ 16 The plaintiff sought review of the Board's determination before the circuit court of Will County. The court reversed the Board's determination. The Board appeals.

¶ 17 II. ANALYSIS

*3 ¶ 18 On appeal, the parties dispute whether the plaintiff was performing an act of duty within the meaning of the Code when he was injured on September 7, 2016.

¶ 19 A. Standard of Review

[1] **[2]** **[3]** ¶ 20 In administrative review cases, this court reviews the decision of the administrative agency, not the decision of the circuit court. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504, 315 Ill.Dec. 772, 877 N.E.2d 1101 (2007). The applicable standard of review depends upon whether the issue presented is one of fact where the manifest weight standard applies, one of law where the *de novo* standard applies, or a mixed question of fact and law where the clearly erroneous standard applies. *Merlo v. Orland Hills Police Pension Board*, 383 Ill. App. 3d 97, 99-100, 321 Ill.Dec. 890, 890 N.E.2d 612 (2008).

¶ 21 Here, the parties dispute the applicable standard of review. However, they agree that the issue is whether the plaintiff was performing an act of duty within the meaning of the Code. The Board argues that we review its decision under the clearly erroneous standard because the issue involves a mixed question of fact and law. The plaintiff argues for *de novo* review because the facts are uncontroverted. We agree with the Board that the clearly erroneous standard applies, as this court is being asked to review an administrative decision that "involves an examination of the legal effect of a given set of facts," thereby constituting a mixed question of fact and law. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205, 229 Ill.Dec. 522, 692 N.E.2d 295 (1998). Stated another way, "act of duty" is a legal term that required the Board's interpretation, and whether the "act of duty" involved a special risk required the Board to make a factual determination. *Gilliam v. Board of Trustees of the City of Pontiac Police Pension Fund*, 2018 IL App (4th) 170232, ¶ 23, 421 Ill.Dec. 762, 101 N.E.3d 199. Thus, we proceed with the clearly erroneous standard. Under this standard, the Board's decision is given some deference and reversal is warranted only when the court is left with the definite and firm conviction that a mistake has been committed. *Merlo*, 383 Ill. App. 3d at 100, 321 Ill.Dec. 890, 890 N.E.2d 612.

¶ 22 B. Act of Duty

¶ 23 Section 3-114.1(a) of the Code provides for a line-of-duty disability pension:

> "If a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an *act of duty*, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service, the police officer shall be entitled to a disability retirement pension * * *.
>
> A police officer shall be considered 'on duty' while on any assignment approved by the chief of the police department of the municipality he or she serves, whether the assignment is within or outside the municipality." (Emphasis added.) 40 ILCS 5/3-114.1(a) (West 2016).

[4] **[5]** ¶ 24 A police officer is not always performing an act of duty within the meaning of the Code just because he is "on duty." *Rose v. Board of Trustees of the Mount Prospect Police Pension Fund*, 2011 IL App (1st) 102157, ¶ 71, 354 Ill.Dec. 572, 958 N.E.2d 315. Instead, there has to be "[s]omething more" than just being "on duty" to receive a line-of-duty pension. *Jones v. Board of Trustees of the Police Pension Fund of the City of Bloomington*, 384 Ill. App. 3d 1064, 1069, 323 Ill.Dec. 936, 894 N.E.2d 962 (2008). The Code defines "act of duty" as:

> ***4** "Any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment; or any act of heroism performed in the city having for its direct purpose the saving of the life or property of a person other than the policeman." 40 ILCS 5/5-113 (West 2016).

¶ 25 In *Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 114 Ill. 2d 518, 521-23, 104 Ill.Dec. 221, 502 N.E.2d 718 (1986), our supreme court addressed this special risk language contained in the Code. In that case, a police officer on traffic-control duty slipped and fell while crossing an intersection in response to a citizen's request to investigate an accident. *Id.* at 520, 104 Ill.Dec. 221, 502 N.E.2d 718. The argument presented to deny the officer a line-of-duty disability pension was that the act of walking across a street is an act assumed by any citizen, which did not contain any special risk as required by the Code. *Id.* at 521, 104 Ill.Dec. 221, 502 N.E.2d 718. More narrowly, it was argued that a line-of-duty disability pension was reserved for officers injured performing inherently dangerous duties that only police officers were called upon to perform. *Id.* The court rejected this interpretation of the Code, stating:

> "We do not find anything in the statute or in its legislative history to support the defendant's strained construction that the term 'special risk' only encompasses 'inherently dangerous' activities. Police officers assigned to duties that involve protection of the public discharge those duties by performing acts which are similar to those involved in many civilian occupations. Driving an automobile, entering a building, walking up stairs, and even crossing the street are activities common to many occupations, be it policeman or plumber.
>
> There can be little question, police officers assigned to duties that involve protection of the public discharge their responsibilities by performing acts which are similar to those involved in many civilian occupations. The crux is the capacity in which the police officer is acting.
>
> When a policeman is called upon to respond to a citizen, he must have his attention and energies directed towards being prepared to deal with any eventuality.
>
> Additionally, unlike an ordinary citizen, the policeman has *no* option as to whether to respond; it is his duty to respond regardless of the hazard ultimately encountered. In the case at bar, at the time of his disabling injury, the plaintiff was discharging his sworn duties to the citizens of Chicago by responding to the call of a citizen to investigate an accident. There is no comparable civilian occupation to that of a traffic patrolman responding to the call of a citizen.
>
> The defendant's ultimate reliance on the fact that the plaintiff was 'traversing a street' when he was injured is misplaced. The provisions of section 5-154 of the Illinois Pension Code (Ill. Rev. Stat. 1983, ch. 108½, par. 5-154) conferring the right to duty-disability benefits do not require that an officer be injured *by* an act of duty. Rather, the duty disability is awarded when an officer is 'disabled * * * as the result of injury incurred * * * *in the performance of an act of duty*.' (Emphasis added.) [*Id.*] In the plaintiff's case, the act of duty was the act of responding to the call of a citizen for assistance. In performing that act, he was injured.

> *5 The defendant's interpretation envisions a police officer involved in a gun battle, a high-speed car chase, or some other obviously dangerous situation in order to qualify for duty-disability benefits. This is an overly restrictive and unrealistic interpretation. If this court were to adopt the defendant's narrow reading of section 5-113, it could discourage police officers from the dedicated and enthusiastic performance of their duties, to the detriment of all the citizens of Chicago." (Emphases in original). *Id.* at 521-23, 104 Ill.Dec. 221, 502 N.E.2d 718.

[6] ¶ 26 Since *Johnson*, there have been several cases where officers were injured in the performance of acts of duty. See *Wagner v. Board of Trustees of the Police Pension Fund of Belleville*, 208 Ill. App. 3d 25, 153 Ill.Dec. 20, 566 N.E.2d 870 (1991) (injured while serving a notice to appear and fell through a porch); *Alm v. Lincolnshire Police Pension Board*, 352 Ill. App. 3d 595, 287 Ill.Dec. 627, 816 N.E.2d 389 (2004) (injured knee over time while riding police bicycle on patrol); *Sarkis v. City of Des Plaines*, 378 Ill. App. 3d 833, 318 Ill.Dec. 145, 882 N.E.2d 1268 (2008) (injured while raising a malfunctioning railroad crossing gate that he was dispatched to address); *Merlo*, 383 Ill. App. 3d 97, 321 Ill.Dec. 890, 890 N.E.2d 612 (injured while unstacking concrete blocks that were reported by a civilian to have been stacked by mischievous juveniles in a parking lot); *Jones*, 384 Ill. App. 3d 1064, 323 Ill.Dec. 936, 894 N.E.2d 962 (injured in a vehicle accident while driving a police vehicle on patrol intending to investigate an area that had reports of speeders); *Mingus v. Board of Trustees of the Police Pension Fund*, 2011 IL App (3d) 110098, 356 Ill.Dec. 650, 961 N.E.2d 1285 (injured while helping a citizen with a stuck vehicle); *Rose*, 2011 IL App (1st) 102157, 354 Ill.Dec. 572, 958 N.E.2d 315 (injured while performing regular patrol duties when his marked squad car was hit by another vehicle); *Martin v. Board of Trustees of the Police Pension Fund*, 2017 IL App (5th) 160344, 419 Ill.Dec. 223, 92 N.E.3d 932 (injured in a vehicle accident in an unmarked squad car while returning to the police department from the county courthouse where he obtained subpoenas for an ongoing investigation and filed tickets); *Gilliam*, 2018 IL App (4th) 170232, 421 Ill.Dec. 762, 101 N.E.3d 199 (injured while performing or learning to perform the duties of a bicycle-patrol officer); *Ashmore v. Board of Trustees of the Bloomington Police Pension Fund*, 2018 IL App (4th) 180196, 434 Ill.Dec. 934, 138 N.E.3d 93 (injured from falling while pushing a civilian's vehicle stuck in the snow). These cases have been broadly categorized as acts of duty involving protecting the public, responding to a disturbance, engaging in patrol duties, and addressing public safety hazards. *Summers v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 2013 IL App (1st) 121345, ¶ 44, 371 Ill.Dec. 49, 989 N.E.2d 639. However, an act of duty is not restricted to one of these four categories. See *id.*

¶ 27 There have also been a number of cases where courts have found that the officer was not injured in the performance of an act of duty. See *Morgan v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 172 Ill. App. 3d 273, 122 Ill.Dec. 234, 526 N.E.2d 493 (1988) (injured when attempting to sit down in a chair at his desk to fill out a police report and the chair rolled out from underneath him); *White v. City of Aurora*, 323 Ill. App. 3d 733, 257 Ill.Dec. 618, 753 N.E.2d 1244 (2001) (injured while exiting his police vehicle to place a parking citation on an illegally parked car where the police department also employed civilians to issue tickets); *Fedorski v. Board of Trustees of the Aurora Police Pension Fund*, 375 Ill. App. 3d 371, 313 Ill.Dec. 720, 873 N.E.2d 15 (2007) (evidence technician on 24-hour call was injured in an unmarked police vehicle that was struck while stopped at a red light); *Filskov v. Board of Trustees of the Northlake Police Pension Fund*, 409 Ill. App. 3d 66, 349 Ill.Dec. 599, 946 N.E.2d 1095 (2011) (injured while entering a police vehicle in the police station's parking lot and had yet to resume patrol); *Buckner v. University Park Police Pension Fund*, 2013 IL App (3d) 120231, 367 Ill.Dec. 971, 983 N.E.2d 125 (injured while driving home after her shift had ended in an unmarked squad car); *Summers*, 2013 IL App (1st) 121345, 371 Ill.Dec. 49, 989 N.E.2d 639 (injured while lifting and handling police supplies); *Swoboda v. Board of Trustees of the Village of Sugar Grove Police Pension Fund*, 2015 IL App (2d) 150265, 399 Ill.Dec. 370, 46 N.E.3d 408 (injured while participating in the police department's fitness testing). These cases involved acts found to involve risk ordinarily assumed by a citizen in the ordinary walks of life.

¶ 28 C. The Plaintiff's Case

*6 [7] ¶ 29 The Board argues that the plaintiff was not disabled by an act of duty because slipping off a curb while getting into a car to return to the police station does not involve special risks. The plaintiff argues that he was engaged in an act of duty when he was injured because he was complying with a direct order to complete a required duty as detective and, therefore, he faced special risks. The parties rely on a number of cases to support their positions. *Supra*

¶¶ 26-27. However, we find the cases of *Filskov* and *Martin* most factually similar.

¶ 30 In *Filskov*, the plaintiff was a patrol officer assigned to an unmarked police vehicle with two other officers. *Filskov*, 409 Ill. App. 3d at 67, 349 Ill.Dec. 599, 946 N.E.2d 1095. The plaintiff left the police station with the two other officers and walked toward the squad car in the police station's parking lot to resume patrol. *Id.* at 68, 349 Ill.Dec. 599, 946 N.E.2d 1095. As he was standing outside the open door of the squad car, the officer driving the car inadvertently put it in drive and drove over his foot. *Id.* The First District held that the plaintiff was not performing an act of duty when he was injured, finding that he was merely entering a vehicle, which did not involve a special risk required by the Code. *Id.* at 72, 349 Ill.Dec. 599, 946 N.E.2d 1095. The court emphasized that the plaintiff (1) was not responding to a call; (2) had yet to resume patrol; and (3) was acting in a capacity in which civilians commonly act, specifically as an automobile passenger, which did not involve a special risk. *Id.* at 72-73, 349 Ill.Dec. 599, 946 N.E.2d 1095. A dissenting justice opined that the plaintiff was performing an act of duty because "his team had completed a report on a prior activity and were headed out to resume their specialized work" "when he was injured." *Id.* at 74, 349 Ill.Dec. 599, 946 N.E.2d 1095 (Cunningham, P.J., dissenting). The dissenting justice went on to note that the plaintiff was entering that specific vehicle because he was performing an act of duty peculiar to his unit and work. *Id.*

¶ 31 In *Martin*, a detective was on duty when he was riding as a passenger in the front seat of an unmarked squad car and it was rear-ended by another vehicle at a stoplight. *Martin*, 2017 IL App (5th) 160344, ¶ 4, 419 Ill.Dec. 223, 92 N.E.3d 932. At the time of the accident, the detective was returning to the police department from the courthouse, where he was obtaining subpoenas for an ongoing investigation and filing traffic tickets. *Id.* The Fifth District held that the detective was injured during the performance of an act of duty. *Id.* ¶ 28. The court found that the duties performed by the detective (obtaining subpoenas and filing tickets) were not delegated to any members of the general public, and because he was a passenger in a squad car at the time of the accident, he was subject to attend to any other police responsibility if necessary. *Id.* The court acknowledged that the detective had already completed his work at the courthouse and was on his way back to the police station at the time of the accident, but found that "he had to 'have his attention and energies directed towards being prepared to deal with any eventuality.' " *Id.* ¶ 29 (quoting *Johnson*, 114 Ill. 2d at 522, 104 Ill.Dec. 221, 502 N.E.2d 718). The court distinguished the case from other decisions, specifically noting that the detective was not (1) performing a clerical duty at a desk (*Morgan*); (2) performing a task delegated to the general public (*White*); or (3) merely riding in an automobile subject to ordinary risk (*Fedorski*), as he was required to have his attention and energy directed toward eventuality. *Id.* ¶¶ 33, 35, 38.

[8] ¶ 32 As our supreme court made clear, the crux of the issue in these cases is the *capacity* in which the officer was serving at the time of the injury and whether that capacity involved special risks. See *Johnson*, 114 Ill. 2d at 522, 104 Ill.Dec. 221, 502 N.E.2d 718. Based on the facts and arguments presented, there are two different capacities the plaintiff could have been serving: a testifying witness in a criminal investigation or a pedestrian that is essentially "on call." As to the testifying capacity, it presents the question of when that capacity ceases. However, we need not answer that question because we find that, for the reasons that follow, the plaintiff was not exposed to special risks not ordinarily assumed by a citizen in the ordinary walks of life in either capacity. See *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10, 402 Ill.Dec. 36, 51 N.E.3d 788 (courts of review do not consider issues where the result will not be affected regardless of how those issues are decided).

*7 ¶ 33 This case is similar to *Filskov* in that the plaintiff was acting in a capacity in which civilians commonly act. Ordinary citizens are called upon every day to testify in court and face the same risk of slipping on a curb when returning to their vehicle with papers in hand. As the plaintiff admitted, he was merely walking from the courthouse to his vehicle with papers in hand following his subpoenaed testimony. He was not looking for crimes, no one contacted him on his department phone or radio to respond to any emergency call or service, and he completed all of his duties related to the grand jury at the time he slipped. Nonetheless, while relying on the *Filskov* dissent's analysis, the plaintiff argues that he was in the performance of an act of duty when he was injured because his injury occurred at a location pursuant to a direct order from his supervisor. The law, both statutory and decisional, is devoid of any positional risk qualifier to satisfy the act-of-duty requirement. Although his presence in the courthouse parking lot was the result of a department requirement, there is no evidence that he was exposed to special risks.

¶ 34 The plaintiff also suggests that the act of carrying the police report and subpoena is unique to him as an officer because the documents were not available to the general public. The Board argues that the documents were obtainable by the general public pursuant to the Freedom of Information Act (**5 ILCS 140**/1 *et seq.* (West 2016)). We fail to see how the content of the document changes the plaintiff's risk. Even assuming that the documents were confidential or unique to policework, this does not defeat the fact that the plaintiff was carrying the documents while merely walking to his vehicle, in contrast to the officer in *Wagner*, who was *serving* a notice to appear when he fell through a rotted porch plank. *Wagner*, 208 Ill. App. 3d at 29, 153 Ill.Dec. 20, 566 N.E.2d 870. Thus, the content of the documents alone does not render his act of walking to his vehicle an act of duty.

¶ 35 Nevertheless, the plaintiff urges this court to apply the reasoning in *Martin* and find that he was performing an act of duty. However, we decline such request because we find that *Martin* is not well reasoned. The *Martin* court concluded that, as a mere passenger in a squad car returning to the police station, the detective was required "to 'have his attention and energies directed towards being prepared to deal with any eventuality.' " *Martin*, 2017 IL App (5th) 160344, ¶ 29, 419 Ill.Dec. 223, 92 N.E.3d 932 (quoting *Johnson*, 114 Ill. 2d at 522, 104 Ill.Dec. 221, 502 N.E.2d 718). This reasoning is at odds with *Johnson*, the very case it relied on for this proposition. For the sake of completeness, the supreme court in *Johnson* stated:

> "*When a policeman is called upon to respond to a citizen*, he must have his attention and energies directed towards being prepared to deal with any eventuality." (Emphasis added.) *Johnson*, 114 Ill. 2d at 522, 104 Ill.Dec. 221, 502 N.E.2d 718.

This statement corresponds with the facts in *Johnson*, where the officer was injured while walking in response to a citizen's request. The court in *Martin* omitted a very critical part of the supreme court's statement referring to when an officer is *responding* to a citizen and broadly applied it.

[9] ¶ 36 Arguably, under the analysis in *Martin*, officers in any capacity have a duty to protect and serve, which would require their "attention and energies directed towards being prepared to deal with any eventuality" (*Martin,* 2017 IL App (5th) 160344, ¶ 22, 419 Ill.Dec. 223, 92 N.E.3d 932) and would result in a qualification for a line-of-duty disability pension for merely being "on duty." This interpretation not only renders the legislature's use and definition of "act of duty" superfluous but also conflates the concept of "act of duty" with "on duty." As an example, the plaintiff in this case argues that he was wearing his service revolver, handcuffs, and police radio and was responsible for responding to any emergency dispatch calls, which would be unique to officers and not citizens. This court addressed a similar argument in *Buckner* and stated that an officer must still be injured while performing a police duty involving special risks even if that officer is injured while on 24-hour call. *Buckner*, 2013 IL App (3d) 120231, ¶ 17, 367 Ill.Dec. 971, 983 N.E.2d 125. The same reasoning applies here. The officer must be doing "[s]omething more" than merely being "on duty." *Jones*, 384 Ill. App. 3d at 1069, 323 Ill.Dec. 936, 894 N.E.2d 962. The act of wearing a service revolver, handcuffs, and a police radio does not involve special risks not ordinarily assumed by a citizen in the ordinary walks of life. For the foregoing reasons, we decline to follow *Martin*.

***8** ¶ 37 We conclude that the plaintiff in this case was not performing an act of duty when he was injured. See 40 ILCS 5/5-113, 3-114.1(a) (West 2016). He was walking toward his police vehicle while carrying paperwork in the courthouse parking lot. The plaintiff admitted that he was not looking for crimes, no one contacted him on his department phone or radio to respond to any emergency call or service, and he completed all of his duties related to the grand jury at the time he slipped. Thus, there was no evidence that he was acting in a way any different than a citizen in the ordinary walks of life, such as protecting the public, responding to a disturbance, patrolling, or addressing a public safety hazard. See *Summers*, 2013 IL App (1st) 121345, 371 Ill.Dec. 49, 989 N.E.2d 639.

¶ 38 For the foregoing reasons, we cannot say that the Board's decision to deny the plaintiff a line-of-duty disability pension was clearly erroneous, as we are not left with the definite and firm conviction that a mistake has been committed. See *Merlo*, 383 Ill. App. 3d at 100, 321 Ill.Dec. 890, 890 N.E.2d 612. Therefore, we reverse the circuit court's judgment, which reversed the Board's decision.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, the judgment of the circuit court is reversed.

¶ 41 Reversed.

Justices O'Brien and Wright concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2021 IL App (3d) 190557, 2021 WL 37521, 2021 Employee Benefits Cas. 1624

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2020 IL App (4th) 190293-U

Samuel GAYDEN, Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF CORRECTIONS, Defendant-Appellee.

NO. 4-19-0293

FILED December 18, 2020

Appeal from the Circuit Court of Sangamon County, No. 18MR449, Honorable Brian T. Otwell, Judge Presiding.

ORDER

JUSTICE HARRIS delivered the judgment of the court.

*1 ¶ 1 *Held*: The appellate court affirmed, finding the trial court properly dismissed plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)), where the documents plaintiff requested from the Illinois Department of Corrections were exempt from disclosure.

¶ 2 In June 2018, plaintiff, Samuel Gayden, an inmate currently incarcerated at Menard Correctional Center, filed a complaint for declaratory judgment and injunctive relief against defendant, the Illinois Department of Corrections (DOC), pursuant to the Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)), requesting the trial court find DOC in violation of FOIA and order DOC to release the documents in relation to his FOIA request.

¶ 3 In September 2018, DOC filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-619 (West 2016)), arguing the records plaintiff requested were exempt from disclosure pursuant to section 7(1)(a) of FOIA (**5 ILCS 140**/7(1)(a) (West 2016)) and section 3-5-1 of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/3-5-1 (West 2016)). In April 2019, the trial court entered a written order granting DOC's motion.

¶ 4 Plaintiff appeals *pro se*, arguing the trial court erred in granting DOC's motion to dismiss. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In June 2018, plaintiff filed a complaint for declaratory judgment and injunctive relief pursuant to FOIA, requesting the trial court find DOC in violation of FOIA and order DOC to release the documents in relation to his FOIA request. Specifically, plaintiff sought: "(1) a certified copy of the arrest warrant issued by plaintiff's parole officer on September 11, 2010; (2) a certified copy of plaintiff's parole violation report sheet that was never tendered; [and] (3) a copy of plaintiff's parole plans from November 6, 2009."

¶ 7 In September 2018, DOC filed a motion and supporting memorandum of law seeking dismissal of plaintiff's complaint with prejudice pursuant to section 2-619 of the Civil Code. DOC argued the records requested by plaintiff fell under the exemption set forth in section 7(1)(a) of FOIA, as they were a part of plaintiff's master record file (see 730 ILCS 5/3-5-1(a) (West 2016)). DOC noted plaintiff's master record file was confidential, which limited access to authorized DOC personnel (see 730 ILCS 5/3-5-1(b) (West 2016); 20 Ill. Adm. Code 107.310(a) (2016)), and further argued plaintiff "fail[ed] to cite to any statute or regulation expressly permitting access to his parole arrest warrant, parole violation report, and parole plans contained in his master record file."

¶ 8 In January 2019, plaintiff filed a response to DOC's motion to dismiss, asserting DOC's motion should be denied "because section 7(1)(a) constitutes an unconstitutional delegation of legislative power in violation of Section I Article IV of [the] Illinois Constitution, 1970," and DOC's argument related to "the [C]orrections [C]ode having precedence over the FOIA *** [was] without merit: and raised no 'affirmative matter' that defeats [plaintiff's] claim."

*2 ¶ 9 In April 2019, the trial court entered a written order granting DOC's motion to dismiss with prejudice. The court found "the requested records are confidential under 730 ILCS 5/3-5-1 and therefore exempt from disclosure under FOIA.

As such, Plaintiff's Complaint against *** IDOC is barred by the affirmative matter that the requested records are exempt from disclosure and this affirmative matter negates Plaintiff's cause of action completely."

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, plaintiff challenges the trial court's grant of DOC's motion to dismiss pursuant to section 2-619 of the Civil Code. Specifically, plaintiff asserts (1) DOC failed to establish an affirmative matter defeating his claim and (2) the arrest warrant contained in his master record file was not exempt from disclosure under FOIA.

¶ 13 DOC responds, arguing the trial court's dismissal was proper as plaintiff's FOIA request was "barred by the Corrections Code, which prevents disclosure of prisoners' master record files."

¶ 14 "A motion brought pursuant to section 2-619 admits the sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats that claim." *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29, 28 N.E.3d 727. "The purpose of a motion to dismiss under section 2-619 *** is to afford litigants a means to dispose of issues of law and easily proved issues of fact at the outset of a case." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 178, 874 N.E.2d 1, 7 (2007). "When ruling on a section 2-619 motion to dismiss, a court interprets all pleadings and supporting documents in the light most favorable to the nonmoving party." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 18, 978 N.E.2d 1020. "A dismissal pursuant to section 2-619 is reviewed *de novo*." *Lucas v. Prisoner Review Board*, 2013 IL App (2d) 110698, ¶ 14, 999 N.E.2d 365.

¶ 15 "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12, 104 N.E.3d 1145. " 'When the language is unambiguous, the statute must be applied as written without resorting to other aids of construction.' " *Howard v. Weitekamp*, 2015 IL App (4th) 150037, ¶ 14, 5[illegible] N.E.3d 499 (quoting *Moore v. Green*, 219 Ill. 2d 470, 479, 848 N.E.2d 1015, 1020 (2006)). " '[W]here there exists a general statutory provision and a specific statutory provision, either in the same or another act, which both relate to the same subject, the specific provision controls and should be applied.' " *Id.* ¶ 17 (quoting *People v. Villarreal*, 152 Ill. 2d 368, 379, 604 N.E.2d 923, 928 (1992)).

¶ 16 The principal law governing the inspection of public records in Illinois is FOIA, which states, "All records in the custody or possession of a public body are presumed to be open to inspection or copying." **5 ILCS 140**/1.2 (West 2016). "Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of [FOIA]." **5 ILCS 140**/3(a) (West 2016). In pertinent part, section 7(1) provides the following:

> "(1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:
>
> ***3** (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." **5 ILCS 140**/7(1)(a) (West 2016)

¶ 17 Section 3-5-1(a) of the Corrections Code provides that DOC "shall maintain a master record file on each person committed to it," which includes, in relevant part: (1) "all information from the committing court"; (2) "reports of disciplinary infractions and disposition, including tickets and Administrative Review Board action"; (3) any parole "plans" and "reports"; (4) a committed person's "criminal history"; and (5) "other information that the respective Department determines is relevant to the secure confinement and rehabilitation of the committed person." 730 ILCS 5/3-5-1(a)(1), (5), (6), (7), (9), (13) (West 2016). Section 107.310 of Title 20 of the Illinois Administrative Code (Administrative Code) provides, "The master record files of offenders shall be confidential and access shall be limited to authorized persons. Offenders shall not be permitted access to their master record files except as expressly permitted by law, including this Subpart." 20 Ill. Adm. Code 107.310(a) (2016); see also 730 ILCS 5/3-5-1(b) (West 2016) ("All [master record] files shall be confidential and access shall be limited to authorized personnel of the respective Department.").

¶ 18 Here, DOC properly denied plaintiff's request seeking access to the "parole issued arrest warrant" contained in his

master record file. As previously stated, section 3-5-1(b) of the Corrections Code provides, "All [master record] files shall be confidential and access shall be limited to authorized personnel of the respective Department." 730 ILCS 5/3-5-1(b) (West 2016). Further, the file plaintiff sought was exempt from disclosure under section 107.310 of Title 20 of the Administrative Code, in that "[o]ffenders shall not be permitted access to their master record files *except as expressly permitted by law*, including this Subpart." (Emphasis added.) 20 Ill. Adm. Code 107.310(a) (2016). Plaintiff does not cite to any statute or regulation expressly permitting access to an inmate's master record file. Rather, plaintiff asserts DOC's argument "hinges upon the ill-founded proposition that the more specific provisions of section 3-5-1(b) of the [Corrections Code] control over the general provisions of the [FOIA]."

¶ 19 However, this court has recognized that "where there exists a general statutory provision and a specific statutory provision, either in the same or another act, which both relate to the same subject, the specific provision controls and should be applied." (Internal quotation marks omitted.) *Weitekamp*, 2015 IL App (4th) 150037, ¶ 17. "Although FOIA created a general right of access to public records, section 3-5-1(b) of the [Corrections] Code (730 ILCS 5/3-5-1(b) (West 2012)) and section 107.310(a) of Title 20 of the Administrative Code (20 Ill. Adm. Code 107.310(a) (2013)) control as they contain more specific provisions, which limit an inmate's right of access." *Id.*; see also *Lucas*, 2013 IL App (2d) 110698, ¶ 22 ("Any claim that the FOIA, the general statute, controls over the Corrections Code, the specific statute, lacks merit.").

***4** ¶ 20 Here, as the more specific provisions of the Corrections Code limiting a committed person's right of access control over the general provisions of FOIA, DOC properly denied plaintiff's request seeking access to the "parole issued arrest warrant" contained in his master record file pursuant to section 3-5-1(b) of the Corrections Code and section 107.310(a) of Title 20 of the Administrative Code. Thus, the trial court properly granted DOC's section 2-619 motion to dismiss.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the trial court's judgment.

¶ 23 Affirmed.

Justices Turner and Holder White concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (4th) 190293-U, 2020 WL 7625343

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2020 IL App (3d) 180678-U

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Dennis WILLIAMS, Defendant-Appellant.

Appeal No. 3-18-0678

Order filed December 16, 2020

Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Circuit No. 09-CF-1019, Honorable John P. Vespa, Judge, Presiding.

ORDER

JUSTICE HOLDRIDGE delivered the judgment of the court.

***1** ¶ 1 *Held*: The court improperly received input from the State in the proceedings on the defendant's request for leave to file a successive postconviction petition, and the appropriate remedy is remand for new proceedings.

¶ 2 The defendant, Dennis Williams, appeals the Peoria County circuit court's order denying him leave to file a successive postconviction petition. The defendant argues (1) the court erroneously allowed the State to participate in the proceedings on the defendant's request for leave to file a successive postconviction petition, and (2) appointed counsel failed to comply with Rule 651(c) or provide a reasonable level of assistance.

¶ 3 I. BACKGROUND

¶ 4 Following a bench trial, the defendant was found guilty of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)) and criminal sexual assault (*id.* § 12-13(a)(1)). The defendant was sentenced to 30 years' imprisonment for aggravated criminal sexual assault. The court did not enter a sentence for criminal sexual assault. On direct appeal, we affirmed the defendant's conviction and sentence. *People v. Williams*, 2013 IL App (3d) 110522-U, ¶ 28.

¶ 5 The defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) as a self-represented litigant. After providing notice to the defendant, the circuit court recharacterized the pleading as a postconviction petition and summarily dismissed it. On appeal, we affirmed the summary dismissal of the defendant's postconviction petition and awarded him seven additional days of presentence incarceration credit. *People v. Williams*, No. 3-14-0808 (2017) (unpublished summary order under Illinois Supreme Court Rule 23(c)(2)).

¶ 6 Without obtaining leave of court, the defendant filed a successive postconviction petition, which is the subject of the instant appeal. The circuit court entered a written order stating that it was mandated to advance the petition to the second stage of postconviction proceedings because it had not ruled on the petition within 90 days. The court appointed counsel to assist the defendant. The court noted that the petition the defendant had filed as self-represented litigant and its attachments were "so disjointed that a complete review of [the] same and likely amendment thereto will be needed from defense counsel."

¶ 7 Postconviction counsel moved to withdraw on the basis that the defendant's petition was a successive petition and was not properly before the court or filed until the court granted the defendant leave to file it. Counsel asserted that the petition was not actually in second-stage proceedings because the court had not explicitly granted the defendant leave to file the petition. Counsel stated that the defendant was not entitled to the appointment of counsel until the court granted leave.

¶ 8 A hearing was held on postconviction counsel's motion to withdraw. The State agreed that the successive postconviction petition had not technically been filed because the court had not granted the defendant leave to file it. The court told the defendant it would grant leave to file the successive petition if the defendant had a good reason for not raising the claims in the first petition. The court then asked postconviction counsel and the State if the defendant alleged anything in the second petition that occurred after the first petition was filed. Postconviction counsel said that he was not completely

certain, but he did not recall the defendant alleging any events that had occurred after the first petition was filed. The assistant state's attorney said that there was nothing in the successive petition that could not have been raised in the initial petition and that many of the claims in the successive petition were already addressed in the first petition. The defendant said that he had raised newly discovered evidence —namely, photographs—that he did not have at the time he filed his initial petition. He obtained these photographs from the police department pursuant to a request under the Freedom of Information Act (**5 ILCS 140**/1 *et seq.* (West 2014)). The State said these photographs were submitted at trial, but the defendant claimed they were not. The court took the matter under advisement.

*2 ¶ 9 The court entered a written order allowing postconviction counsel to withdraw and finding that the defendant failed to make the requisite showing of cause and prejudice to show why he should be granted leave to file the successive petition.

¶ 10 II. ANALYSIS

¶ 11 A. State's Participation

¶ 12 The defendant argues that the matter should be remanded for new proceedings on the question of whether he should be granted leave to file his successive petition because the court improperly sought input from the State in making its cause and prejudice determination. The State concedes that its participation at the cause and prejudice stage was improper but argues that this court should conduct its own cause and prejudice analysis rather than remanding the matter for new proceedings in the circuit court. In *People v. Bailey*, 2017 IL 121450, ¶ 20, our supreme court held that "it is premature and improper for the State to provide input to the court before the court has granted a defendant's motion for leave to file a successive petition." The *Bailey* court reasoned that the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) contemplated an independent determination by the circuit court. *Bailey*, 2017 IL 121450, ¶ 24. Accordingly, we accept the State's confession of error.

¶ 13 We now turn to the question of whether the matter should be remanded for new proceedings concerning the defendant's request for leave to file a successive postconviction petition. In *Bailey*, the court did not remand the matter. *Id.* ¶ 42. Rather, the *Bailey* court made its own, independent cause and prejudice determination in the interest of judicial economy. *Id.* In *People v. Lusby*, 2020 IL 124046, ¶ 29 n.1, our supreme court clarified that the appellate court may also take the approach of the *Bailey* court. *Lusby* overruled appellate decisions that have held that the appellate court is precluded from adopting such an approach. *Id.*

¶ 14 While *Lusby* allows us to conduct our own cause and prejudice analysis, it does not mandate that we do so. As in *People v. Smith*, 2020 IL App (3d) 170666, ¶ 11, we find that the more appropriate remedy in this case is to remand the matter to the circuit court for a new judge to make an independent cause and prejudice determination without the State's improper participation. "This will ensure that the *circuit court* conducts a truly independent examination ***." (Emphasis in original.) *Id.*; see also *Bailey*, 2017 IL 121450, ¶ 24 (holding that the Act contemplates an independent determination by the circuit court).

¶ 15 Also, as in *Smith*, neither party has made any argument on appeal concerning whether the defendant made the requisite showing of cause and prejudice. The only remedy requested by the defendant is remand, and the State has refrained from making any argument on the matter. Accordingly, as in *Smith*, we find that the more appropriate procedure is to remand the matter to the circuit court. See *Smith*, 2020 IL App (3d) 170666, ¶ 12.

¶ 16 B. Performance of Postconviction Counsel

¶ 17 The defendant also argues that the matter should be remanded for further proceedings because postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) and failed to address the defendant's *pro se* claims or the issue of obtaining leave to file the successive petition in his motion to withdraw. The defendant contends that, although the Act does not mandate the appointment of counsel at the leave to file stage, the circuit court had discretion to appoint counsel. The defendant argues that once counsel was appointed, counsel had a duty to comply with Rule 651(c). We need not reach this issue because we have already held that remand for new proceedings is warranted on other grounds.

*3 ¶ 18 We note, however, that while the circuit court always has discretion to appoint counsel to assist indigent prisoners (see *Tedder v. Fairman*, 92 Ill. 2d 216, 226-27 (1982)), the record in this case does not indicate that the court appointed

counsel in an exercise of its discretion. Rather, the court incorrectly believed that the defendant's successive petition was an initial postconviction petition and that appointment of counsel was mandatory because more than 90 days had elapsed. Also, the court did not appoint counsel to assist the defendant in making a showing of cause of prejudice. Instead, the record shows that counsel was appointed for the express purpose of assisting the defendant at the second stage of postconviction proceedings. On remand, while appointment of counsel to assist the defendant at the leave to file stage is not mandated by the Act, the circuit court nevertheless retains the discretion to make such an appointment.

¶ 19 III. CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County denying the defendant leave to file his successive postconviction petition is reversed. The matter is remanded to the circuit court with directions that the court independently consider the defendant's request for leave to file a successive postconviction petition without receiving input from the State. The proceedings on remand should occur before a new judge. The court may, in its discretion, appoint counsel to assist the defendant at the cause and prejudice stage, but it is not required to do so.

¶ 21 Reversed and remanded with directions.

Presiding Justice Lytton and Justice Wright concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (3d) 180678-U, 2020 WL 7398725

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2020 IL App (1st) 191267

Appellate Court of Illinois, First District,
FIFTH DIVISION.

Roger GRABINSKI, Special Administrator of the Estate of Jonathan Grabinski, Deceased, and Sandra Denardo-Melant, Special Administrator of the Estate of Salvatore Melant, Deceased, Plaintiffs-Appellants,

v.

The FOREST PRESERVE DISTRICT OF COOK COUNTY, Commonwealth Edison Company, and Intren, Inc., Defendants-Appellees.

No. 1-19-1267
|
DECEMBER 11, 2020

Synopsis

Background: Estates of motorist and his passenger, who were killed in motor vehicle accident, brought wrongful death action against county forest preserve, electrical utility company, and company's subcontractor, alleging that defendants obstructed road's drainage system causing accident. Defendants filed separate motions to dismiss, which the Circuit Court, Cook County, Christopher E. Lawler, J., granted. Estates appealed.

Holdings: The Appellate Court, Cunningham, J., held that:

[1] preserve did not owe motorist or passenger a duty of care not to obstruct roadway's drainage system;

[2] preserve did not owe motorist or passenger a common law duty of care;

[3] utility company and its subcontractor did not owe motorist or passenger a contractual duty to clean up debris they created; and

[4] utility company and its subcontractor did not owe motorist or passenger a common law duty to clean up debris they created.

Affirmed.

West Headnotes (12)

[1] **Pretrial Procedure** ⇐ Affirmative Defenses, Raising by Motion to Dismiss

Pretrial Procedure ⇐ Matters Deemed Admitted

A motion for involuntary dismissal based on certain defects or defenses admits the legal sufficiency of the pleadings but asserts certain defects or defenses. 720 Ill. Comp. Stat. Ann. 5/2-619.

[2] **Appeal and Error** ⇐ De novo review

The Appellate Court reviews a trial court's order dismissing a complaint under statute governing involuntary dismissals de novo. 720 Ill. Comp. Stat. Ann. 5/2-619(a)(9).

[3] **Death** ⇐ Grounds of Action

In a wrongful death action, as in any negligence action, it is the plaintiff's burden to prove three essential elements: (1) that the defendants owed a duty, (2) that the defendants breached the duty they owed, and (3) that the breach proximately caused the injury.

[4] **Negligence** ⇐ Necessity and Existence of Duty

Unless a duty is owed, there can be no negligence.

[5] **Negligence** ⇐ Duty as question of fact or law generally

Whether a duty exists in a particular negligence case is a question of law for the court to decide.

[6] **Negligence** ⇐ Relationship between parties

In determining whether a duty of care exists, the court considers whether there is a relationship between the parties such that a legal obligation is placed upon one party for the other party's benefit.

[7] **Negligence** ⇐ Necessity and Existence of Duty

The factors a court considers when determining whether a defendant owes a duty of care include: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant.

[8] **Automobiles** ⇐ Failure to prevent or remove defects or obstructions

County forest preserve did not owe a duty of care to not obstruct state roadway's drainage system to motorist or his passenger, who were killed on roadway when their motor vehicle allegedly hydroplaned on water overflowing from drainage system obstructed by debris from forest preserve more than a year before accident, as required to support wrongful death action; preserve did not own, operate, or control road or its drainage system, and preserve did not let debris invade road.

[9] **Automobiles** ⇐ Failure to prevent or remove defects or obstructions

The reasonable foreseeability of injuries and likelihood of injuries, as factors for determining whether county forest preserve owed motorist and his passenger a duty of care, weighed against finding of a duty, in wrongful death action brought by estates of motorist and passenger, who were killed on roadway maintained by state department of transportation (DOT) when their motor vehicle allegedly hydroplaned on water overflowing from drainage system obstructed by debris from forest preserve more than a year before accident; it was unlikely that preserve could foresee that debris would migrate from preserve into drainage system and not be cleared out by DOT more than a year after it was created.

[10] **Automobiles** ⇐ Failure to prevent or remove defects or obstructions

The magnitude of burden of guarding against injury and consequences of placing that burden on county forest preserve, as factors for determining whether preserve owed motorist and his passenger a duty of care, weighed against finding of a duty, in wrongful death action brought by estates of motorist and passenger, who were killed on roadway maintained by state department of transportation (DOT) when their motor vehicle allegedly hydroplaned on water overflowing from drainage system obstructed by debris created by forest preserve more than a year before accident; requiring preserve to ensure that debris on its land did not migrate into road's drainage system and that DOT did not let debris build up over time would place an undue burden on preserve.

[11] **Automobiles** ⇐ Failure to prevent or remove defects or obstructions

Electrical utility company and its subcontractor, which were contracted by county forest preserve to perform construction project on area adjacent to roadway maintained by state department of transportation, did not owe a contractual duty to clean up debris they created to motorist or his passenger, who were killed on roadway when their motor vehicle allegedly hydroplaned on water overflowing from roadway's drainage system that was obstructed by debris that had migrated into system more than a year after construction; motorist and passenger were neither parties nor third-party beneficiaries

to company's and subcontractor's contracts, contracts' scope did not include ensuring that debris did not migrate into system, and company's and subcontractor's permit to access site had expired.

[12] **Automobiles** Failure to prevent or remove defects or obstructions

Electrical utility company and its subcontractor, which were contracted by county forest preserve to perform construction project on area adjacent to roadway maintained by state department of transportation, did not owe a common law duty to clean up debris they created to motorist or his passenger, who were killed on roadway when their motor vehicle allegedly hydroplaned on water overflowing from roadway's drainage system that was obstructed by debris that had migrated into system more than a year after construction; company and subcontractor did not own construction area and had no access to area once their work was completed.

Appeal from the Circuit Court of Cook County. No. 17 L 2287, Honorable Christopher Lawler, Judge Presiding.

Attorneys and Law Firms

Jennifer L. Barron, of Barron Legal, Ltd., and Lynn D. Dowd, both of Naperville, and Frank J. Olavarria, of Chicago, for appellants.

Robert L. Baker, of Forest Preserve District of Cook County, of Chicago, for appellee Forest Preserve District of Cook County.

Dawn M. Gonzalez, of Stone & Johnson, Chtrd., of Chicago, for appellee Commonwealth Edison Company.

Aleen R. Tiffany, Jamie Rein, and Sarah B. Jansen, of HeplerBroom, LLC, of Crystal Lake, for other appellee.

OPINION

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.

***1** ¶ 1 The circuit court of Cook County dismissed a wrongful death action brought by the plaintiffs-appellants, Roger Grabinski, special administrator of the estate of Jonathan Grabinski, deceased, and Sandra Denardo-Melant, special administrator of the estate of Salvatore Melant, deceased (Estates), against the defendants-appellees, the Forest Preserve District of Cook County (Forest Preserve), Commonwealth Edison Company (ComEd), and Intren, Inc. (Intren). The Estates now appeal. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 2 BACKGROUND

¶ 3 This case arises out of a fatal car accident that occurred on March 5, 2016, in the 9400 block of Archer Avenue (road) in Willow Springs, Illinois. The Forest Preserve owns the property adjacent to the road where the accident occurred, but it is undisputed that the Illinois Department of Transportation (IDOT) owns, operates, and maintains the road, its right-of-way,[1] and its drainage system. According to the Estates, 17-year-old Jonathan Grabinksi was driving a car on the road with 18-year-old Salvatore Melant as his passenger when water on the road caused the car to hydroplane and hit a tree. Both teenagers suffered fatal injuries.

¶ 4 On March 3, 2017, the Estates filed a wrongful death action against several governmental entities, including IDOT and the Forest Preserve, alleging that each governmental entity "owned, controlled, maintained, possessed, and/or managed the road, adjacent ditch and/or adjacent terrain where" the accident occurred. The Estates eventually voluntarily dismissed all of the governmental entities as defendants except the Forest Preserve.[2]

¶ 5 In response, the Forest Preserve filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 2-619(a)(9) (West 2016)). The motion argued that the Forest Preserve did not own, operate, or control the road or its drainage system, as it was all under the exclusive jurisdiction and control of IDOT. In support of its motion, the Forest Preserve attached IDOT's response to the Forest Preserve's Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)) request, which contained documents demonstrating IDOT's exclusive ownership of

the road, including a 66 foot right-of-way and the road's drainage system. The FOIA documents included IDOT's guidelines, which define "highway" to include "rights of way, bridges, drainage structures, signs, guardrails, and all other appurtenances necessary for vehicular travel."

¶ 6 On December 15, 2017, the Forest Preserve filed a supplement to its motion to dismiss. Its supplement cited to deposition testimony from three witnesses: John Sterenberg, surveyor for land use compliance for the Forest Preserve; John McCabe, director of resource management for the Forest Preserve; and James Stumpner, bureau chief of maintenance for IDOT. All three witnesses testified consistently that the road is an IDOT roadway for which IDOT, and not the Forest Preserve, has jurisdiction and control; including removing any debris that may build up in the road's drainage system. The Forest Preserve's supplement also raised three governmental tort immunities: (1) no liability for failure to inspect the property of others (745 ILCS 10/2-105 (West 2016)), (2) no liability for the effects of weather on roadways (745 ILCS 10/3-105(a) (West 2016)), and (3) no liability for failure to install warning signs (745 ILCS 10/3-104 (West 2016)).

*2 ¶ 7 On March 2, 2018, the Estates filed an amended complaint, modifying the claims against the Forest Preserve and adding several new defendants, including ComEd and Intren.[3] The amended complaint alleged that "on or about late 2014 to 2015, the Forest Preserve commissioned the construction of Camp Bullfrog," which was adjacent to the road and "in an area in close proximity to" the location of the accident. The amended complaint further alleged that, as part of the Camp Bullfrog construction project, ComEd "commissioned, directed and/or installed the electric poles and powerlines" and its subcontractor, Intren, "engaged in the installation of electric poles and powerlines * * * including the cutting of trees, stumps and debris" along the road. In the amended complaint, the Estates alleged that the work completed on the Camp Bullfrog construction project by the Forest Preserve, ComEd, and Intren created debris that was never removed. According to the Estates, the debris eventually migrated into the adjacent road's drainage system, causing it to be "obstructed and [filled] with soil and debris, in effect closing the ditch and drainage system and making it useless, and allowing water and run-off onto the road * * *."[4] The Estates asserted that the Forest Preserve, ComEd, and Intren all "had a duty to exercise ordinary care to not obstruct, alter, damage and/or hinder the adjacent ditch and drainage system," and that they were negligent in allowing the road's drainage system to become obstructed with debris from the Camp Bullfrog construction project.

¶ 8 The trial court allowed the Forest Preserve's original motion to dismiss, as well as its supplement, to stand as its response to the amended complaint. On July 27, 2018, Intren filed a motion to dismiss pursuant to section 2-619 of the Code. And on October 5, 2018, ComEd filed its own section 2-619 motion to dismiss. Both Intren and ComEd's motions joined in the argument asserted by the Forest Preserve that IDOT was solely responsible for the road and its drainage system.

¶ 9 On May 21, 2019, the trial court entered an order granting all three motions to dismiss. The order stated that "the uncontroverted evidence shows that IDOT has exclusive jurisdiction over the road." Citing *Dixon v. City of Chicago*, 101 Ill. App. 3d 453, 56 Ill.Dec. 950, 428 N.E.2d 542 (1981), and section 4-203 of the Illinois Highway Code (Highway Code) (605 ILCS 5/4-203 (West 2016)), the trial court held that neither the Forest Preserve, ComEd, nor Intren had a concurrent duty to maintain the road or its drainage system. The trial court additionally held that the governmental tort immunities raised by the Forest Preserve protected it against allegations that it conducted activities on its property which allowed water to collect on the adjacent road. The trial court accordingly dismissed the Estates' amended complaint with prejudice. This appeal followed.

¶ 10 ANALYSIS

¶ 11 We note that we have jurisdiction to consider this matter, as the Estates filed a timely notice of appeal. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 12 The Estates present the following issue: whether the trial court erred in dismissing its amended complaint against the Forest Preserve, ComEd, and Intren. The Estates argue that the Highway Code cited by the trial court is inapplicable because their claim is that all three defendants owed a duty to remove debris from the Camp Bullfrog construction project and not allow it to clog the adjacent road's drainage system. Specifically, the Estates claim that the three defendants breached their duty by cutting down trees and digging up dirt and not cleaning up the leftover debris. And over a year later, all that debris migrated into the adjacent road's drainage system, allowing water to pool on the road and causing the accident.

[1] [2] ¶ 13 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of the pleadings but asserts certain defects or defenses. *Duncan v. FedEx Office & Print Services, Inc.*, 2019 IL App (1st) 180857, ¶ 10, 429 Ill.Dec. 190, 123 N.E.3d 1249. When considering a section 2-619 motion to dismiss, all well-pleaded facts in the complaint must be accepted as true. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 35, 391 Ill.Dec. 647, 31 N.E.3d 323. We review a trial court's order dismissing a complaint under section 2-619 *de novo*. *Id.*

***3 [3] [4] [5] [6] [7]** ¶ 14 In this case, the trial court dismissed the Estates' wrongful death action on the basis that none of the defendants owed a duty of care to the decedents since the road and its drainage system were owned and maintained solely by IDOT. In a wrongful death action, as in any negligence action, it is the plaintiff's burden to prove three essential elements: (1) that the defendants owed a duty; (2) that the defendants breached the duty they owed; and (3) that the breach proximately caused the injury. *Stanphill v. Ortberg*, 2018 IL 122974, ¶ 33, 432 Ill.Dec. 624, 129 N.E.3d 1167. "Unless a duty is owed, there can be no negligence." *Rozowicz v. C3 Presents, LLC*, 2017 IL App (1st) 161177, ¶ 12, 420 Ill.Dec. 181, 95 N.E.3d 1277. Whether a duty exists in a particular case is a question of law for the court to decide. *Id.* In determining whether a duty of care exists, the court considers whether there is a relationship between the parties such that a legal obligation is placed upon one party for the other party's benefit. *Id.* ¶ 13. The factors a court considers when determining whether a defendant owes a duty of care include: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant. *Id.*

¶ 15 Although the Estates treat the three defendants as one unit and allege that they each owed the same duty, we find it important to parse the Forest Preserve's duty separate from that of ComEd and Intren where the Forest Preserve *owned* the adjacent property and ComEd and Intren did not. Thus, we consider the Forest Preserve's duty first.

[8] ¶ 16 As already noted, it is undisputed that IDOT owns, controls, and maintains the road, including the road's drainage system. See 605 ILCS 5/4-203 (West 2016) ("[IDOT] shall have exclusive jurisdiction and control over only that part of such highway which [IDOT] has constructed, * * * and for the maintenance of which [IDOT] is responsible, including the hardsurfaced slab, shoulders and drainage ditches"). Indeed, in *Dixon*, 101 Ill. App. 3d 453, 56 Ill.Dec. 950, 428 N.E.2d 542, the Illinois Supreme Court established that, pursuant to section 4-203 of the Highway Code, IDOT has exclusive jurisdiction and control over its roads. *Id.* at 456-57, 56 Ill.Dec. 950, 428 N.E.2d 542. In that case, our supreme court held that although a defective sidewalk curb was located within the City of Chicago, section 4-203 made clear that the City did not have a concurrent duty to maintain that particular sidewalk curb along with IDOT. *Id.*

¶ 17 Nonetheless, the Estates still claim that the Forest Preserve owed a duty of care as the road's adjacent property owner. In support of their argument, the Estates cite to *Whittaker v. Honegger*, 284 Ill. App. 3d 739, 221 Ill.Dec. 169, 674 N.E.2d 1274 (1996). In *Whittaker*, the landowners had a gravel driveway. *Id.* at 741, 221 Ill.Dec. 169, 674 N.E.2d 1274. Over time, the gravel migrated onto the adjacent roadway and caused an accident when a motorcyclist hit a patch of the gravel. *Id.* The Fifth District of this court held that the landowners owed a duty to travelers on the adjacent road to keep their land free from conditions that were unreasonably dangerous to such travelers who may come into contact with the condition. *Id.* at 742, 221 Ill.Dec. 169, 674 N.E.2d 1274. Specifically, the court stated:

> "[The landowners] created a condition or allowed a condition to develop that was literally on the highway's surface. The gravel posed a danger to passing motorists, regardless of any third-party conduct. Hence, the imposition of a duty in this case does not put an elevated burden on [the landowners] to guard against the negligence of others. It merely asks [the landowners] to prevent conditions on *their land* from migrating onto the highway and thereby creating hazards to the motoring public." (Emphasis added.) *Id.* at 743-44, 221 Ill.Dec. 169, 674 N.E.2d 1274.

¶ 18 However, the instant case is distinguishable from *Whittaker* because the Estates do not allege that the Forest Preserve let debris from the Camp Bullfrog construction project migrate *directly onto the road*. Stated another way, there are no allegations that the Forest Preserve's property invaded the actual pavement of the road. Instead, the Estates allege that the Forest Preserve let debris migrate into the road's drainage system, which was not cleared out by IDOT, and ultimately caused water to pool on the road. This is an important distinction, especially considering that IDOT is *solely* responsible for maintaining the road's drainage system. The evidence in the record establishes

that IDOT's responsibility over the road's drainage system includes cleaning of debris out of the road's drainage system, notwithstanding the source of the debris.

*4 ¶ 19 The Estates further cite to cases involving defendants that owned, operated, or controlled water systems that diverted or leaked water onto an adjacent roadway or property. See *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 278 Ill.Dec. 555, 799 N.E.2d 273 (2003) (municipal defendant had a duty to not divert water from its drainage system onto the adjacent property); *Tzakis v. Berger Excavating Contractors, Inc.*, 2019 IL App (1st) 170859, 436 Ill.Dec. 185, 142 N.E.3d 288 (a local public entity bears a common law duty to not let its drains and sewers increase the natural flow of surface water onto an adjacent property); *Stoewsand v. Checker Taxi Co.*, 331 Ill. App. 192, 73 N.E.2d 4 (1947) (the City was responsible for its water main beneath the surface of the State highway breaking, which caused a dangerous condition on the highway's pavement). Again, all of these cases are distinguishable from the instant case where there is no allegation that the Forest Preserve's own water system caused the dangerous condition. The Estates concede that IDOT owns and operates the road's drainage system which they allege caused water to pool on the road.

¶ 20 Simply put, the Forest Preserve does not own, operate, or control the road and its drainage system, rather, IDOT does. And that is the problem here, and the Estates do not allege that the Forest Preserve let debris invade the road itself. Accordingly, the Estates' argument that the Forest Preserve still owed a duty of care to the decedents under these facts and circumstances is baseless. Nonetheless, we will analyze whether the Forest Preserve owed a common law duty to clean up the debris from its Camp Bullfrog construction project and ensure it did not migrate into the adjacent road's drainage system.

[9] ¶ 21 Looking at the first factor, the reasonable foreseeability of the injury, even accepting the pleaded fact that the Forest Preserve left debris consisting of tree limbs and dirt on its property as true, it is highly unlikely that the Forest Preserve could foresee that the debris would migrate into the adjacent road's drainage system more than a year later, and not be cleared out by IDOT, causing water to pool on the road. See *Yager v. Illinois Bell Telephone Co.*, 281 Ill. App. 3d 903, 907, 217 Ill.Dec. 695, 667 N.E.2d 1088 (1996) ("[f]oreseeability means that which it is objectively *reasonable* to expect, not merely what might conceivably occur" (emphasis in original)). For the same reasons, the second factor, the likelihood of the injury, weighs against finding that the Forest Preserve owed the decedents a duty of care.

[10] ¶ 22 The third and fourth factors, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the Forest Preserve, further weigh against finding a duty of care. In *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 153 Ill.Dec. 259, 566 N.E.2d 1365 (1991), the plaintiff bicyclist collided with a dump truck that was exiting the defendant's driveway. *Id.* at 45-46, 153 Ill.Dec. 259, 566 N.E.2d 1365. The plaintiff alleged that the defendant landowner owed a duty to not allow growing foliage on his property to obscure the driveway from view from the road. *Id.* at 46, 153 Ill.Dec. 259, 566 N.E.2d 1365. Our supreme court held that the defendant landowner did not owe a duty of care to the plaintiff because the condition on the defendant's property did not pose a danger to the plaintiff absent the dump truck driver's actions and requiring the defendant to be responsible *for others' negligence* would be too high of a burden. *Id.* at 53, 153 Ill.Dec. 259, 566 N.E.2d 1365. Specifically, the supreme court stated:

> "[The] imposition of a duty here would require defendant to 'guard against the negligence of others.' This is a considerably higher burden than guarding against dangers created solely by conditions on his land. Therefore, we find defendant did not have a duty to maintain his property in such a way that plaintiff could see his driveway from [the road]." *Id.*

Likewise, in the instant case, requiring the Forest Preserve to ensure that debris on its land did not migrate into the adjacent road's drainage system *and* that IDOT did not let the debris build up over time would place an undue burden on the Forest Preserve. Public policy supports our decision considering that the legislature has explicitly placed the burden for maintaining the road and its drainage system on IDOT. See 605 ILCS 5/4-203 (West 2016).

*5 ¶ 23 Accordingly, we find that the Forest Preserve did not owe a duty of care to the decedents to clean up the debris from its Camp Bullfrog construction project and ensure it did not migrate into the adjacent road's drainage system where it would be left by IDOT. The trial court properly dismissed the Estates' amended complaint against the Forest Preserve on that basis. Thus, we need not address the trial court's alternative grounds for dismissing the complaint against the Forest Preserve, *i.e.*, the governmental tort immunities.

[11] ¶ 24 We now turn to whether ComEd and Intren owed the decedents a duty of care. The Estates claim that even though ComEd and Intren are not the relevant landowners, they nonetheless owed the decedents a contractual duty to clean up any debris they created as part of the Camp Bullfrog construction project. However, the decedents were neither a party nor a third-party beneficiary to any of ComEd's and Intren's contracts regarding the Camp Bullfrog construction project, so the Estates cannot assert any contractual rights. See *Barry v. St. Mary's Hospital Decatur*, 2016 IL App (4th) 150961, ¶ 82, 409 Ill.Dec. 856, 68 N.E.3d 964 (only third parties who are direct beneficiaries have rights under a contract). Moreover, the scope of ComEd's and Intren's contractual duties regarding the Camp Bullfrog construction project did not include ensuring that debris did not, more than a year later, migrate into an adjacent IDOT road drainage system. Further, in order to work on the Camp Bullfrog construction project, ComEd and Intren were required to obtain a permit from IDOT to access the Camp Bullfrog construction site since it was so close to an IDOT road. The permit expired after 90 days, and ComEd and Intren were not allowed to access the construction site area after the permit's expiration. It cannot be said that, under these facts and circumstances, ComEd and Intren owed a duty to travelers using the adjacent road to keep IDOT's drainage system free from debris which migrated from the Camp Bullfrog construction site.

[12] ¶ 25 Still, we consider whether ComEd and Intren owed a *common law* duty under the traditional four-factor analysis. As with the Forest Preserve, the foreseeability and likelihood of injury factors weigh against finding a duty of care. And the burden and consequences of placing such a duty on ComEd and Intren are even greater, considering that they do not own the property at issue and had no access to the property once their work was completed.

¶ 26 In sum, neither ComEd nor Intren owed any kind of duty of care to the decedents regarding debris migrating from the Forest Preserve's property into IDOT's drainage system. The trial court accordingly did not err in dismissing the Estates' claims against ComEd and Intren. Thus, we affirm the trial court's judgment dismissing the Estates' amended complaint pursuant to section 2-619 of the Code.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.

Justices Hoffman and Rochford concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 191267, 2020 WL 7319270

Footnotes

1 A right-of-way is defined by the Illinois Highway Code as: "The land, or interest therein, acquired for or devoted to a highway." 605 ILCS 5/2-217 (West 2016).

2 The Estates later filed a separate lawsuit against IDOT in the Illinois Court of Claims, which is stayed pending the outcome of this appeal.

3 The other added defendants, R.M. Chin & Associates and Cornerstone Contracting, Inc., were later dismissed from the case.

4 The Estates' amended complaint, as well as their brief on appeal, reference the road's drainage ditch and a separate culvert pipe interchangeably. For the sake of clarity, we will refer to the road's entire drainage system, including both the ditch and culvert, simply as the road's "drainage system."

2020 IL App (1st) 191384

Appellate Court of Illinois, First District,
FOURTH DIVISION.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Jason VAN DYKE, Defendant,
(Chicago Public Media, Inc., WLS Television, Inc.; WFLD Fox 32 Chicago, WGN Continental Broadcasting Company, Chicago Tribune Company, L.L.C., and Sun-Times Media, L.L.C., Intervenors-Appellants).

No. 1-19-1384
|
Opinion filed December 3, 2020

Synopsis

Background: Media companies filed post-trial motion to unseal court records from a highly publicized murder trial, and filed a motion to intervene and to modify the trial court's interim decorum order limiting the release of information to the public. The Circuit Court, Cook County, Vincent M. Gaughan, J., orally denied media company's motion to reconsider its order denying journalist's motion to intervene and vacate interim decorum order, dismissed media companies' motion to join the motion to intervene, and subsequently issued a written order that maintained some of the requested documents under seal. Media companies appealed.

Holdings: The Appellate Court, Robert E. Gordon, J., held that:

[1] appellate court did not have jurisdiction to consider media companies' appeal of trial court's oral denial of their motion to reconsider the denial of journalist's motion to intervene and vacate interim decorum order;

[2] trial court did not abuse its discretion by delaying release of documents or in releasing them as redacted; and

[3] trial court retained jurisdiction to modify its prior interim decorum order.

Affirmed in part, and dismissed in part.

West Headnotes (27)

[1] **Criminal Law** Appellate Jurisdiction

A reviewing court has an independent duty to consider its own jurisdiction.

[2] **Criminal Law** Review De Novo

Questions concerning appellate jurisdiction are questions of law that are considered de novo.

[3] **Criminal Law** Review De Novo

Generally, de novo consideration means that a reviewing court performs the same analysis that a trial judge would perform; however, when there is no ruling below for the appellate court to review, de novo review means that appellate legal consideration is made on a blank slate.

[4] **Records** Proceedings to open or unseal judicial records

The appellate court did not have jurisdiction under rule governing the appeal of an interlocutory order to consider media companies' appeal of trial court's oral denial of their motion to reconsider the denial of journalist's motion to intervene and vacate the trial court's interim decorum order limiting public access to certain documents used in highly publicized murder trial, where media companies did not file notice of appeal within 30 days after entry of the order. Ill. Sup. Ct. R. 307.

[5] **Criminal Law** Commencement of period of limitations

Under the rule governing when an interlocutory order is appealable as of right, a motion to reconsider does not toll the time to appeal. Ill. Sup. Ct. R. 307.

[6] **Criminal Law** Scope of Inquiry

A concession by the State does not confer jurisdiction upon the appellate court.

[7] **Criminal Law** Notice of Appeal

The filing of a notice of appeal is the jurisdictional step that initiates review.

[8] **Criminal Law** Notice of Appeal

Without a properly filed notice, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss the appeal.

[9] **Criminal Law** Preliminary or interlocutory orders in general

The proper vehicle for appealing a denial of access to the media in a criminal case is an immediate appeal pursuant to rule governing the appeal of an interlocutory order. Ill. Sup. Ct. R. 307.

[10] **Records** Review

A trial court's order denying access to a media intervenor is in the nature of injunctive relief for purposes of rule governing interlocutory appeals as of right. Ill. Sup. Ct. R. 307(a)(1).

[11] **Records** Proceedings to open or unseal judicial records

Appellate court did not have jurisdiction to consider media companies' appeal of trial court's oral denial of their motion to reconsider its denial of journalist's motion to intervene and vacate interim decorum order limiting public access to documents used in highly publicized murder trial, under rule governing appeals from final judgments in civil cases, where trial court's denial of motion to reconsider another intervenor's motion was an interlocutory order and not a final judgment nor a necessary step in media companies' pending motion regarding access to specific documents, and media companies did not timely appeal the denial. Ill. Sup. Ct. R. 303(a)(1).

[12] **Records** Proceedings to open or unseal judicial records

The appellate court did not have jurisdiction to consider media companies' appeal of trial court's oral denial of their motion to reconsider its denial of another journalist's motion to intervene and vacate an interim decorum order limiting public access to documents used in highly publicized murder trial, under rule governing appeals in criminal cases, where media companies failed to file their appeal within 30 days from the entry of final judgment against criminal defendant. Ill. Sup. Ct. R. 605.

[13] **Records** Proceedings to open or unseal judicial records

When reviewing the denial of a motion by media intervenors to unseal a court file, the appellate court reviews the trial court's decision only for an abuse of discretion, whether the claimed right of access is based on the first amendment, common law, or statute. U.S. Const. Amend. 1.

[14] **Criminal Law** Discretion of Lower Court

An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the position adopted by the trial court.

[15] **Estoppel** Waiver Distinguished

"Forfeiture" is the failure to make the timely assertion of a right.

[16] **Criminal Law** Presentation of questions in general

The failure of a timely assertion in the court below results in forfeiture of the issue on review.

[17] **Records** Proceedings to open or unseal judicial records

Media companies did not forfeit the right to appellate review of trial court's order denying release of unredacted documents used in high-profile murder trial nor invite an error by successfully urging trial court to release redacted documents that excluded grand jury testimony, where media companies sought redacted documents to review them for newsworthy purposes and never intended to give up their claimed right to unredacted material.

[18] **Criminal Law** Error committed or invited by party complaining in general

A party cannot invite an error by the trial court and then use it as a basis for appeal.

[19] **Records** Presumptions, inferences, and burden of proof

When faced with a request for media access in a criminal proceeding, a trial court generally determines, first, whether a presumption of public access applies to the particular type of information sought.

[20] **Records** Review

Whether a presumption of public access in a criminal proceeding applies to a particular type of information sought by the media is a purely legal question that is reviewed de novo.

[21] **Records** Presumptions, inferences, and burden of proof

If the trial court finds the presumption of public access applies to information sought by the media in a criminal proceeding, then it determines whether the presumption is rebutted by other concerns.

[22] **Criminal Law** Public trial

Records Review

The appellate court applies an abuse of discretion standard of review to the balancing of interests and determining of parameters a trial court in a criminal proceeding must undertake when deciding to deny access to certain proceedings and records for a certain length of time.

[23] **Grand Jury** Secrecy as to Proceedings

A presumptive right of public access does not attach to grand jury proceedings.

[24] **Records** Proceedings to open or unseal judicial records

Trial court did not abuse its discretion in high-profile murder prosecution by delaying release of the documents sought by media companies or in releasing them as redacted; media companies did not establish prejudice caused by two-month delay between their filing a notice of appeal and the release of redacted documents, and the redacted information sought by media companies consisted of grand jury proceedings which were protected by statute and common law. 725 Ill. Comp. Stat. Ann. 5/112-6.

[25] **Constitutional Law** Access to Proceedings; Closure

Even a short denial of public access to information sought by the media in a criminal proceeding may implicate important First Amendment concerns. U.S. Const. Amend. 1.

[26] **Records** Judgment, order, or decree

Trial court in high-profile murder prosecution retained jurisdiction to modify its prior interim decorum order regarding release of documents sought by media companies after media companies' notice of appeal of interim order, where trial court retained jurisdiction with respect to defendant and the State who were also interested parties in interim order, and interim order was properly appealed under rule governing appeal of interlocutory order rather than as final declaratory judgment. Ill. Sup. Ct. R. 307.

[27] **Records** Judgment, order, or decree

To the extent, if any, that changed circumstances were required to give trial court jurisdiction to modify its prior interim decorum order regarding release of documents in high-profile murder prosecution, the changed circumstances were that prior objections by city and defendant to media companies' request for release of the documents had evaporated, and city and defendant supported the release of documents in redacted form.

Appeal from the Circuit Court of Cook County. No. 17 CR 4286, The Honorable Vincent M. Gaughan, Judge, presiding.

Attorneys and Law Firms

Brendan J. Healey, of Baron Harris Healey, of Chicago, for appellants WLS Television, Inc., WFLD Fox 32 Chicago, and WGN Continental Broadcasting Company. Natalie J. Spears and Gregory R. Naron, of Dentons US, LLP, of Chicago, for appellant Chicago Tribune Company, L.L.C. Jeffrey D. Colman, Michael T. Brody, Catherine L. Doyle, and Christina T. Lopez, of Jenner & Block LLP, of Chicago, for appellant Chicago Public Media, Inc. Damon E. Dunn, of Funkhouser Vegosen Liebman & Dunn Ltd., of Chicago, for appellant Sun-Times Media, L.L.C.

Joseph H. McMahon, State's Attorney, Special Prosecutor, of St. Charles (Michelle Katz, Assistant State's Attorney, of counsel), for the People.

OPINION

PRESIDING JUSTICE GORDON delivered the judgment of the court, with opinion.

***1** ¶ 1 This appeal involves the denial of access to the media in a criminal case. In the highly publicized criminal case of *People v. Jason Van Dyke*, the trial court entered an "interim decorum order" to manage trial publicity and the media to ensure that defendant Van Dyke received a fair trial. The criminal defendant is not a party to the instant appeal.

¶ 2 Appellants Chicago Public Media, Inc.; WLS Television, Inc.; WFLD Fox 32 Chicago; WGN Continental Broadcasting Company; Chicago Tribune Company, L.L.C.; and Sun-Times Media, L.L.C. are not appealing the entry of the trial court's interim decorum order in this case—nor could they, since they previously moved to vacate only a modification of that order, and our supreme court swiftly granted their relief within 12 days after they requested a supervisory order.

¶ 3 The order appealed from in this case was entered posttrial, and it ordered certain documents to remain under seal. Three months after its entry and two months after this appeal was filed, the trial court ordered the 18 remaining sealed documents to be released with some redactions. However, the media appellants claim that the trial court lacked jurisdiction to grant any relief at this time.

¶ 4 For the following reasons we dismiss a part of this appeal for lack of jurisdiction, and we affirm in part.

¶ 5 BACKGROUND

¶ 6 This case stems from the shooting death of 17-year old Laquan McDonald by Chicago police officer Jason Van Dyke on October 20, 2014. Defendant Van Dyke was charged on November 24, 2015, with first degree murder and official misconduct.

¶ 7 On January 20, 2016, the trial court issued, without objection, an "Interim Decorum Order" that provided, in full:

"It is the Order of this court that no attorney connected with this case as Prosecutor or Defense Counsel, nor any other attorney working in or with the offices of either of them, nor their agents, staff, or experts, nor any judicial officer or

court employee, nor any law enforcement employee of any agency involved in this case, nor any persons subpoenaed or expected to testify in this matter, shall do any of the following:

1. Release or authorize the release for public dissemination any purported extrajudicial statement of either the defendant or witnesses relating to this case;

2. Release or authorize the release of any documents, exhibits, photographs or any evidence, the admissibility of which may have to be determined by the Court;

3. Make any statement for public dissemination as to the existence or possible existence of any documents, exhibits, photographs or any evidence, the admissibility of which may have to be determined by the Court;

4. Express outside of court an opinion or make any comment of public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence;

5. Make any statement outside of court as to the content, nature, substance, or effect of any statements or testimony that is expected to be given in any proceedings in or relating to this matter;

*2 6. Make any out-of-court statement as to the nature, source or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter.

7. This Decorum Order also incorporates Article VIII. Illinois Rules of Professional Conduct, effective January 1, 2010.

This Order does not include any of the following:

1. Quotations from, or any reference without comment to, public records of the Court in the case.

2. The scheduling and result of any stage of the judicial proceedings held in open court in an open or public session.

3. Any witness may discuss any matter with any Prosecution or Defense Attorney in this action, or any agent thereof, and if represented may discuss any matter with his or her own attorney.

Anyone in violation of this court order may be subject to contempt of court."

¶ 8 On February 3, 2017, the trial court modified the interim decorum order with an order that stated, in full:

"To be in compliance with the decorum order entered January 20, 2016:

IT IS HEREBY ORDERED that any documents or pleadings filed in this matter are to be filed in room 500 of the George N. Leighton Criminal Courthouse only. This order applies to the defense, special prosecutor, and any other party that may occasionally become involved in these proceedings. This procedure will remain in effect unless and until otherwise ordered by the court."

¶ 9 On March 8, 2018, the media appellants were granted leave to intervene in the Van Dyke case.

¶ 10 On May 11, 2018, they moved for a supervisory order in the Illinois Supreme Court to vacate the February 3, 2017, order. The media appellants' proposed supervisory order asked for the following relief:

"(1) That the February 2017 Decorum Order is vacated;

(2) That going forward, all motions, briefs, pleadings, and other judicial documents in this case shall be filed publicly in the Circuit Court Clerk's Office, subject to any properly supported motion to seal; and

(3) That in ruling on any such future motion to seal judicial records, or any motion to reconsider [the trial court's] earlier sealing of any previously filed judicial records, [the trial court] shall adhere to the governing First Amendment standards and enter specific, on-the-record judicial findings supporting suppression under those standards, or release such records in whole or in part, consistent with consideration of the least restrictive alternatives to complete suppression."

¶ 11 Twelve days after the media appellants filed their motion, our supreme court "[a]llowed" it and issued a supervisory order on May 23, 2018, that stated, in full:

"This cause coming to be heard on the motion of movants, Chicago Public Media, Inc., et al, due notice having been given to respondent, and the Court being fully advised in the premises:

IT IS ORDERED: Motion by Movants for a supervisory order. Allowed. The Circuit Court of Cook County is

directed to vacate its February 3, 2017, order, directing that all documents and pleadings shall be filed in Room 500 of the George N. Leighton Criminal Courthouse only. All documents and pleadings shall be filed in the circuit clerk's office. The parties may move to file any document under seal." *Chicago Public. Media, Inc. v. Hon. Vincent M. Gaughan*, No. 123569 (Ill. May 23, 2018).

*3 ¶ 12 On May 24, 2018, the trial court entered an order (1) vacating its February 3, 2017, order; (2) requiring all filings to be made with the clerk of the court, with courtesy copies provided to the trial court on the same day; and (3) requiring a "filing party" to "first notify the opposing party of its intention" to file a document and "the nature of the document" to be filed in order "to afford the other party fair opportunity to request the document be sealed."

¶ 13 On August 7, 2018, the media appellants moved the supreme court again for a supervisory order, this time asking for an order directing the trial court (1) to unseal 35 documents sealed prior to the supreme court's May 23, 2018, supervisory order, unless the parties filed new and publicly filed motions to seal these documents, and (2) to vacate the trial court's May 24, 2018, order and require the public filing of all future requests under seal. On September 12, 2018, the supreme court issued an order stating that the media appellants' "motion for supervisory order is dismissed."[1]

¶ 14 Defendant Van Dyke's jury trial began on September 17, 2018, and his jury returned a verdict on October 5, 2018, finding him guilty of second-degree murder and aggravated battery with a firearm.

¶ 15 On October 26, 2018, the media appellants filed a motion titled a "Post-Trial Motion to Unseal Court Records," seeking to unseal court records then under seal and citing in support the Illinois Supreme Court's recent decision on October 18, 2018, in *People v. Zimmerman*, 2018 IL 122261, 427 Ill.Dec. 851, 120 N.E.3d 918 (denying media intervenors access to pretrial motions in a criminal case). Specifically, the media appellants sought the release of 99 documents, which they described on an attached list. To the extent that any records contained any sensitive information, the media appellants argued that they should be redacted. On January 14, 2019, the trial court continued the media appellants' motion for unsealing until after sentencing. Defendant Van Dyke was sentenced on January 18, 2019, and he filed a notice of appeal on February 8, 2019.[2]

¶ 16 On February 28, 2019, Brandon Smith filed a motion as a "third-party journalist,"[3] seeking to intervene and to modify the 2016 interim decorum order, in order to permit the release of certain documents by the Chicago Police Department. The department had denied part of his Freedom of Information Act (FOIA) request based on the 2016 order. See **5 ILCS 140**/1 *et seq.* (West 2018). On March 8, 2019, the media appellants filed a four-paragraph document stating that they "hereby join in" Smith's motion. In their concluding paragraph, they stated that they "seek the relief requested by Mr. Smith" and "adopt his arguments in support thereof."

*4 ¶ 17 On March 15, 2019, the media appellants filed a "Status Report Regarding [Their] Posttrial Motion to Unseal" which stated that the trial court had previously asked the State, defendant, and the media appellants to meet in order to reach an agreement on what documents should be released. That effort was largely successful, and the media appellants reported that neither the defense nor the State objected to the release of 87 court records and 2 transcripts and that only 21 records remained under dispute.

¶ 18 On April 5, 2019, the media appellants filed a proposed agreed order "Regarding [Their] Post-Trial Motion to Unseal Court Records." The proposed order stated that "[t]his matter" was "coming to be heard" on the media appellants' "Post-Trial Motion to Unseal Court Records" and was entered "by agreement" among the State, defendant Van Dyke, and the media appellants. In the order, the media appellants sought the release of 87 documents, as well as the transcripts, "including sidebar deliberations," of a May 10, 2018, hearing and "all trial proceedings." On April 10, 2019, the trial court granted the proposed order in its entirety, adding only details about copying charges and that production in "10 days" meant "10 business days."

¶ 19 At a hearing on April 10, 2019, the parties discussed the remaining 21 documents in dispute, and the media appellants' attorney repeatedly asked the court to consider redacting them to permit release. The State objected to the release because the documents contained grand jury material and information concerning the juvenile victim, Laquan McDonald. When the court agreed with the State, the media appellants' attorney asked: "Would you please reconsider and consider redacting the grand jury information[?]" The media appellants argued that "the least restrictive means would warrant redactions if there's a reference to grand jury material."

¶ 20 On April 10, 2019, the trial court also entered an order (1) that denied Smith's motion to intervene and to modify the interim decorum order, (2) that modified the decorum order to permit city employees to answer certain questions about their e-mails and texts regarding the Laquan McDonald shooting, as Smith had requested, and (3) that denied the media appellants' motion to modify to the extent that they had joined in Smith's motion. Regarding the last item, the trial court stated at the hearing: "your motion to join is denied. How can they join anything that doesn't exist?" Smith's attorney and the trial court then had the following exchange:

> "MR. TOPIC: I guess the question would there be—and I don't know whether they would do this. Would it be moot for them to file the same motion that we filed because you went through the merits of it, and so I get the sense—
>
> THE COURT: Well, then they can file that. And we'll hear it at some time later on down the road, maybe."

However, at this point in time, the trial court ruled that the media appellants "joined in a nullity," since the court did not allow Smith to intervene. To Smith, the trial court stated: "I'm not ruling on your motion [to vacate] because it's not before me because I denied your right to intervene." To the media appellants' counsel, the trial court stated that their motion "[g]oes down with his motion to intervene."

¶ 21 On May 9, 2019, the media appellants moved the trial court "to reconsider or clarify its April 10, 2019[,] denial of [the media appellants'] request, through their joinder in a motion by would-be intervenor Brandon Smith, to modify the January 20, 2016," order, on the ground that the order was being used by the city and the Chicago Police Department as a ground for withholding documents from FOIA requests. As part of its motion to reconsider, the media appellants asked the court to vacate the 2016 order or, "at a minimum," modify it to state that it is not a basis for third parties to withhold documents.

*5 ¶ 22 On May 23, 2019, the trial court entered a written order regarding "the Post-Trial Motion of [the media appellants] for access to certain materials." The order, which indicated that it had been prepared by the media appellants' counsel, stated that the trial court had previously granted access to "certain agreed-upon materials," that "[t]here remained 21" documents "that were the subject" of objections by the State, that a list of those 21 documents was attached to the order, and that "Document Nos. 1 through 17 and Document No. 20" were to remain under seal. At the hearing on May 23, 2019, the media appellants had withdrawn their request to unseal documents 18, 19, and 21, which concerned United States Department of Justice (DOJ) employees. With respect to these three documents, the order directed the special prosecutor to request them from DOJ.

¶ 23 At the May 23 hearing, the media appellants' attorney again suggested redacting the 18 documents so that they could be released:

> "APPELLANTS' ATTORNEY: Before court this morning, [the special prosecutor] told me that he was prepared to make redactions and tender to the Court redacted versions of some of the materials relating to the motions to dismiss the indictment based on alleged misconduct * * *. And it's actually what I suggested back on April 10th * * * And we favor going forward with a redaction process to see if we can avoid an appeal under those issues."

These 18 documents included documents concerning defendant Van Dyke's motions to dismiss the indictment based on misconduct (dismissal documents). With respect to these dismissal documents, the special prosecutor explained how he had redacted information that was not subject to disclosure:

> "SPECIAL PROSECUTOR: What I have done since April 10th is gone through those documents and redacted any reference to Grand Jury testimony. In one of those documents there is a complete transcript of the Grand Jury proceedings attached[. I am] proposing that that is removed. The identity of any witnesses or anyone who appeared before the Grand Jury, to redact all of that information in a way to kind of compromise. What would remain in those documents would be allegations that were made by the defense in the motions to dismiss. * * * [O]ne proposed resolution would be to redact identities, actual quotations from Grand Jury testimony, summaries and inferences drawn from the testimony before the Grand Jury. * * * So that's what I discussed with [the media appellants' attorney] before court this morning."

The special prosecutor argued that that the trial court had previously found that "there was not a scintilla of evidence to support the allegations" that defendant Van Dyke had made in these documents and, thus, no reason to keep them sealed.

¶ 24 Defendant Van Dyke's attorney objected to what the State said, and the trial court replied: "Maybe you should take that up on appeal on Mr. Van Dyke's case." The trial court then found that its sealing order would stand. It is these 8 documents, later released in the redacted form described above, that are at issue on appeal.

¶ 25 Also at the May 23, 2019, hearing, the trial court orally found, with respect to the media appellants' motion to reconsider, that, once the court had denied Smith's motion[4] to intervene, there was nothing for the media appellants to join and, thus, the media appellants' joinder motion "fell with his motion." The court explained that it had entered an order giving Smith "all [he] wanted" and, "if he's done, you're done." When the media appellants argued, pursuant to their motion to reconsider, that the court should vacate the 2016 interim decorum order, the special prosecutor responded: "But there was no motion by Counsel to vacate the decorum order that was before this court on April 10th, * * * [o]nce [the trial court] denied [Smith's motion to intervene." The special prosecutor argued that, since there had been "no new filing" by the media appellants, "other than a motion to reconsider what was denied on April 10th," there was no motion for the court now to resolve. The trial judge agreed that this was his "interpretation" and "now you can't file. All right. That's it." The court found: "your motion to litigate—I mean to vacate the decorum order is denied, and I'm setting it *nunc pro tunc* to the other ruling." The media appellants did not object to the court's *nunc pro tunc* order, entering the denial as of April 10, 2019.

***6** ¶ 26 When the trial court inquired if there was anything else, the media appellants replied: "We'd like a final order." The State responded that it felt like they were "repeating" themselves, and the court agreed. The media appellants repeated "all we want is a final order." The trial court stated orally in court: "Here is my final order, all right, denied. That's it." When the media appellants' attorney asked the trial court, "[s]o we're done with you?" the court replied: "Never." The media appellants' attorney persisted, stating that he "just want[ed] clarity in the record that there [were] no issues left" from the media appellants, and the trial court agreed.

¶ 27 On June 21, 2019, the media appellants filed a notice of appeal alleging that the trial court's May 23, 2019, "order" was a final order, since it "resolv[ed] all pending matters raised by Intervenors-Appellants in the above captioned [Van Dyke] case." The media appellants stated that they were appealing the trial court's May 23, 2019, order and "all matters [that] merged into the May 23 Final Order, including: (1) the April 10, 2019[,] Order denying [the media appellants'] motion to modify the Decorum Order, and (2) the Decorum Order entered on January 20, 2016)." The notice alleged that this court had jurisdiction "[p]ursuant to Illinois Supreme Court Rule 303, or if deemed appropriate, Rule 307(a) and/or Rule 605."

¶ 28 On July 2, 2019, Smith moved again to intervene and also for an *in camera* inspection of four documents being withheld by the Chicago Police Department from a FOIA response, on the basis of the trial court's 2016 interim decorum order. Smith had filed suit in chancery court against the Chicago Police Department challenging its FOIA response to him. Smith v. Chicago Police Department, No. 16 CH 03254 (Cir. Ct. Cook County). On May 3, 2019, the chancery court issued an order finding: "this Court defers to [the trial court], in the first instance, to determine whether disclosure of the four documents would be prohibited by his Order." *Smith*, No. 16 CH 03254 (Cir. Ct. Cook County, May 3, 2019). None of the media appellants were a party to Smith's chancery suit.

¶ 29 On July 31, 2019, the trial court issued an order stating that the four withheld documents were, in fact, prohibited from disclosure by the trial court's 2016 order, that the 2016 order was modified to allow for the production of these four documents, and that the matter was continued to August 14, 2019.

¶ 30 On August 14, 2019, the special prosecutor in the Van Dyke case moved the trial court to lift the interim decorum order entered in 2016. The notice of motion stated that it was e-mailed to the media appellants' attorneys and that the matter was scheduled for September 4, 2019. The media appellants did not move in the circuit court or in this court to stay these proceedings. See Ill. S. Ct. R. 305(d) (eff. July 1, 2017) (a motion for a stay may be made to the reviewing court upon a showing "that application to the circuit court is not practical").

¶ 31 In his motion, the prosecutor argued that the 2016 order applied "to a mere 18 items that currently remain under seal" and that it had no other continuing effect, since it depended on a " 'determination' " of " 'admissibility' " by the trial court in the underlying Van Dyke case, which was then over. The motion observed that the State had already redacted these 18 items to comply with state law and that the media appellants had indicated at a prior hearing that they favored redaction as an alternative to appeal. The motion included a proposed order that stated (1) "[t]he Special Prosecutor's Motion to Lift the Decorum Order entered on January 20, 2016[,] is granted" and (2) "[t]he 18 items currently under seal shall be released in redacted form."

*7 ¶ 32 On August 14, 2019, the special prosecutor and counsel for the city appeared in front of the trial court. The prosecutor informed the court that he had "sen[t] notice out" concerning his motion and he had received no objections from defendant or the media appellants or "any of the other individuals who have petitioned to intervene." The trial court observed:

> "And I think a reasonable explanation to that would be other than the third-party interven[o]rs, the other ones, if they—my understanding is that they appealed my orders about sealing 18 of the documents. And so if they come in here and start saying some things, then they might—well, they wouldn't reinvest jurisdiction, so they'd be kicked out of the Appellate Court."

¶ 33 On September 4, 2019, the trial court signed the proposed order in its entirety, without changes. The transcript indicates that Van Dyke's counsel was present but the media appellants' attorneys did not attend. Explaining the redactions, the special prosecutor stated that he had

> "redacted only information that contains personal identifiable information about La[q]uan McDonald that would be—that is protected by the Juvenile Court Act and then transcripts or quotations of testimony before the Grand Jury including the identity of any witness that would have testified before any of the Grand Jury proceedings in the underlying criminal case."

Counsel for the City of Chicago, who was also present, stated that the City supported the prosecutor's motion.

¶ 34 On August 23, 2019, the media appellants filed a motion in the appellate court, claiming: "There are 17 documents at issue in this appeal that are currently under seal in the Circuit Court." The media appellants listed the 17 documents by title and filing date and requested an order directing the circuit court of Cook County to transmit these 17 documents under seal to the appellate court, which we granted.

¶ 35 Briefing in the instant appeal began six months later, with the first brief filed January 8, 2020. The appellate record in this case was received in 12 different e-filings, over the course of nine months, with the documents often not in chronological order. We want to remind the parties that we do read the record and perform our own independent review and analysis of it, and that it is the appellants' responsibility to provide "a," *i.e.*, one, coherent and complete table of contents. Ill. S. Ct. R. 342 (eff. Oct. 1, 2019).

¶ 36 ANALYSIS

¶ 37 The media appellants' first claim is that the trial court erred by failing to vacate the interim decorum order after the Van Dyke jury returned a verdict in October 2018.

¶ 38 Although the media appellants' initial appellate brief argued that the trial court improperly entered the order and asked this court to find that its entry was improper, the media appellants' reply brief clarified that they are challenging only "the *maintenance*" of the interim decorum order "rather than the *entry*" of the order "itself." (Emphasis in original.) The reply brief emphasized that "what this appeal is about" is "the maintenance of the [d]ecorum [o]rder after the jury returned its verdict."

¶ 39 The media appellants' second claim is that the trial court erred by "maintaining" under seal, after the jury's verdict, the documents regarding defendant's motion to dismiss, and the media appellants ask this court to order the documents' release in unredacted form.

¶ 40 I. Jurisdiction

*8 [1] [2] [3] ¶ 41 First, we must consider whether we have jurisdiction. A reviewing court has an independent duty to consider its own jurisdiction. *People v. Smith*, 228 Ill. 2d 95, 104, 319 Ill.Dec. 373, 885 N.E.2d 1053 (2008). Questions concerning appellate jurisdiction are questions of law that are considered *de novo*. *In re Marriage of Kelly*, 2020 IL App (1st) 200130, ¶ 21, —— Ill.Dec. ——, —— N.E.3d —— (hereinafter *Marriage of Kelly*). Generally, *de novo* consideration means that a reviewing court performs the same analysis that a trial judge would perform. *People v. Aljohani*, 2020 IL App (1st) 190692, ¶ 78, —— Ill.Dec. ——, —— N.E.3d ——. However, "[w]hen there is no ruling below for us to review," *de novo* review means that "our legal consideration is made on a blank slate." *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 104, 390 Ill.Dec. 549, 29 N.E.3d 481.

¶ 42 A. First Claim: Interim Decorum Order

¶ 43 The media appellants argue that the trial court's order "of May 23, 2019 is the adverse judgment appealed from." As noted above, on May 23, 2019, the trial court (1) orally denied

the media appellants' motion to reconsider the April 10 order and (2) issued a written order maintaining a few documents under seal. We consider first our jurisdiction over the denial of the motion to reconsider.[5]

[4] **[5]** ¶ 44 The basis for our jurisdiction is significant because, if the proper basis for jurisdiction is Illinois Supreme Court Rule 307, then we lack jurisdiction with respect to the media appellants' first claim. Rule 307 does not provide jurisdiction over the media appellants' motion to join Smith's motion to intervene and vacate because it is well established that, under Rule 307, a motion to reconsider does not toll the time to appeal. *E.g.*, *In re Marriage of Salviola*, 2020 IL App (1st) 182185, ¶ 39, 390 Ill.Dec. 549, 29 N.E.3d 481 (citing a number of cases); Ill. S. Ct. R. 307(a)(7) (eff. Nov. 1, 2017) ("the appeal must be perfected within 30 days from the entry of the interlocutory order by filing a notice of appeal"). Thus, the media appellants' time to appeal under Rule 307 expired 30 days after the entry of the original April 10, 2019, order, or on May 10, 2019, and the media appellants did not appeal until over a month later, on June 21, 2019.[6]

[6] **[7]** **[8]** ¶ 45 The State concedes that we have jurisdiction pursuant to Rule 303. However, a concession by the State does not confer jurisdiction upon us. As we noted above, a reviewing court has an independent duty to consider its own jurisdiction. *Smith*, 228 Ill. 2d at 104, 319 Ill.Dec. 373, 885 N.E.2d 1053. The filing of a notice of appeal is the jurisdictional step that initiates review. *Smith*, 228 Ill. 2d at 104, 319 Ill.Dec. 373, 885 N.E.2d 1053. Without a properly filed notice, "a reviewing court has no jurisdiction over the appeal and is obliged to dismiss" the appeal. *Smith*, 228 Ill. 2d at 104, 319 Ill.Dec. 373, 885 N.E.2d 1053.

[9] ¶ 46 In *People v. Kelly*, 397 Ill. App. 3d 232, 336 Ill.Dec. 719, 921 N.E.2d 333 (2009) (hereinafter *R. Kelly*), we set forth the proper vehicle for appealing a denial of access to the media in a criminal case. That vehicle was an immediate appeal pursuant to Rule 307. *R. Kelly*, 397 Ill. App. 3d at 247, 336 Ill.Dec. 719, 921 N.E.2d 333.

¶ 47 The parties were well aware of our decision in the *R. Kelly* case. They cited to it and quoted from it repeatedly in the court below. After the *R. Kelly* case, our supreme court decided the *Zimmerman* case, which also found Rule 307 to be the proper vehicle for providing jurisdiction to the appellate court. *Zimmerman*, 2018 IL 122261, ¶ 20, 427 Ill.Dec. 851, 120 N.E.3d 918. The media appellants moved the trial court to consider *Zimmerman*, only eight days after it was decided, and thus, they were aware that it was instructive in conferring jurisdiction in access-to-the-media cases. Yet, they chose to wait to file their notice of appeal.

***9** ¶ 48 In *R. Kelly*, this court affirmed on appeal a "Decorum Order," issued by the same trial judge, that is virtually identical to the interim decorum order entered here. *R. Kelly*, 397 Ill. App. 3d at 270, 336 Ill.Dec. 719, 921 N.E.2d 333 ("we find that the trial court's Decorum Order was not an abuse of discretion by the trial court"). Compare *R. Kelly*, 397 Ill. App. 3d at 239-40, 336 Ill.Dec. 719, 921 N.E.2d 333 (quoting the *R. Kelly* decorum order in full), with *supra* ¶ 7 (quoting the decorum order in the instant case).[7] The *R. Kelly* intervenors included at least two of the appellants before us now, represented by at least one of the same counsel. Unlike here, the *R. Kelly* intervenors filed their own independent motion to vacate, and unlike here, they appealed the denial of that motion within 30 days pursuant to Rule 307. *R. Kelly*, 397 Ill. App. 3d at 240-41, 336 Ill.Dec. 719, 921 N.E.2d 333. In *R. Kelly*, we stated that "the question" before us was "whether the path to review" for a media intervenor denied access was "Supreme Court Rule 307(a) or some other rule or statute." *R. Kelly*, 397 Ill. App. 3d at 245, 336 Ill.Dec. 719, 921 N.E.2d 333.

[10] ¶ 49 Rule 307(a) provides that "[a]n appeal may be taken to the Appellate Court from an interlocutory order of court: (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Nov. 1, 2017). "[A] trial court's order denying access to a media intervenor is 'in the nature of injunctive relief.' " *R. Kelly*, 397 Ill. App. 3d at 245, 336 Ill.Dec. 719, 921 N.E.2d 333 (quoting *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 990-91, 290 Ill.Dec. 664, 821 N.E.2d 1238 (2004)).

¶ 50 After an exhaustive review of precedent, we found, unequivocally, that Rule 307 is and has been "the appropriate vehicle" in this state for an appeal by media intervenors denied access to documents that they may find to be newsworthy. *R. Kelly*, 397 Ill. App. 3d at 248, 250, 336 Ill.Dec. 719, 921 N.E.2d 333 (noting the media's interest in " 'newsworthy' " documents).

¶ 51 Citing our decision in *R. Kelly* with approval, the supreme court also found that "Rule 307(a)(1) has long been the vehicle in Illinois for appellate review of orders denying access to criminal records or proceedings." *Zimmerman*, 2018 IL 122261, ¶ 20, 427 Ill.Dec. 851, 120 N.E.3d 918. The State in *Zimmerman* asked the supreme court "to refer the issue to

our rules committee for consideration of the proper vehicle for reviewing orders denying access to criminal records or proceedings." *Zimmerman*, 2018 IL 122261, ¶ 21, 427 Ill.Dec. 851, 120 N.E.3d 918. However, our supreme court "f[ou]nd that unnecessary," given that the proper vehicle was already well established in our state as Rule 307. *Zimmerman*, 2018 IL 122261, ¶¶ 21-22, 427 Ill.Dec. 851, 120 N.E.3d 918.

¶ 52 The media appellants also argue that we have jurisdiction pursuant to Rule 303 and that their notice of appeal deprived the trial court of jurisdiction to vacate the interim decorum order—but that the earlier notice of appeal filed by defendant Van Dyke did not.

¶ 53 In support of their argument that the trial court lacked jurisdiction, the media appellants cite *Daley v. Laurie*, 106 Ill. 2d 33, 37, 86 Ill.Dec. 918, 476 N.E.2d 419 (1985), but that case actually undercuts their argument. In *Laurie*, the supreme court found that, once the criminal defendant had filed his notice of appeal, the trial court lacked jurisdiction to entertain any further motions in the case. The supreme court explained that, after a notice of appeal is filed in a criminal case, "the cause is beyond the jurisdiction of the trial court." *Laurie*, 106 Ill. 2d at 38, 86 Ill.Dec. 918, 476 N.E.2d 419.

¶ 54 Their argument illustrates the wisdom of not relying on Rule 303 in media intervenor cases—what is final to one will not be final to another, as shown by Smith's and the State's later motions and the grant of the very relief that the media appellants claim they sought. The media appellants fail to explain why their notice of appeal would cut off the trial court's jurisdiction with respect to Smith or the State, any more than defendant's notice of appeal would cut off jurisdiction with respect to them.[8]

***10** ¶ 55 Rule 303(a)(1) provides in relevant part that

> "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed, * * * within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017).

The media appellants filed their notice of appeal within 30 days of the May 23, 2019, orders; so, if Rule 303 applied, then their notice would be timely.

[11] ¶ 56 The media appellants claim that they joined in Smith's motion to intervene and to vacate, that this motion was denied on April 10, 2019, and that they filed a motion to reconsider that was denied on May 23, 2019. If one strains to apply the language of Rule 303 to these facts in order to find jurisdiction over the media appellants' claim to vacate, then "the final judgment" becomes the order on April 10 denying the motion to intervene and to vacate, and the media appellants' motion to reconsider must then be a "posttrial motion directed against the judgment." Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). A denial merely to "reconsider" is obviously not a final judgment unto itself; the final judgment is what the court was being asked to reconsider.

¶ 57 The problem with trying to cast the April 10 order as a "final judgment" regarding the media appellants is, of course, the problem observed below by the trial court itself—there never was a pending motion to vacate for them to join. Ill. S. Ct. R 303(a)(1) (eff. July 1, 2017). In a short four-paragraph document, the media appellants merely asked to "join in" Smith's motion. However, once his motion to intervene was denied, there was no pending motion to vacate for the media appellants to join in. Therefore, their theory is contrary to the law, as made and provided.

¶ 58 If it is the written order concerning the 18 documents that is considered "the final judgment" for purposes of Rule 303, then the April 10 order denying Smith's motion to intervene must be considered a necessary step to this order, for us to have jurisdiction over it. Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017); *Direct Auto Insurance Co. v. Bahena*, 2019 IL App (1st) 172918, ¶ 43, 433 Ill.Dec. 249, 131 N.E.3d 1094 (an appeal is deemed to include an interlocutory order if it was a necessary step in the procedural progression to the order before us); *Filliung v. Adams*, 387 Ill. App. 3d 40, 50, 326 Ill.Dec. 268, 899 N.E.2d 485 (2008). However, we fail to see how the denial of another's motion to intervene could be considered a "necessary step" in the resolution of the media appellants' already pending motion regarding a short list of specified documents. See *Marriage of Kelly*, 2020 IL App (1st) 200130, ¶¶ 23-25, —— Ill.Dec. ——, —— N.E.3d —— (where a trial court's prior orders denying access to media intervenors were immediately appealable under Rule 307, appellate court lacked jurisdiction to consider these prior orders, although intervenors had appealed 30 days after the trial court's last and final order).

***11** ¶ 59 Straining to fit this case into the words of Rule 303 shows the wisdom of handling these types of matters

under Rule 307. This is, after all, a criminal case. The parties are the State and defendant. The "final judgment" in this criminal case was the conviction and sentence entered against defendant Van Dyke. The media appellants are not parties to the criminal case but rather are intervenors who are trying to protect their first amendment rights and the first amendment rights of the public by challenging injunctions against access and release of information. On appeal, those challenges are best handled, as we and the supreme court have both found, through Rule 307. Since an appeal under Rule 307 is untimely, we lack jurisdiction to consider the appeal of the trial court's denial of the media appellants' motion to reconsider the denial of their motion to join in Smith's motion to intervene and vacate.[9]

[12] ¶ 60 The media appellants also ask us to consider the possibility of jurisdiction under Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001), which governs appeals in criminal cases. Rule 605 provides, in relevant part, that "the right to appeal the judgment of conviction * * * will be preserved only if a notice of appeal is filed in the trial court within thirty (30) days from the date on which sentence is imposed." Ill. S. Ct. R. 605(a)(3)(A) (eff. Oct. 1, 2001). In their initial brief, the media appellants argued: "to the extent this Court treats this case as a criminal appeal because it arises from a criminal case, the Court has appellate jurisdiction pursuant to Illinois Supreme Court Rule 605." However, to the extent that this was a criminal case, final judgment was entered on January 18, 2019, when defendant Van Dyke was sentenced. Van Dyke filed a notice of appeal on February 8, 2019, and any rights the media appellants possibly had to appeal under Rule 605 expired 30 days after the entry of the final judgment in his case. We observe that, in their reply brief, the media appellants do not argue for jurisdiction under Rule 605.

¶ 61 For all the above reasons, we do not have jurisdiction to consider the media appellants' first claim regarding the trial court's oral denial of their motion to reconsider the denial of Smith's motion to intervene and vacate.

¶ 62 B. Order Denying Release of 18 Documents

¶ 63 We do, however, have jurisdiction under Rule 307 to consider the appeal of the trial court's written order, also entered on May 23, 2019, denying the release of 18 listed documents. The notice of appeal of that interlocutory order was timely filed under Rule 307, less than 30 days after the order was entered.

¶ 64 II. Dismissal Documents

¶ 65 Although the order covered 18 documents, the media appellants challenge the order on appeal with respect to only 8 documents and ask this court to order the release of these 8 documents in "full" or unredacted form.

[13] **[14]** ¶ 66 When reviewing the denial of a motion by media intervenors to unseal a court file, we review the trial court's decision only for an abuse of discretion, whether the claimed right of access is based on the first amendment, common law, or statute. *Marriage of Kelly*, 2020 IL App (1st) 200130, ¶ 32, — Ill.Dec. ——, — N.E.3d ——; *R. Kelly*, 397 Ill. App. 3d at 256, 336 Ill.Dec. 719, 921 N.E.2d 333; see also *Zimmerman*, 2018 IL 122261, ¶ 44, 427 Ill.Dec. 851, 120 N.E.3d 918 ("the trial court did not abuse its discretion by allowing" certain documents "to remain sealed"); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 233, 246 Ill.Dec. 324, 730 N.E.2d 4 (2000). An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the position adopted by the trial court. *People v. Thompson*, 2020 IL App (1st) 171265, ¶ 84, — Ill.Dec. ——, — N.E.3d ——.

***12** ¶ 67 In their initial appellate brief, the media appellants describe the documents at issue as "the eight documents filed with the Circuit Court concerning motions to dismiss the indictment based on allegation of misconduct by the State's Attorney." Although the subsequently released 18 documents are part of the appellate record, the media appellants do not provide record citations for the particular 8 documents that they are disputing. The 18 documents have titles and are stamped with the dates that they were filed in the circuit court, but the media appellants do not identify the disputed documents by either title or filing date.

¶ 68 In its response brief, the State argues that the "eight" documents that the media appellants seek are actually the seven documents that the media appellants listed on March 15, 2019, in their "Status Report," as documents concerning defendant Van Dyke's motion to dismiss the indictment for misconduct. The media appellants' "Status Report" listed 21 documents, by title and filing date, that were still under seal at that time, and the first 7 listed concerned defendant Van Dyke's motion to dismiss the indictment for misconduct. The State's appellate brief lists these 7 documents by title, by filing date in the circuit court, and by citation of the appellate record.

¶ 69 In their reply brief, the media appellants acknowledge that the State might be right and that it is "possible" that there are only seven. The media appellants claim that "the lack of clarity" is due to the "secrecy surrounding the record." However, the special prosecutor represented to the trial court that only 18 documents remained under seal as of September 2019 and moved to unseal and release all of them, which the trial court then ordered. Thus, all 18 previously sealed documents have now been released in redacted form and can be identified by title and filing date. Since the media appellants have chosen not to specifically identify the documents that they are challenging, we are persuaded by the State's reasoning that there are only 7 in dispute and that those are the 7 listed in the media appellants' status report and in the State's appellate brief.

[15] **[16]** ¶ 70 The State argues that the media appellants' claims are forfeited. Forfeiture is " 'the failure to make the timely assertion of [a] right.' " *People v. Sophanavong*, 2020 IL 124337, ¶ 20, —— Ill.Dec. ——, —— N.E.3d —— (quoting *People v. Lesley*, 2018 IL 122100, ¶ 37, 429 Ill.Dec. 1, 123 N.E.3d 1060). The failure of a timely assertion in the court below results in forfeiture of the issue on review. *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 3d 1, 8, 313 Ill.Dec. 132, 871 N.E.2d 859 (2007).

¶ 71 With respect to the redactions, the media appellants repeatedly suggested redacting to the trial court as a solution.

¶ 72 On April 10, 2019, when the State objected to the release of certain documents on the ground that they contained grand jury material and the trial court agreed, the media appellants pleaded: "Would you please reconsider and consider redacting grand jury information [?]" The media appellants argued that "the least restrictive means would warrant redactions if there's a reference to grand jury materials."

[17] **[18]** ¶ 73 On May 23, 2019, the media appellants were the ones who raised the topic of redacting, informing the trial court that they were in favor of redacting "the materials relating to the motions to dismiss the indictment based on alleged misconduct before the Grand Jury"—*i.e.*, the documents at issue now. The media appellants stated that the prosecutor had described to them prior to court on May 23 how "he was prepared to make redactions." The State then described for the court how it planned to redact, namely, that it would redact the names of grand jury witnesses and quotes from their testimony. 725 ILCS 5/112-6 (West 2018) (prohibiting disclosure of grand jury matters); *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (the right of public access does not apply to grand jury proceedings). The media appellants do not claim that the State's redaction process differed from how it was described, nor can we find that it did. Generally, appellants' claims regarding the State's redactions would be considered either forfeited or invited error. "A party cannot invite an error by the trial court and then use it as a basis for appeal." *Direct Auto Insurance Co. v. Bahena*, 2019 IL App (1st) 172918, ¶ 36, 433 Ill.Dec. 249, 131 N.E.3d 1094. In the case at bar, appellants repeatedly invited the trial court to redact references to the grand jury, and so an argument can be made that the media appellants cannot complain now about those redactions on appeal. However, we understand that the reason that they asked for the redacted documents was because they wanted to review them for newsworthy purposes and never intended to give up their claimed right to the unredacted material. *Cf. R. Kelly*, 397 Ill. App. 3d at 249, 336 Ill.Dec. 719, 921 N.E.2d 333 (discussing the media's interest in " 'newsworthy information' " (quoting *In re A Minor*, 127 Ill. 2d 247, 257, 130 Ill.Dec. 225, 537 N.E.2d 292 (1989))). Thus, we do not find forfeiture or invited error.

***13** ¶ 74 The seven documents are

1. Defendant Van Dyke's "Motion to Dismiss the Indictment for Misconduct at Grand Jury," filed February 3, 2017;

2. Defendant Van Dyke's "Memorandum of Law in Support of Motion to Dismiss the Indictment," filed February 3, 2017;

3. "People's Response and Motion to Clarify Defendant's Motion to Dismiss the Indictment and/or Other Relief Pursuant to *Garrity v. New Jersey*," filed February 3, 2017;

4. Defendant Van Dyke's "Motion to Dismiss the Indictment And/Or Other Relief," filed April 20, 2017;

5. Defendant Van Dyke's "Motion to Dismiss the Indictment," filed April 20, 2017;

6. Defendant Van Dyke's "Memorandum of Law in Support of Motion to Dismiss the Indictment," filed April 20, 2017; and

7. "People's Combined Response to Defendant's Motion to Dismiss the Indictment and Motion to Dismiss the Indictment And/Or Other Relief," filed May 11, 2017.

¶ 75 After reviewing the full, unredacted copies of the above listed documents for our *in camera* review, we find that the redactions consisted of (1) in item No. 1, the name of a grand jury witness, questions and testimony before the grand jury, and citations of the appropriate pages; (2) in item No. 2, grand jury questions, discussions and testimony, and the names of grand jury witnesses; (3) in item No. 4, the name of a grand jury witness and his testimony;[10] (4) in item No. 5, the name of a grand jury witness; and (5) in item No. 7, the names of grand jury witnesses, grand jury testimony, statements by the prosecutor before the grand jury, and descriptions of grand jury evidence.

¶ 76 With respect to item No. 6 listed above, the special prosecutor released two redacted documents on September 4, 2019, that were both titled defendant Van Dyke's "Memorandum of Law in Support of Motion to Dismiss the Indictment." One was file-stamped April 20, 2017, and the other was not file-stamped. The file-stamped copy is 10 pages, and the one that is not file-stamped is only 5 pages. The longer version appears to elaborate on the shorter version, and the State listed the longer version as the document that the media appellants sought, rather than the shorter version. However, when the circuit court produced the sealed, unredacted copies for our inspection, it provided us only with the shorter version. This omission did not adversely affect our independent *in camera* review, since the only redaction in the longer document was the name of one Federal Bureau of Investigation (FBI) agent who testified before the grand jury. The shorter version had no redactions at all.

¶ 77 With respect to item No. 3 listed above, the document is three pages long, and the appellate record is missing the second and fourth pages of the redacted version. Thus, we do not know what was redacted on those two pages. However, the only words redacted from the rest of the document is the name of an FBI agent.

[19] **[20]** **[21]** **[22]** **[23]** ¶ 78 When faced with a request for media access, a trial court generally determines, first, whether a presumption of public access applies to the particular type of information sought. *R. Kelly*, 397 Ill. App. 3d at 255, 336 Ill.Dec. 719, 921 N.E.2d 333. This is a purely legal question that is reviewed *de novo*. *R. Kelly*, 397 Ill. App. 3d at 255, 336 Ill.Dec. 719, 921 N.E.2d 333. *De novo* consideration means that we perform the same analysis that a trial judge would perform. *People v. Knight*, 2020 IL App (1st) 170550, ¶ 37, — Ill.Dec. ——, —— N.E.3d ——. If the trial court finds the presumption applies, then it determines whether the presumption is rebutted by other concerns. *R. Kelly*, 397 Ill. App. 3d at 255, 336 Ill.Dec. 719, 921 N.E.2d 333. "In deciding to deny access to certain proceedings and records for a certain length of time, the trial court ha[s] to craft a careful and delicate balance among competing interests." *R. Kelly*, 397 Ill. App. 3d at 256, 336 Ill.Dec. 719, 921 N.E.2d 333. "To this balancing of interests and determining of parameters, we apply an abuse of discretion standard" of review. *R. Kelly*, 397 Ill. App. 3d at 256, 336 Ill.Dec. 719, 921 N.E.2d 333. An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the position adopted by the trial court. *People v. Thompson*, 2020 IL App (1st) 171265, ¶ 84, —— Ill.Dec. ——, —— N.E.3d ——. A presumptive right of public access does not attach to grand jury proceedings. *Press-Enterprise Co.*, 478 U.S. at 9, 106 S.Ct. 2735.

***14** **[24]** ¶ 79 On appeal, appellants argue that the grand jury materials should be released in full, based on the following set of propositions. First, appellants observe that grand jury materials are routinely used in trials to impeach witnesses.[11] Second, they argue, without citation of a statute or a case, that grand jury transcripts used at trial become "public." Third, arguing by analogy to their unsupported second proposition, appellants claim that this court should apply "[t]he same principle" to grand jury transcripts used to support or oppose pretrial motions. Without supporting statutory or case law, we do not find their argument persuasive.

[25] ¶ 80 In addition, the media appellants do not argue that they were prejudiced by the two-month delay between their filing a notice of appeal and the trial court's grant of the relief they requested, namely, the release of the documents. Although even a short denial of access may implicate important first amendment concerns (*R. Kelly*, 397 Ill. App. 3d at 247, 336 Ill.Dec. 719, 921 N.E.2d 333), the media appellants needed to articulate the concerns present during the delay. *R. Kelly*, 397 Ill. App. 3d at 250, 336 Ill.Dec. 719, 921 N.E.2d 333 (observing that a newspaper has an interest in " 'newsworthy information' " (quoting *In re A Minor*, 127 Ill. 2d at 257, 130 Ill.Dec. 225, 537 N.E.2d 292)). During these two months, defendant Van Dyke's trial

was over, and no briefs were filed in his appeal.[12] Prior to that period, the record established that all parties were actively trying to reach an agreement concerning the disputed documents, which was largely successful, and we cannot find error by the trial court in allowing this process to proceed. A decorum order is like a permanent injunction and lasts, as all permanent injunctions do, until it is lifted. However, it is a good idea for a trial judge to include an end date, if it meets the ends of justice.

¶ 81 The media appellants argue that the need to maintain grand jury secrecy was greatly diminished one year after the verdict and cite in support *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 32, 432 Ill.Dec. 638, 129 N.E.3d 1181. However, that case stands for just the opposite. In that case, our supreme court found that a party seeking release of grand jury material must demonstrate a particularized need for the material that outweighs the policies supporting secrecy. *Special Prosecutor*, 2019 IL 122949, ¶ 47, 432 Ill.Dec. 638, 129 N.E.3d 1181. The appellant in that case had argued that disclosure of grand jury witnesses and statements would "serve the public interest in detecting and deterring political and prosecutorial corruption." *Special Prosecutor*, 2019 IL 122949, ¶¶ 48, 39, 432 Ill.Dec. 638, 129 N.E.3d 1181. Our supreme court found "[s]uch generalized statements do not constitute 'particularized need' " and affirmed the denial of the release of seven-year-old grand jury material. *Special Prosecutor*, 2019 IL 122949, ¶¶ 48-49, 432 Ill.Dec. 638, 129 N.E.3d 1181. This case does not help the media appellants.

¶ 82 The media appellants also cite the Seventh's Circuit decision in *Carlson v. United States*, 837 F.3d 753 (7th Cir. 2016), which bears little resemblance to our case. In *Carlson*, a World War II historian was writing a book and sought grand jury materials from almost 75 years ago. *Carlson*, 837 F.3d at 756-57. The Seventh Circuit found that the courts, as part of their limited and inherent supervisory power over the grand jury, had the discretion to release these historical records, and the government conceded that the district judge did not abuse his discretion in doing so. *Carlson*, 837 F.3d at 755-56, 767. In its brief to this court, the media appellants quoted the part of the decision where the court found that the historian had the right "to petition" for access. *Carlson*, 837 F.3d at 759. However, in almost the next line, the court also found that "his petition is not guaranteed to be granted." *Carlson*, 837 F.3d at 759.[13]

***15** ¶ 83 In sum, we are not persuaded by this claim due to a lack of error on the part of the trial court. Historically, documents pertaining to matters before the grand jury are not the type of material that is given to the media because those proceedings are protected by statute and common law. See 725 ILCS 5/112-6 (West 2018) ("Secrecy of proceedings"); *Special Prosecutor*, 2019 IL 122949, ¶ 31, 432 Ill.Dec. 638, 129 N.E.3d 1181 ("The rule of secrecy surrounding grand jury proceedings is a common-law concept recognized as a fundamental component of both federal and state criminal procedural law."); *Press-Enterprise Co.*, 478 U.S. at 8-9, 106 S.Ct. 2735 (the grand jury is the "classic example" of a government proceeding where the right of public access does *not* apply).

¶ 84 III. Validity of the Trial Court's September 2019 Order

[26] ¶ 85 Lastly, the media appellants argue that the trial court's September 2019 order is invalid, because the court lacked jurisdiction in September 2019 to modify its May 2019 order to permit release of the 18 documents.

¶ 86 The media appellants argue that the trial court lacked jurisdiction because (1) the media appellants had filed a notice of appeal and (2) there were no changed circumstances between May and September 2019. With respect to the first argument, we already observed above that the media appellants fail to explain why their notice of appeal would cut off the trial court's jurisdiction with respect to Smith and the State, any more than the filing of defendant Van Dyke's notice would cut off jurisdiction with respect to them. Defendant Van Dyke was also an interested party with respect to the interim decorum order. In *R. Kelly*, when we explained the advantages of treating access orders as interlocutory orders appealable under Rule 307, rather than as final declaratory judgments, we explained that (1) "the criminal defendant, who has an interest in the disclosure issue, is already before the court with counsel" and (2) unlike a declaratory judgment which is final, an interlocutory order can "adapt to the unfolding and possibly shifting needs of a criminal case." *R. Kelly*, 397 Ill. App. 3d at 244-45, 336 Ill.Dec. 719, 921 N.E.2d 333; see also *Zimmerman*, 2018 IL 122261, ¶ 20, 427 Ill.Dec. 851, 120 N.E.3d 918 (Rule 307 is "the vehicle in Illinois for appellate review of orders denying access to criminal records or proceedings"); *Marriage of Kelly*, 2020 IL App (1st) 200130, ¶ 23, —— Ill.Dec. ——, —— N.E.3d —— (where media intervenors failed to appeal within 30 days as Rule 307 required, this court lacked jurisdiction to review

an access order). In essence, appellants are trying to turn the trial court's May 2019 order into a final declaratory judgment between just them on one side and the State on the other—a procedure that we already rejected in the *R. Kelly* case because the appellants before us are simply not the only interested parties.

¶ 87 Thus, we are not persuaded by appellants' argument that their notice of appeal cut off the trial court's jurisdiction to enter the September 2019 order.

[27] ¶ 88 With respect to appellants' second argument concerning changed circumstances, both parties cite *Bundy v. Chicago League of America*, 125 Ill. App. 3d 800, 806, 81 Ill.Dec. 95, 466 N.E.2d 681 (1984), where the appellate court found that a trial court lacked jurisdiction to modify a permanent injunction in the absence of changed circumstances in law or facts.

¶ 89 In *Bundy*, the parties reached an agreement that led to the trial court's entry of an agreed order that included a permanent injunction. *Bundy*, 125 Ill. App. 3d at 802, 805, 81 Ill.Dec. 95, 466 N.E.2d 681. Nine months later, without a request pending from either party, the trial court *sua sponte* dissolved the permanent injunction. *Bundy*, 125 Ill. App. 3d at 801-02, 81 Ill.Dec. 95, 466 N.E.2d 681. One of the parties appealed from the dissolution order within 30 days pursuant to Supreme Court Rule 307. *Bundy*, 125 Ill. App. 3d at 802, 81 Ill.Dec. 95, 466 N.E.2d 681. The appellate court found that the trial court lacked jurisdiction to *sua sponte* dissolve a permanent injunction in an agreed order without changed circumstances. *Bundy*, 125 Ill. App. 3d at 807, 81 Ill.Dec. 95, 466 N.E.2d 681.

***16** ¶ 90 The *Bundy* case bears little resemblance to our case. In the case at bar, the original 2016 order was titled an "interim" order rather than a permanent injunction; the trial court did not act *sua sponte* when it dissolved the interim order in September 2019. By doing so, the trial court provided relief previously requested by appellants and subsequently requested, or at least unopposed, by all parties. As noted above, although formally notified of the continuing proceedings, appellants did not seek a stay.

¶ 91 To the extent that changed circumstances were required to dissolve an "interim" order—and we do not find that they were—those changed circumstances were the fact that prior objections by the city and defendant had evaporated. On May 23, 2019, when the State proposed a way to redact the disputed documents, defendant Van Dyke's attorney had objected to factual assertions made by the State. By contrast, on September 4, 2019, defendant Van Dyke's attorney attended and voiced no objection, and the counsel for the City of Chicago supported the State's motion.

¶ 92 Appellants argue that the State failed to argue changed circumstances before the trial court in September 2019. But why would the State make such an argument when everyone was on notice of the State's proposed order and no one was objecting to its entry?

¶ 93 Thus, we do not find persuasive appellants' claim that the trial court's September 2019 order was invalid.

¶ 94 CONCLUSION

¶ 95 For the foregoing reasons, we find (1) that we lack jurisdiction to consider appellants' first claim concerning their motion to join in another journalist's motion to intervene and to vacate; (2) that, with respect to their second claim, the trial court did not err in delaying release of the disputed documents or in releasing them as redacted; and (3) that the trial court had jurisdiction in September 2019 to modify its prior interim order. Thus, we dismiss the first claim and affirm the dismissal of the second.

¶ 96 Affirmed in part and dismissed in part.

Justices Hall and Lavin concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 191384, 2020 WL 7074523

Footnotes

1 The order explained: "In this case, two Justices of this Court have recused themselves and the remaining members of the Court are divided so that it is not possible to secure the constitutionally required concurrence of four judges for a decision (Ill. Const. 1970, art. IV, sec. 3)." *Chicago Public Media, Inc. v. Hon. Vincent M. Gaughan*, No. 123880 (Ill. Sept. 12, 2018).

2 On September 29, 2020, defendant Van Dyke moved to dismiss his appeal, which this court granted on October 9, 2020. *People v. Van Dyke*, No. 1-19-0398 (Oct. 9, 2020).

3 Smith's motion did not identify a journal or an employer. According to his *alma mater*, Columbia College, he was a freelance journalist at the time. Jeremy Borden, *How a Little Known, Uber-driving Freelancer Brought the Lawsuit that Forced Chicago to Release a Police Shooting Video*, Colum. Journalism Rev. (Nov. 25, 2015), https://www.cjr.org/united_states_project/brandon smith_chicago_police_laquan_mcdonald.php [https://perma.cc/F5RU-3QZZ].

4 During the hearing, the parties referred to Smith's motion as "Topic's" motion. Matthew Topic was Smith's attorney.

5 In their appellate brief filed January 8, 2020, the media appellants stated specifically that they were appealing "from the May 23, 2019 Final Order denying Intervenors' Motion to Reconsider."

6 In addition, the denial of the media appellants' motion to reconsider was entered *nunc pro tunc* as of April 10, 2019. Thus, even if the media appellants' ability to appeal this issue was alive and well on May 23, 2019, it vanished when the trial court entered the denial, without any objection, *nunc pro tunc* back to April 10, 2019.

7 Appellants concede in their appellate brief that the interim decorum order in the instant case "substantially tracks the order in" the *R. Kelly* case.

8 The two cases cited by the media appellants in their reply brief do not address the issues raised by two notices of appeal. In *Cain v. Sukkar*, 167 Ill. App. 3d 941, 945, 118 Ill.Dec. 599, 521 N.E.2d 1292 (1988), no notice of appeal had been filed prior to the motion at issue. In *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173-74, 351 Ill.Dec. 308, 950 N.E.2d 1136 (2011), our supreme court found that the circuit court retains jurisdiction to consider certain matters after the filing of a notice of appeal, such as a stay of judgment, a petition of fees or costs, or the award of judgment interest. Neither case addressed issues relating to two notices of appeal, injunctions or interlocutory orders, or unrelated parties.

9 Yet another advantage of handling media access orders pursuant to Rule 307 is it removes the fear of reinvesting the trial court with jurisdiction. In their appellate brief, the media appellants observe that they did not appear in subsequent proceedings after filing a notice of appeal from the "final" decision, for fear of reinvesting the trial court with jurisdiction and jeopardizing their appeal. If each media access order is considered as an interlocutory order, that fear is eliminated, allowing both the parties and the courts greater flexibility.

10 Not all of his testimony was redacted from the document.

11 In support of this proposition, the media appellants cite a case, *People v. Robinson*, 368 Ill. App. 3d 963, 980, 307 Ill.Dec. 232, 859 N.E.2d 232 (2006), in which the appellate court quoted a question and answer from a witness's grand jury testimony.

12 No briefs were filed in the appeal of defendant Van Dyke's conviction, and the appeal was ultimately dismissed upon his motion to dismiss. *People v. Van Dyke*, No. 1-19-0398 (Oct. 9, 2020).

13 The media appellants also cite *Lucas v. Turner*, 725 F.2d 1095, 1109 (7th Cir. 1984), which denied the release of grand jury materials, on the ground that plaintiffs failed to "demonstrate[ ] that they have conducted prompt, thorough and exhaustive discovery before seeking the materials protected by grand jury secrecy."

End of Document

2020 IL App (1st) 190697

Appellate Court of Illinois, First District,
FIRST DIVISION.

BETTER GOVERNMENT ASSOCIATION,
Plaintiff-Appellee and Cross-Appellant,
v.
The METROPOLITAN PIER AND EXPOSITION AUTHORITY and Navy Pier, Inc., Defendants-Appellants and Cross-Appellees.

No. 1-19-0697
|
November 30, 2020

Synopsis

Background: Non-profit sued municipal corporation and private corporation, which was created by municipal corporation, and operated pier under state Freedom of Information Act (FOIA) seeking records pertaining to the operation of pier. The Circuit Court, Cook County, Thomas R. Allen, J., granted non-profit's motion for summary judgment with respect to the municipal corporation, but after a bench trial, entered judgment in favor of private corporation. Parties appealed.

Holdings: The Appellate Court, Walker, J., held that:

[1] private corporation performed a "governmental function" for purposes of state FOIA, as was required to compel municipal corporation to turn over documents related to pier under FOIA;

[2] documents requested by non-profit were directly related to governmental function of private corporation for purposes of the state FOIA, as was required to compel municipal corporation to turn over documents related to pier under FOIA;

[3] private corporation had an independent legal identity from municipal corporation, and thus factor of independent legal identity weighed against treating private corporation as a subsidiary body of municipal corporation subject disclosure requirements of state FOIA;

[4] restrictions in lease of pier regarding how private corporation could operate pier did not amount to governmental control, and thus factor of governmental control weighed against treating private corporation as a subsidiary body of municipal corporation subject to disclosure requirements of state FOIA;

[5] public funding received by private corporation from municipal corporation did not count as grounds for treating private corporation as a subsidiary body of municipal corporation subject to disclosure requirements of state FOIA; but

[6] private corporation performed governmental functions on behalf of municipal corporation, and thus factor of nature of functions performed by private corporation weighed in favor of treating private corporation as a subsidiary of municipal corporation subject to disclosure requirements of state FOIA.

Affirmed.

West Headnotes (7)

[1] Records ⇐ Parties performing government functions in general

Private corporation created by municipal corporation to operate pier performed a "governmental function" for purposes of state Freedom of Information Act (FOIA), as was required to compel municipal corporation to turn over documents related to pier under FOIA; general assembly expressly imposed duty on municipal corporation to carry out or otherwise provide for the recreational, cultural, commercial, or residential development of pier, and municipal corporation delegated to private corporation its responsibility for development of pier. 5 Ill. Comp. Stat. Ann. 140/7(2); 70 Ill. Comp. Stat. Ann. 210/4(b).

[2] **Records** ⇐ Parties performing government functions in general

Documents requested by non-profit were directly related to governmental function of private corporation, which was created by municipal corporation to manage and operate pier, for purposes of the state Freedom of Information Act (FOIA), as was required to compel municipal corporation to turn over documents related to pier under FOIA, where budgets, audit reports, and the other documents requested fell under the general presumption of accessibility for public records, as all the documents related to private corporation's operations, and private corporation established in its bylaws that all its operations fulfilled functions assigned to municipal corporation by statute. 5 Ill. Comp. Stat. Ann. 140/7(2); 70 Ill. Comp. Stat. Ann. 210/4(b).

[3] **Records** ⇐ Private Persons and Entities

Private corporation, which was created by municipal corporation and operated pier, had an independent legal identity from municipal corporation, and thus factor of independent legal identity weighed against treating private corporation as a subsidiary body of municipal corporation subject disclosure requirements of state Freedom of Information Act (FOIA), where municipal corporation put "training wheels on the bike" to get private corporation started, and private corporation had a separate legal identity from municipal corporation as a formally independent corporation. 5 Ill. Comp. Stat. Ann. 140/7(2); 70 Ill. Comp. Stat. Ann. 210/4(b).

[4] **Records** ⇐ Parties performing government functions in general

Restrictions in lease of pier regarding how private corporation, which was created by municipal corporation, could operate pier did not amount to governmental control, and thus factor of governmental control weighed against treating private corporation as a subsidiary body of municipal corporation subject to disclosure requirements of state Freedom of Information Act (FOIA), where municipal corporation exercised only general supervision over private corporation under framework plan. 5 Ill. Comp. Stat. Ann. 140/7(2); 70 Ill. Comp. Stat. Ann. 210/4(b).

[5] **Evidence** ⇐ Admissions of law

A party is not bound by admissions regarding conclusions of law because the courts determine the legal effect of the facts adduced.

[6] **Records** ⇐ Parties performing government functions in general

Public funding received by private corporation, which was created by municipal corporation to manage pier, from municipal corporation did not count as grounds for treating private corporation as a subsidiary body of municipal corporation subject to disclosure requirements of state Freedom of Information Act (FOIA), where most of private corporation's funds for daily operations came from its revenues from operations and charitable donations it raised without municipal corporation's assistance, and $115 million given by municipal corporation to private corporation served to improve the value of municipal corporation's property, and not to fund private corporation's operations. 5 Ill. Comp. Stat. Ann. 140/7(2); 70 Ill. Comp. Stat. Ann. 210/4(b).

[7] **Records** ⇐ Parties performing government functions in general

Private corporation, which was created by municipal corporation to operate and manage pier, performed governmental functions on behalf of municipal corporation, and thus factor of nature of functions performed by private corporation weighed in favor of treating private corporation as a subsidiary of municipal corporation subject to disclosure requirements of state Freedom of Information Act (FOIA). 5 Ill. Comp. Stat. Ann. 140/7(2); 70 Ill. Comp. Stat. Ann. 210/4(b).

Appeal from the Circuit Court Of Cook County. No. 14 CH 10364, The Honorable Thomas R. Allen, Judge Presiding.

Attorneys and Law Firms

Michele Odorizzi and Joseph M. Callaghan, of Mayer Brown LLP, of Chicago, for appellant Metropolitan Pier & Exposition Authority. Daniel P. Blondin, of Navy Pier, Inc., William R. Pokorny, of Franczek P.C., and Vincent D. Pinelli and Martin T. Burns, of Burke Burns & Pinelli, Ltd., all of Chicago, for other appellant.

Matthew Topic, Joshua Burday, and Merrick Wayne, of Loevy & Loevy, of Chicago, for appellee.

OPINION

PRESIDING JUSTICE WALKER delivered the judgment of the court, with opinion.

***1** ¶ 1 In 2014, the Better Government Association (BGA) sued the Metropolitan Pier and Exposition Authority (MPEA) and Navy Pier, Inc. (NPI) under the Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2014)), seeking records pertaining to the operation of Navy Pier. The trial court granted summary judgment in favor of BGA on its claim against MPEA, but after a bench trial, the court entered judgment in favor of NPI on BGA's claims directed against NPI. MPEA and NPI appeal from the summary judgment entered on the count against MPEA, and BGA cross-appeals from the judgment entered on the counts naming NPI as defendant.

¶ 2 We find that NPI performs a governmental function on the behalf of MPEA and that the documents requested relate directly to that governmental function. Therefore, we affirm the summary judgment entered against MPEA. We also affirm the entry of judgment against BGA on the other counts because the court's finding that NPI did not operate as a subsidiary body of MPEA, within the meaning of the FOIA, is not contrary to the manifest weight of the evidence.

¶ 3 BACKGROUND

¶ 4 In July 1989, the Illinois General Assembly created MPEA to promote and operate expositions and conventions in Chicago and "[t]o carry out or otherwise provide for the recreational, cultural, commercial, or residential development of Navy Pier." 70 ILCS 210/4(b) (West 2014). In May 2010, the General Assembly directed MPEA's trustee, James Reilly, to report to the General Assembly his findings on the issue of whether Navy Pier should remain within the control of the MPEA or serve as an entity independent from the MPEA. Reilly recommended that MPEA should transfer operation of Navy Pier to a private corporation "governed by a civically oriented not-for-profit board."

¶ 5 Some employees and directors of MPEA, along with others, incorporated NPI in 2011 "to support and sustain the operation of Navy Pier, a Chicago Landmark, so as to facilitate the ongoing recreational, cultural and other development of Navy Pier for the benefit of the general public, and all activities incidental or related thereto, including, in particular, maintaining and operating the grounds, buildings, and facilities of Navy Pier." NPI's bylaws further elaborate its purpose:

> "The Corporation is organized and shall be operated exclusively for civic and charitable purposes, including (a) supporting, sustaining, investing its funds in and for, and lessening the burdens of government related to the operation of Navy Pier, so as to facilitate the ongoing recreational, educational, cultural and other development of Navy Pier for the benefit of the general public, and all activities incidental or related thereto; (b) maintaining, repairing, operating, designing, financing, subleasing, facilities, developing, redeveloping, and/or demolishing the grounds, buildings, facilities, and/or improvements of, and located on, Navy Pier and Gateway Park; and (c) supporting and benefiting the [MPEA] through the development and operation of Navy Pier."

***2** ¶ 6 MPEA leased Navy Pier to NPI for 25 years at $1 per year. The lease required NPI to "offer to the general public free admission to the public portions" of Navy Pier and to operate in accord with a "Framework Plan" that MPEA and NPI would develop together to further the objective of making Navy Pier "a world-class public place that celebrate[s] and showcases the vitality of Chicago, and provides for the enjoyment of Chicago-area residents and visitors, by creating an eclectic mix of public, cultural, recreational, retail, dining, entertainment and other compatible uses attracting a broad-range of visitors, and managed within a business framework that provides for the long-term financial sustainability of Navy Pier."

¶ 7 MPEA granted NPI $220,000 and loaned it $5 million for start-up expenses, and it gave NPI $115 million to use for improvements to the property. MPEA also gave NPI other assets including a number of vehicles.

¶ 8 In 2014, BGA, invoking the FOIA, requested from MPEA and NPI various records relating to the operation of Navy Pier. MPEA supplied some of the documents and said it did not have others in its possession. NPI denied the request claiming that it is not subject to the FOIA.

¶ 9 On June 14, 2014, BGA filed a complaint accusing MPEA and NPI of violating the FOIA. In counts I and III, BGA sought a judgment declaring that NPI served as a public body obliged to respond directly to FOIA requests. In count II, BGA charged MPEA with violating the FOIA on the alternative theory that NPI performed a governmental function on the MPEA's behalf and therefore MPEA had a duty to produce public records in NPI's possession that relate directly to that governmental function.

¶ 10 BGA and MPEA filed motions for summary judgment on count II. In response to MPEA's motion for summary judgment, BGA presented reports that led to the creation of NPI, NPI's tax returns claiming exemption because of its public purpose, hundreds of e-mails between MPEA personnel and NPI personnel, and a letter from the Attorney General concerning BGA's request for NPI documents. The Attorney General said:

> "Navy Pier is a publicly-owned property. MPEA has contracted with NPI to operate Navy Pier for the benefit of the public. It is clear that if Navy Pier was currently being operated by MPEA or by the trustee, all records relating to its operation would 'pertain to public business,' for purposes of FOIA, and would be subject to disclosure. The fact that a non-profit entity created for that purpose operates Navy Pier pursuant to contract with MPEA does not change the nature of the operation. Accordingly, the records prepared by or used by NPI in connection with the operation of Navy Pier unequivocally pertain to public business of MPEA, a public entity.
>
> * * *
>
> The operation of Navy Pier—including its beer garden and other facilities—is clearly for the benefit of the public as a tourist attraction, and is therefore a 'governmental function' of MPEA. Thus, the requested records directly relate to that governmental function, which NPI has contracted to perform. Accordingly, we conclude that records in the possession of NPI which are responsive [to] FOIA request[s] must be produced by MPEA under section 7(2) of FOIA."

¶ 11 The trial court held that MPEA hired NPI to perform a governmental function and therefore MPEA had a duty to produce all documents related to NPI's performance of that function. The court then considered the particular documents BGA requested. BGA alleged that MPEA violated the FOIA by refusing BGA's request for:

> "1. A list of NPI's employees, titles and salaries since the date NPI was created * * *. 2. A list of all contracts to which NPI is a party, showing the name of the counterparty, the amount of the contract, the date of the contract, and the goods or services purchased * * *. 3. A list of all leases at Navy Pier showing the owners of each business, the date the lease began and the date the lease ended or will end, and the revenue generated * * *. 4. NPI's annual budgets and financial statements since NPI was created. 5. The results of all audits of NPI. 6. Minutes of all NPI board meetings since NPI was created. 7. All employment contracts governing the employment of any NPI employees. 8. All settlement agreements and employment termination or severance agreements involving NPI. 9. NPI's articles of incorporation and by-laws, including all amendments. 10. All emails sent or received * * * by NPI's president/CEO, chief operating officer, board chair, board vice-chair, and/or director of external communications on March 21 or March 22, 2014. 11. All expense reimbursement requests and statements for any credit card, debit card, procurement cards, or other payment mechanisms issued in whole or in part to NPI or MPEA, for NPI's president/CEO dated January 1, 2014 to present. 12. All conflict-of-interest disclosures by any NPI employees or directors. 13. All NPI policies and procedures. 14. All documents related to the $34,490 transaction involving Patrick Gardner reported on Schedule L of NPI's 2011 IRS Form 990."

*3 ¶ 12 The trial court held that all the requested documents related to NPI's performance of a governmental function. The court granted summary judgment in favor of BGA for the relief requested in count II of the complaint.

¶ 13 The court then heard evidence on BGA's assertion that NPI counted as a public body. The FOIA defines " '[p]ublic bod[ies]' " as

> "all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code." **5 ILCS 140**/2(a) (West 2014).

¶ 14 The parties agreed that NPI met the definition of "public body" only if it qualified as a "subsidiary bod[y]" of MPEA.

¶ 15 Marilynn Gardner, president of NPI, testified that NPI's board has more than 30 members, and only 3 of those members work for MPEA. After NPI's board approves its budget, the board presents the budget to MPEA. Some items in the budget might require MPEA approval, but MPEA did not generally retain veto power over NPI's decisions. NPI mostly funds its operations from its revenues. Gardner detailed some of the capital improvements NPI made with the $115 million it obtained from MPEA. NPI repaid in full the $5 million MPEA loaned to NPI.

¶ 16 The trial court entered a judgment in favor of NPI on counts I and III of the complaint, holding that NPI did not act as a subsidiary body of MPEA. MPEA and NPI filed an appeal from the summary judgment entered on count II, and BGA filed a cross-appeal from the judgments entered on counts I and III.

¶ 17 ANALYSIS

¶ 18 We address the appeal of MPEA and NPI first. We review *de novo* the trial court's grant of summary judgment. *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 234, 298 Ill.Dec. 739, 840 N.E.2d 1174 (2005). MPEA and NPI contend that NPI does not perform a governmental function within the meaning of the FOIA, and the documents requested do not directly relate to any governmental function NPI might perform.

¶ 19 A. Governmental Function

¶ 20 Section 7(2) of the FOIA 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." **5 ILCS 140**/7(2) (West 2014).

¶ 21 Our supreme court, interpreting the FOIA, defined "governmental function" as "a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public." (Internal quotation marks omitted.) *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 63, 417 Ill.Dec. 728, 89 N.E.3d 376 (*IHSA*).

[1] ¶ 22 The General Assembly expressly imposed on MPEA the duty "[t]o carry out or otherwise provide for the recreational, cultural, commercial, or residential development of Navy Pier." 70 ILCS 210/4(b) (West2014). MPEA delegated to NPI its responsibility for development of Navy Pier. NPI, in its bylaws, asserts that it

> ***4** "shall be operated exclusively for civic and charitable purposes, including (a) supporting, sustaining, investing its funds in and for, and lessening the burdens of government related to the operation of Navy Pier, so as to facilitate the ongoing recreational, educational, cultural and other development of Navy Pier for the benefit of the general public, and all activities incidental or related thereto; (b) maintaining, repairing, operating, designing, financing, subleasing, facilities, developing, redeveloping, and/or demolishing the grounds, buildings, facilities, and/or improvements of, and located on, Navy Pier and Gateway Park; and (c) supporting and benefiting the [MPEA] through the development and operation of Navy Pier."

¶ 23 Insofar as NPI fulfills the duties the General Assembly assigned to MPEA, by "carry[ing] out or otherwise provid[ing] for the recreational, cultural, commercial or residential development of Navy Pier" (70 ILCS 210/5(c) (West 2014)), NPI performs a governmental function. See *IHSA*, 2017 IL 121124, ¶ 63, 417 Ill.Dec. 728, 89 N.E.3d 376.

¶ 24 MPEA and NPI argue—at astounding length—that our supreme court did not intend to define "governmental

function" in *IHSA* where the court found, " 'governmental function' is defined as 'a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.' " *IHSA*, 2017 IL 121124, ¶ 63, 417 Ill.Dec. 728, 89 N.E.3d 376 (quoting Black's Law Dictionary (10th ed. 2014)). If MPEA and NPI mean to argue on policy grounds that courts should not so define "governmental function," they should present the argument to the General Assembly. We apply the definition our supreme court set out in *IHSA*. Because NPI fulfills the duties the General Assembly assigned by statute to MPEA, NPI performs a governmental function.

¶ 25 B. Directly Related

[2] ¶ 26 MPEA and NPI contend that the documents requested do not directly relate to NPI's governmental function. For documents "in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body," section 7(2) of the FOIA limits the FOIA's reach to documents "directly relate[d] to the governmental function [which are] not otherwise exempt under this Act." **5 ILCS 140**/7(2) (West 2014). The FOIA does not explain what documents directly relate to a governmental function. *Rushton v. Department of Corrections*, 2019 IL 124552, ¶ 28, —— N.E.3d ——.

> "[T]he meaning of 'directly relates' must be considered in light of FOIA's policy * * *, and also the specific policy and purpose behind section 7(2). * * * [S]ection 7(2) was the legislature's response to the privatization of government responsibilities and its impact on the right of public information access and transparency and * * * this section ensures that governmental entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibility to a private entity." (Internal quotation marks omitted.) *Rushton*, 2019 IL 124552, ¶ 28, —— N.E.3d —— .

¶ 27 If MPEA had itself entered into the employment contracts, vendor contracts, and leases BGA seeks, MPEA would have had a duty to disclose them. See, *e.g.*, *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 405-06, 331 Ill.Dec. 12, 910 N.E.2d 85 (2009) (employment contracts); *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 204, 228 Ill.Dec. 447, 689 N.E.2d 319 (1997) (expenditure of public funds); *Mid-America Television Co. v. Peoria Housing Authority*, 93 Ill. App. 3d 314, 316-17, 48 Ill.Dec. 808, 417 N.E.2d 210 (1981) (leases). Budgets, audit reports, and the other documents requested apparently fall under the general presumption of accessibility for public records, as all the documents relate to NPI operations. NPI established in its bylaws that all its operations fulfill functions assigned to MPEA by statute. See *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 534-35, 139 Ill.Dec. 554, 548 N.E.2d 1110 (1989). The Attorney General persuasively argued that MPEA could not use the arrangement with NPI to avoid disclosure of the documents BGA requested.

***5** ¶ 28 Finally, MPEA and NPI assert that the trial court erred by ordering MPEA to produce all the requested documents "Without Consideration Of Whether The Documents Were Otherwise Exempt From FOIA." Both in the trial court and on appeal, MPEA and NPI have not identified any exemptions applicable to the requested documents. MPEA, as a public body, bears the burden of proving that records requested fall within an exemption. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 198, 283 Ill.Dec. 506, 808 N.E.2d 56 (2004). MPEA has not attempted to meet that burden. We affirm the trial court's order granting summary judgment in favor of BGA on count II of the complaint.

¶ 29 C. Subsidiary Body

¶ 30 BGA contends in its cross-appeal that the trial court erred when it entered judgment in favor of NPI on counts I and III of the complaint, which accused NPI itself of violating the FOIA and which asked the court for a judgment declaring that NPI served as a public body. We will not disturb the trial court's findings of fact unless they are against the manifest weight of the evidence. *Fox v. Heimann*, 375 Ill. App. 3d 35, 46, 313 Ill.Dec. 366, 872 N.E.2d 126 (2007).

¶ 31 The FOIA statute does not define "subsidiary body." Our supreme court in *IHSA* held that, to determine whether the FOIA applied to an entity as a subsidiary body, the court should consider four factors: "(1) the extent to which the entity has a legal existence independent of government resolution, (2) the degree of government control exerted over the entity, (3) the extent to which the entity is publicly funded, and (4) the nature of the functions performed by the entity." *IHSA*, 2017 IL 121124, ¶ 26, 417 Ill.Dec. 728, 89 N.E.3d 376. The *IHSA* court added, "no single factor is determinative or conclusive, but as the definition indicates,

the key distinguishing factors are government creation and control." *IHSA*, 2017 IL 121124, ¶ 26, 417 Ill.Dec. 728, 89 N.E.3d 376.

¶ 32 1. Independent Legal Identity

[3] ¶ 33 The trial court found that Reilly's recommendation to the legislature led to the creation of NPI as a spinoff from MPEA. The trial court said MPEA put "training wheels on the bike" to get NPI started. The court concluded that NPI had a separate legal identity from MPEA as a formally independent corporation, divorced from MPEA in accord with Reilly's recommendation. The trial court's finding that NPI has an independent legal identity was not against the manifest weight of the evidence.

¶ 34 2. Control

[4] ¶ 35 With respect to the second factor, BGA argues that the restrictions in the lease regarding how NPI can operate Navy Pier amount to governmental control. The testimony of Gardner and the documentary evidence show that MPEA exercised only general supervision under the framework plan. "Such general supervision does not transform the supervised company into a subsidiary of the government." *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism & Drug Dependence*, 64 Ill. App. 3d 94, 97, 21 Ill.Dec. 16, 380 N.E.2d 1192 (1978); see *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887, 194 Ill.Dec. 814, 628 N.E.2d 311 (1993).

¶ 36 We find useful guidance in *O'Toole v. Chicago Zoological Society*, 2015 IL 118254, 396 Ill.Dec. 120, 39 N.E.3d 946. The Chicago Zoological Society (Society) was a private nonprofit corporation that controlled the operation of the Brookfield Zoo, a publicly owned property, just as NPI controls daily operations of Navy Pier. NPI, like the Society, purchased its own insurance and made its own employment decisions. The *O'Toole* court said, "The Society's private, nonprofit corporate structure effectively insulates its officers from [the Forest Preserve District of Cook County (District)] control over management decisions. The officers, who handle the zoo's day-to-day operations, owe their positions to the trustees and, indirectly, to the governing members. Among these latter two groups the District enjoys only nominal representation." (Internal quotation marks omitted.) *O'Toole*, 2015 IL 118254, ¶ 28, 396 Ill.Dec. 120, 39 N.E.3d 946. The court concluded that the District, a unit of local government, did not maintain operational control over the Society, and therefore the Society did not count as a public entity. *O'Toole*, 2015 IL 118254, ¶ 30, 396 Ill.Dec. 120, 39 N.E.3d 946. Following the reasoning of *O'Toole*, we find that MPEA does not maintain operational control of NPI.

*6 [5] ¶ 37 BGA argues that NPI's assertions of tort immunity in other lawsuits count as admissions of government control. However, " '[a] party is not bound by admissions regarding conclusions of law because the courts determine the legal effect of the facts adduced.' " *IHSA*, 2017 IL 121124, ¶ 47, 417 Ill.Dec. 728, 89 N.E.3d 376 (quoting *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 475, 345 Ill.Dec. 644, 939 N.E.2d 487 (2010)). Courts conclude as a matter of law that tort immunity applies or does not apply. See *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 412, 164 Ill.Dec. 622, 583 N.E.2d 538 (1991). The assertion of tort immunity does not amount to an admission of fact. BGA presented no evidence that NPI ever asserted that MPEA controlled its operations. The trial court's finding that MPEA does not control NPI accords with the manifest weight of the evidence.

¶ 38 3. Public Funding

[6] ¶ 39 MPEA gave NPI $220,000 in seed money to cover start-up costs. MPEA loaned NPI $5 million at 0% interest, leased Navy Pier to NPI for $1 per year, and gave NPI property that included vehicles, worth about $2.5 million. MPEA also gave NPI $115 million for capital improvements at Navy Pier. The trial court held that public funding did not count as a factor in favor of finding that NPI operated as a subsidiary body of MPEA.

¶ 40 Apart from the funding for capital improvements, MPEA's contributions did not form a large part of NPI's funding. Most of NPI's funds for daily operations came from its revenues from operations and charitable donations it raised without MPEA's assistance. BGA emphasizes the $115 million MPEA gave NPI. We find this case similar to *Hopf*, in which the City of Evanston gave Topcorp funds as part of a plan for Topcorp to develop real estate in Evanston. The *Hopf* court noted that "the majority of the funds that the City has expended were not used to operate [the properties], but instead were used to make infrastructure improvements to the area where the research park is located." *Hopf*, 256 Ill. App. 3d at 896-897, 194 Ill.Dec. 814, 628 N.E.2d 311. The *Hopf* court found that the public funding did not count

as grounds for treating the private corporation as a subsidiary body. Likewise, where the $115 million served to improve the value of MPEA's property, and not to fund NPI's operations, we do not construe the contribution as public funding of NPI. The trial court's finding concerning the public funding factor is not against the manifest weight of the evidence.

¶ 41 4. Nature of the Functions Performed

[7] ¶ 42 The trial court found that NPI performs a governmental function on the MPEA's behalf and that the final factor weighed in favor of finding that NPI acted as a subsidiary body of MPEA. However, the court held that this factor did not outweigh the other factors, which all presented grounds for finding that NPI did not operate as a subsidiary of MPEA. We hold that the manifest weight of the evidence sufficiently supports the trial court's finding that NPI is not a subsidiary body of MPEA within the meaning of the FOIA.

¶ 43 CONCLUSION

¶ 44 NPI performs a governmental function on behalf of the MPEA, and the records BGA requested directly relate to NPI's performance of that governmental function. Accordingly, we affirm the trial court's order granting BGA's motion for summary judgment on count II of the complaint. Because NPI is not a subsidiary body of the MPEA, we affirm the trial court's judgment in favor of NPI on counts I and III of the complaint.

¶ 45 Affirmed.

Justices Hyman and Coghlan concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 190697, 2020 WL 7022750

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2020 IL App (5th) 190016-U

Appellate Court of Illinois, Fifth District.

Scott D. PEERY, Plaintiff-Appellant and Cross-Appellee,

v.

MADISON COUNTY STATE'S ATTORNEY'S OFFICE, Defendant-Appellee and Cross-Appellant.

NO. 5-19-0016

|

11/25/2020

Appeal from the Circuit Court of Madison County. No. 16-CH-684, Honorable Clarence W. Harrison II, Judge, presiding.

ORDER

JUSTICE OVERSTREET delivered the judgment of the court.

***1** ¶ 1 *Held*: Because the evidence revealed no willful or intentional failure by the public body to comply with the Illinois Freedom of Information Act, the court improperly imposed a civil penalty against the public body.

¶ 2 The plaintiff, Scott D. Peery, requested documents from the defendant, the Madison County State's Attorney's Office, pursuant to the Illinois Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)) on four occasions between March 2016 and September 2016. In response, the defendant granted the requests in part, denied the requests in part, and provided redacted portions of documents. The plaintiff thereafter filed suit against the defendant, requesting injunctive and declaratory relief regarding the four requests. Following an evidentiary hearing, the circuit court entered judgment, finding all required documents had been produced to the plaintiff, but awarding the plaintiff civil penalties of $2500 and court costs of $227 on the basis of his March 4, 2016, request for documents. Both the plaintiff and the defendant appeal the circuit court's judgment.

¶ 3 On appeal, the plaintiff contends that he is entitled to relief from the circuit court's decision because the circuit court misapplied the law regarding the FOIA, failed to require a proper index of redacted and withheld documents, failed to require production of documents responsive to his requests and not found to be exempt, and issued a fine not supported by statute. The defendant cross-appeals, arguing that the circuit court erred in awarding the plaintiff civil penalties when the evidence did not support a finding of a willful, intentional, or bad faith violation of the FOIA. For the following reasons, we hereby affirm in part and reverse in part the circuit court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. Plaintiff's FOIA Requests

¶ 6 On March 4, 2016, the plaintiff submitted a FOIA request to the defendant seeking "all internal and external communications of the [defendant] in the matter of People v. Scott Peery in both 14[-]TR[-]200094 and 15[-]CM[-]1539[,] [including] all written and verbal communications conducted at government offices or on government equipment *** from 9-25-14 to present day." In People v. Peery, case number 14-TR-200094, the defendant, on June 12, 2014, entered a plea of no contest to the ticketed charge of failure to reduce speed, which resulted from his striking and killing a pedestrian with his pickup truck in September 2013. *People v. Peery*, 2019 IL App (5th) 160255-U, ¶ 2. However, on June 30, 2014, by agreement of the parties, the defendant's conviction was vacated, the failure-to-reduce-speed charge was amended to a charge of reckless conduct not involving a motor vehicle, and the defendant entered a plea of *nolo contendere* to the amended charge. *Id.* ¶¶ 5-6.[1]

***2** ¶ 7 Pursuant to a July 19, 2016, letter to the Public Access Counselor (the PAC) of the Office of the Attorney General of Illinois, the defendant asserted that after the plaintiff had pled guilty to the reckless conduct charge in 2014, the victim's sisters learned of the modification and prompted the defendant's First Assistant to send a letter to the Secretary of State notifying it of the factual background

behind the defendant's conviction, and the Secretary of State exercised its discretion and suspended or revoked the plaintiff's driver's license. In the July 19, 2016, letter to the PAC, the defendant asserted that the plaintiff thereafter began a pattern of harassment of the defendant, including numerous office visits, persistent harassing telephone calls, and an uninvited visit to the home of the First Assistant, all of which resulted in a 2015 charge of telephone harassment against the plaintiff in case number 2015-CM-1539, for which the plaintiff also sought documents pursuant to his March 4, 2016, request.

¶ 8 On March 17, 2016, after invoking the statutory provision for an extension to respond to the request, the defendant provided 50 documents free of charge, requested a fee for an additional 70 pages of responsive documents, and denied the plaintiff's request in part. The defendant asserted that many of the requested documents were exempt from inspection and copying. Specifically, the defendant asserted the following exemptions: an exemption pursuant to section 7(1)(a) of the FOIA (**5 ILCS 140**/7(1)(a) (West 2016)), involving information prohibited from disclosure by federal or state rules or regulations, on the basis that the prosecutor's files are privileged; an exemption pursuant to section 7(1)(b) of the FOIA (*id.* § 7(1)(b)), involving private information redacted from the records provided; an exemption pursuant to section 7(1)(c) of the FOIA (*id.* § 7(1)(c)), involving personal information contained within public records, on the basis that "all records of communication between [the defendant] and the family of *** the woman that [the plaintiff] killed, in cause 14[-]TR[-]200094 [were exempt because] their privacy interests outweigh[ed] [the plaintiff's] interest *** in viewing these communications"; and an exemption pursuant to section 7(1)(n) of the FOIA (*id.* § 7(1)(n)) on the basis that any communications between the defendant and its staff discussing legal strategy or the merits of cases were exempt from inspection and copying. The defendant informed the plaintiff of his right to appeal the decision to the PAC or to seek judicial review.

¶ 9 Accordingly, on May 10, 2016, the plaintiff submitted a request for the PAC to review his March 4, 2016, request. The plaintiff disagreed with the defendant's 7(1)(c) exemption involving an invasion of privacy. The plaintiff argued that any communication with the defendant with regard to the plaintiff's driver's license was not an invasion of privacy for the victim's family members. The plaintiff also disagreed with the defendant's assertion of an exemption pursuant to section 7(1)(n), involving communications between a public body and an attorney representing the public body due to attorney-client privilege and attorney work product. The plaintiff asserted that the defendant's First Assistant included false information in letters to the Secretary of State. The plaintiff asserted that "[a]ny communication internal or external to this should not have occurred and cannot be shielded by attorney client or attorney work product."

¶ 10 On May 24, 2016, the PAC notified the defendant that further action on the plaintiff's request was warranted. The PAC requested the defendant to furnish copies of the withheld records for confidential review, as well as a detailed explanation of the factual and legal bases for the asserted section 7 exemptions.

¶ 11 On July 6, 2016, the defendant, via John McGuire, sent a letter to the plaintiff stating that some of the documents had been omitted because they were no longer in the defendant's possession. The defendant explained that in June 2015, a special state's attorney was appointed in the plaintiff's traffic case, and thus, the defendant had sent the file to the special state's attorney. The defendant asserted that an August 2014, letter, sent to the Secretary of State by the defendant's First Assistant, along with supporting documents, were in that file.

***3** ¶ 12 In his response, the plaintiff clarified that he sought "all internal and external communications of the [defendant] in the matter of People v. Scott Peery in both TR[-]14200094 and 15[-]CM[-]1539 *** to include all written and verbal communications conducted at government offices or on government equipment *** from 9-25-13 to present day." The plaintiff asserted that in the 120 pages that the defendant had provided him, a copy of the August 2014 letter from the defendant's First Assistant had been included without the supporting documentation.

¶ 13 In the previously referenced July 19, 2016, letter to the PAC, the defendant explained that after the plaintiff was charged with telephone harassment of the defendant in 2015, the defendant had filed a motion seeking the appointment of a special state's attorney in both 14-TR-200094 and 15-CM-1539, and both case files were sent to the Illinois State's Attorneys Appellate Prosecutor's Office. The defendant, believing that an August 2014 packet of documentation sent to the Secretary of State, had been sent to the special state's attorney, thereafter retrieved the files from the special state's attorney, and the packet remained missing. The defendant explained that it had made an effort to reconstruct this packet of documents for the plaintiff. The defendant further

explained that it did not claim exemption with regard to the letter and supporting documentation sent to the Secretary of State in August 2014 but asserted an inability to locate the packet of documents within its office.

¶ 14 The defendant submitted to the PAC the remaining withheld documents and the supplied documents, separated into five individual packets. The defendant asserted that the records denied to the plaintiff included e-mails where all parties were the defendant's employees and e-mails of communications between the defendant's employees and the victim's sisters. The defendant asserted an exemption to the latter records, arguing that the defendant was advocating for the sisters' interest, so that although not a traditional attorney-client relationship, it created the perception of a victim/survivor and attorney relationship, which would require the sisters' waiver to release (**5 ILCS 140**/7(1)(n) (West 2016)). The defendant also asserted that the sisters' right to privacy outweighed any public interest in the records (*id.* § 7(1)(c)). The defendant thus asserted that the records of communications between it and the victim's sisters were exempt from inspection and copying, except for two documents intended by the sisters to be formal statements to the circuit court, which the defendant tendered.

¶ 15 On September 1, 2016, the PAC issued an opinion concluding that the defendant had "improperly withheld certain records responsive to the plaintiff's March 4, 2016, FOIA request." The PAC concluded that the defendant improperly denied the plaintiff's request pursuant to section 7(1)(a) and any asserted common law privilege. The PAC also determined that although two January 24, 2014, e-mails constituted privileged attorney-client communications, the defendant did not meet its burden to show that all the withheld e-mails regarding the plaintiff's prosecution, subsequent notification to the Secretary of State, and conduct after revocation of his driving privileges were exempt pursuant to section 7(1)(m) of the FOIA (*id.* § 7(1)(m)). Pursuant to the letter, the PAC requested the defendant to produce additional responsive e-mails to the plaintiff, namely the internal e-mail communications with the exception of the two e-mails dated January 24, 2014, which were from attorneys outside the defendant's office, not internal legal communications, and constituted privileged attorney-client communications.

*4 ¶ 16 In its September 1, 2016, nonbinding opinion, the PAC further concluded, however, that much of the communications between the victim's family members and the defendant contained highly personal information and because of the level of detail, redaction would not prevent the family member from being identified. The PAC thus concluded that e-mails which tended to identify a particular family member as author or recipient may be withheld in their entireties under section 7(1)(c) of the FOIA (*id.* § 7(1)(c)), 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." With regard to the production of additional communications that the plaintiff contended the defendant had failed to furnish, the PAC noted that the defendant had stated that it had not maintained a complete copy of the packet of information sent to the Secretary of State and that the packet was not in the criminal case file in the possession of the special state's attorney handling the criminal prosecution. The PAC concluded that the search for the record was not inadequate. On September 13, 2016, the defendant mailed further documentation, including the remaining internal e-mails it had previously withheld, to the plaintiff in response to the PAC's opinion dated September 1, 2016.

¶ 17 In addition to the March 4, 2016, FOIA request, the plaintiff submitted three more FOIA requests. On August 26, 2016, the plaintiff submitted a second FOIA request to the defendant requesting "the appointment calendar for Tom Gibbons, Jennifer Mudge (nee. Vucich), Katie Wykoff, and Desi Jellen for the period of September 25, 2013, to August 26, 2016 *** to include all records of meetings, including, but not limited to, the names of meeting attendees and locations that the meeting took place." After exercising the right to an extension to respond to the plaintiff's request, the defendant requested from the plaintiff an additional extension or a narrowing of his request, explaining that the plaintiff had requested over 4400 days of documents for four different individuals. On September 6, 2016, the plaintiff declined the requested extension, refused to narrow the scope of his request, and requested that the calendar entries be produced in an electronic format. On September 8, 2016, the defendant denied the request as one that could not reasonably be responded to without unduly burdening the defendant (*id.* § 3(g)).

¶ 18 On September 9, 2016, the plaintiff submitted a third FOIA request to the defendant seeking "via electronic means, disclos[ure] [of] all internal e[-]mails from June 10, 2015, to June 18, 2015, and March 27, 2015, to April 3, 2015." On September 22, 2016, after corresponding with the plaintiff, the defendant denied the request, explaining that given the

magnitude of the broad request and the plaintiff's refusal to narrow the scope of the request, the defendant had determined the burden of the request outweighed the public interest of the requested information (*id.*).

¶ 19 On September 20, 2016, the plaintiff submitted a fourth FOIA request to the defendant. The plaintiff sought "via electronic means *** the calendars of Jennifer Mudge, Katie Wykoff, Thomas Gibbons, and Desi Jellen (the Victims' Right Advocate for Madison County) from the dates of June 27[,] 2014[,] to October 29[,] 2014[,] [including] all appointments with subject of the meetings and attendees." On October 4, 2016, after invoking the right to an extension, the defendant sent correspondence to the plaintiff stating that the requested documents totaled 184 pages, requesting payment for the copies, and advising the plaintiff that it was not feasible for the defendant to provide the requested documents in an electronic format. On October 6, 2016, the plaintiff sent an e-mail to the defendant demanding production in electronic format and without redactions. On October 7, 2016, the defendant sent correspondence to the plaintiff explaining that the calendar entries redacted contained personal information exempted under section 7(1)(c) of the FOIA (*id.* § 7(1)(c)), private information exempted under section 7(1)(b) (*id.* § 7(1)(b)), communications involving attorney-client privilege exempted under section 7(1)(m) (*id.* § 7(1)(m)), information relating to crime victims protected by Illinois Rule of Professional Conduct 1.6, and information exempt under the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2016)). On October 11, 2016, the defendant provided the plaintiff with the requested documents in a redacted form.

***5** ¶ 20 On June 19, 2017, the defendant located the August 2014 letters and enclosures sent to the Secretary of State regarding the plaintiff's driver's license. At the later hearing on FOIA civil penalties, the defendant's FOIA officer, David Jeffrey Ezra, testified that the letters had been misplaced in the defendant's office but were produced to the plaintiff as soon as they were discovered.

¶ 21 B. Plaintiff's FOIA Complaint

¶ 22 On November 7, 2016, the plaintiff filed in the circuit court a complaint for injunctive and declaratory relief, alleging that his four FOIA requests directed to the defendant had been met with a pattern of noncompliance, partial compliance, delay, and obfuscation. The plaintiff alleged that the defendant had erroneously withheld documents from disclosure that would have been responsive to the plaintiff's requests on March 4, 2016, August 26, 2016, September 9, 2016, and September 20, 2016. The plaintiff sought, *inter alia*, an injunction requiring the defendant to disclose without improper redaction the requested records, a declaratory judgment regarding exemptions asserted by the defendant, and an order requiring the defendant to pay a civil penalty of not less than $2500 nor more than $5000 for each occurrence, pursuant to section 11(j) of the FOIA (**5 ILCS 140**/11(j) (West 2016)). On January 26, 2017, the plaintiff filed an amended complaint naming the defendant, rather than Thomas Gibbons in his official capacity.

¶ 23 On March 9, 2017, on the plaintiff's motion, the circuit court ordered the defendant to provide an index of documents to which access had been denied, and on April 13, 2017, the defendant filed an "Index of Documents" with the circuit court. Pursuant to an affidavit submitted by Kyle Lane, an attorney retained to represent the defendant, Lane mailed the Index of Documents to the plaintiff on the evening of April 6, 2017, and on April 11, 2017, the plaintiff phoned Lane to discuss the Index of Documents he received in the mail. The Index of Documents filed in the circuit court provided as follows:

> "March 4, 2016 Request
>
> Redacted information related to communications between the [defendant] and the sisters of [the victim] redacted from correspondence found to be exempt from the disclosure under FOIA Section 140/7(1)(c) by [the PAC's] determination letter dated September 1, 2016 ***.
>
> A letter and supporting documentation sent by [the defendant] to the Illinois Secretary of State in August 2014. Upon information and belief these documents were sent to the Special State's Attorney upon his appointment to prosecute the subsequent traffic proceeding against Plaintiff after he moved to vacate his original conviction. When the file was returned by the Special State's Attorney, the below-listed documents were no longer included in the file:
>
> The Collinsville, Illinois Incident Report Form with the Illinois Traffic Crash Report;
>
> The Traffic Crash Reconstruction Report;
>
> Plaintiff's driver's abstract;

A copy of the Collinsville Police Department Citation;

A certified copy of the conviction; and

Victim Impact letters from the [victim's] sisters *** to the [trial court] presiding over Plaintiff's criminal case.

Redaction of information from meeting agenda in e-mail dated August 11, 2014[,] from Shannon Goforth to Jennifer Vucich regarding an individual subject to a then-pending confidential investigation. Exempt from disclosure under FOIA Sections 140/7(1)(c) and (d)(vii) because it would invade the privacy of the individual, disclose the fact that he or she was under investigation, and destroy the confidential nature of the investigation. [**5 ILCS 140**/7(1)(c), (d)(vii) (West 2016).]

***6** Two internal e-mails of the [defendant] dated January 24, 2014[,] to be found to be exempt from disclosure under FOIA Section 140/7(1)(m) by the PAC in the determination letter dated September 1. 2016 ***.

August 26, 2016 Request

Calendar entries of Thomas, Gibbons, Katie Wykoff, Jennifer Mudge (nee Vucich), and Desi Jellen from September 25, 2013[,] through August 26, 2016[,] to the extent said information was not produced in response to Plaintiff's September 20, 2016[,] FOIA request. Denied as unduly burdensome under FOIA Section 140/3(g) because it was a blanket request for the above individuals' calendars for a three-year period, which [the plaintiff] refused to narrow down. Additionally, as stated below, the calendar entries for these individuals include their private information [Section 140/7(1)(c)], unique identifiers of persons [Section 140/3(b)], communications protected by the attorney-client privilege [Section 140/7(1)(m)], and/or confidential information relating to the representation of a client [Illinois [R]ule of Professional Conduct 1.6] that are exempt from disclosure under FOIA. [**5 ILCS 140**/3(b), (g); **5 ILCS 140**/7(1)(c). (1)(m) (West 2016).]

September 9, 2016 Request

Internal e-mails of the [defendant] for the periods June 10, 2015[,] through June 18, 2015[,] and March 27, 2015[,] through April 3, 2015[,] to the extent said information was not produced in response to Plaintiff's March 4, 2016[,] FOIA request. Denied as unduly burdensome under FOIA Section 140/3(g) because it was a blanket request for all internal e-mails of thirty (30) attorneys, twenty-two (22) clerical staff, and nine interns/clerks, which Plaintiff refused to narrow down.

September 20, 2016 Request

Information redacted from calendar entries for Thomas Gibbons, Katie E. Wykoff, and Jennifer Mudge (nee Vucich), and Desi Jellen from June 27, 2014[,] through October 29, 2014. The redacted information concerned the private information of the above individuals [Section 140/7(1)(c)], unique identifiers of persons [Section 140/3(b)], communications protected by the attorney-client privilege [Section 140/7(1)(m)], and/or confidential information relating to the representation of a client [Illinois Rule of Professional Conduct 1.6] that are exempt from disclosure under FOIA."

¶ 24 In the Index of Documents, the defendant asserted that with regard to the documents omitted from the file returned from the special state's attorney, the defendant had attempted to reconstruct the file and provided to the plaintiff the Collinsville, Illinois, Incident Report Form with the Illinois Traffic Crash Report, the most recent version of the plaintiff's driver's abstract (at the time), a copy of the Collinsville Police Department citation, and letters believed to be the victim impact letters sent to the trial court presiding over the plaintiff's criminal case. The defendant explained that a certified copy of the plaintiff's conviction could not be located and a copy could not be obtained because the conviction was vacated. The defendant noted that the PAC, in its determination letter dated September 1, 2016, declined to take further action regarding these documents because it concluded that the defendant's search for these records was not inadequate.

***7** ¶ 25 Thereafter, the circuit court ruled on what further documents were to be produced and which documents remained exempt, and when necessary, the circuit court performed an *in camera* view of the withheld documents. As such, the defendant produced further documents to the plaintiff during the litigation, including documents responsive to the August 26, 2016, and September 9, 2016, requests, once the circuit court narrowed the plaintiff's initial requests.

¶ 26 At the hearing on the imposition of a civil penalty, held on February 1, 2018, and April 25, 2018, the circuit court set out that it was denying a civil penalty award pursuant to section 11(j) (**5 ILCS 140**/11(j) (West 2016)) for anything other than items the PAC found were not properly exempted from production in its September 1, 2016, letter. With respect

to those items, the plaintiff questioned Ezra, the defendant's FOIA officer who handled the plaintiff's last three FOIA requests. Ezra testified that with regard to the March 4, 2016, request, responded to by McGuire, some of the defendant's records had been stored in the Wood River Township Hospital area. Ezra testified, however, that in June 2017, the mislocated packet was located on a shelf in a manila folder under other materials on a bookcase in the defendant's office and had not been stored in a typical storage place.

¶ 27 Ezra testified that the August 2014 packet had been misplaced within the office, that McGuire had gone to great lengths to reconstruct the packet, and that he had no reason to believe that the recovered packet was any different than the reconstructed packet previously submitted. Ezra testified that once the documents were found, they were immediately provided to the plaintiff.

¶ 28 In its August 23, 2018, judgment, the circuit court noted that in accord with civil discovery practice in litigation, it had allowed for a greater scope of discovery than that required by the FOIA. The circuit court also noted that the items recommended for release by PAC were "generally produced in one form or another," and thus, the plaintiff's request for further discovery was moot.

¶ 29 With regard to the plaintiff's request for a civil penalty as permitted under section 11(j) of the FOIA (**5 ILCS 140**/11(j) (West 2016)), the circuit court held that some items were produced after considerable delay, "which was attributed to inexplicable misplacement." The court held that the "process leading to the loss was entirely unnecessary and reflect[ed] an intent to not produce the materials." The circuit court found the minimum civil penalty appropriate given the "nature of Plaintiff's quest and limited material recovery, and limited significance to the public good." Accordingly, the circuit court entered a civil penalty of $2500, the minimum as provided pursuant to statute. The circuit court also awarded the plaintiff court costs of $227.

¶ 30 On September 21, 2018, the plaintiff filed a motion to reconsider the circuit court's order. The plaintiff requested the disclosure of all previously withheld documents and the assessment of fines. On September 24, 2018, the defendant filed a motion to reconsider, requesting the court to vacate the award of civil penalties and costs. The defendant argued that the evidence established that it had responded to the plaintiff's FOIA requests by providing information, notifying the plaintiff of what the defendant reasonably believed to be statutory exemptions to providing information, or sought extensions pursuant to the FOIA and then either produced information or cited exemptions. The defendant further argued that the evidence demonstrated that when the PAC ruled that documents were required to be produced under the FOIA, the defendant produced those records it was able to locate. The evidence also established that some of the records, which were not found during applicable compliance periods, were located after further search and produced to the plaintiff once found. The defendant further asserted that the evidence had established that the plaintiff had received the records he sought.

***8** ¶ 31 On December 7, 2018, the circuit court entered its order denying the parties' motions to reconsider. In its order, the circuit court noted that it did not grant relief with regard to the production of documents but exclusively addressed the issue of penalties. The circuit court found as follows:

> "In the case at bar, even taken at its most charitable, the [defendant] sequestered all documents for which it had withheld production after claim of exception had been previously denied. It then delivered the documents to its FOIA Officer, not for production but to raise new objections, and the FOIA Officer then is alleged to have promptly misfiled/lost the documents thereafter."

¶ 32 On January 7, 2019, the plaintiff filed a timely notice of appeal, and the defendant filed a timely notice of cross-appeal. In his notice of appeal, the plaintiff stated that he sought an order changing the judgment to provide for: "[r]elease of all documents that were not proven to be exempt under FOIA" and "[c]hange [of] the civil penalties award."

¶ 33 II. ANALYSIS

¶ 34 A. Brief Deficiencies

¶ 35 Initially, the defendant argues that the plaintiff's brief violates Illinois Supreme Court Rule 341(h) (eff. May 25, 2018), warranting either dismissal of the plaintiff's appeal or disregard of several sections and arguments of his brief. Specifically, the defendant argues that the plaintiff's brief violates Rule 341(h) in the following respects: (1) the plaintiff's brief contains an incomplete "Points and Authorities" section, (2) the plaintiff's brief contains no "Standard of Review" section with citation to authority, (3) the plaintiff's brief fails to reference the record to support

statements of fact or evidence, and (4) the plaintiff's brief fails to provide specific and clear arguments.

¶ 36 We acknowledge that the appellate court has discretion to strike a brief, to dismiss an appeal, or to disregard an appellant's arguments where the appellant's brief violates our supreme court rule requirements. *Budzileni v. Deptartment of Human Rights*, 392 Ill. App. 3d 422, 440 (2009). Nevertheless, where violations of the supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted. *Id.* In this case, because the plaintiff's violations are not so flagrant so as to preclude review, we elect to disregard the offending portions and turn to the merits on appeal.

¶ 37 B. The FOIA

¶ 38 All records in the custody of a public body are presumed open to inspection or copying. **5 ILCS 140**/1.2 (West 2016). If the public body asserts an exemption from disclosure, the public body "has the burden of proving by clear and convincing evidence" that the record is exempt from disclosure. *Id.* When a public body denies a FOIA request, it must notify the requester of the denial in writing and offer the reasons the request was denied, including a "detailed factual basis" for the claimed exemption. *Id.* § 9(a). When the public body claims exemptions under FOIA's section 7, the denial notice shall specify the exemption claimed and the specific reasons for the denial, including the factual basis and supporting legal citations. *Id.* § 9(b). The trial court may conduct an *in camera* inspection of the requested documents to determine whether the claimed exemptions apply. *Id.* § 11(f). Where a public body willfully and intentionally fails to comply with the FOIA, it is subject to a civil penalty ranging from $2500 to $5000 for each occurrence of noncompliance. *Id.* § 11(j). "The public body satisfies its burden when it provides a detailed justification for the claimed exemption which addresses the specific documents requested and allows for adequate adversarial testing." *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, ¶ 10.

***9** ¶ 39 Section 3(g) of the FOIA provides that requests for records falling within a category shall be complied with unless compliance would be unduly burdensome, there is no way to narrow the request, and the burden on the public body outweighs the public interest in the information. **5 ILCS 140**/3(g) (West 2016). FOIA exemptions found in section 7(1) of the FOIA include, in relevant part:

"(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

(b) Private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order.

***

(c) Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. 'Unwarranted invasion of personal privacy' means 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. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

* * *

(vii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

* * *

(m) Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil[,] or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

(n) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed." *Id.* § 7(1)(a), (b), (c), (d)(vii), (m), (n).

¶ 40 "A person whose request to inspect or copy a public record is denied by a public body *** may file a request for review with the [PAC] established in the Office of the Attorney General not later than 60 days after the date of the final denial." *Id.* § 9.5(a). "Upon receipt of a request for review, the [PAC] shall determine whether further action is warranted." *Id.* § 9.5(c). The PAC then shall forward a copy of the request for review to the public body and shall specify the records that the public body shall furnish to facilitate the review. *Id.* The public body shall provide copies of the records requested and shall otherwise fully cooperate with the PAC. *Id.* "Under FOIA, the Attorney General, through the [PAC], can render an advisory opinion or a binding opinion." *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 56; **5 ILCS 140**/9.5(f) (West 2016). "Advisory opinions are not subject to administrative review." *City of Champaign*, 2013 IL App (4th) 120662, ¶ 56; **5 ILCS 140**/11.5 (West 2016). "In amending FOIA and establishing the Attorney General's [PAC], the legislature sought to create an expeditious proceeding for the parties to obtain guidance and avoid having to bring a court action." *City of Champaign*, 2013 IL App (4th) 120662, ¶ 56.

¶ 41 i. *Index of Documents*

***10** ¶ 42 On appeal, the plaintiff argues that the defendant's Index of Documents was merely a generalization of documents withheld without any description of the nature of the contents of each document withheld or the deletions from released documents.

¶ 43 Section 11(e) of the FOIA provides that on motion of the plaintiff, the court shall order the public body to provide an index of the records to which access has been denied. **5 ILCS 140**/11(e) (West 2016). The index shall include the following:

> "(i) A description of the nature or contents of each document withheld, or each deletion from a released document, provided, however, that the public body shall not be required to disclose the information which it asserts is exempt; and
>
> (ii) A statement of the exemption or exemptions claimed for each such deletion or withheld document." *Id.* § 11(e)(i), (ii).

¶ 44 The Index of Documents provided by the defendant described the nature or contents of each document withheld, or each deletion from a released document, as well as a statement of the claimed exemption, as follows: (1) "[r]edacted information related to communications between [the defendant] and the sisters of [the victim killed by the plaintiff's truck]" and an exemption claimed under section 7(1)(c); (2) redacted information from meeting agenda in e-mail dated August 11, 2014, regarding an individual subject to confidential investigation and an exemption claimed under sections 7(1)(c) and (d)(vii); (3) redacted e-mails dated January 24, 2014, and an exemption claimed under section 7(1)(m); (4) withheld "[c]alendar entries of Thomas Gibbons, Katie Wykoff, Jennifer Mudge (nee Vucich), and Desi Jellen from September 25, 2013[,] through August 26, 2016," and an exemption claimed under sections 3(g) and 7(1)(b), (c), and (m); (5) withheld "[i]nternal e[-]mails of the [defendant] for the periods June 10, 2015[,] through June 18, 2015[,] and March 27, 2015[,] through April 3, 2015," and an exemption claimed under section 3(g); and (6) "[i]nformation redacted from calendar entries for Thomas Gibbons, Katie E. Wykoff, and Jennifer Mudge (nee Vucich), and Desi Jellen from June 27, 2014[,] through October 29, 2014," and exemption claimed under sections 3(b), section 7(1)(c), and section 7(1)(m). We agree with the defendant that these descriptions adequately identified the nature or contents of the withheld documents or deletions so that the plaintiff knew what had been withheld or redacted and the circuit court could rule on production or order *in camera* review of the same.

¶ 45 The plaintiff also argues that the Index of Documents was inadequate because it had "no statement of the exemption or exemptions claimed" as required by section 11(e)(ii) of the FOIA (**5 ILCS 140**/11(e)(ii) (West 2016)). As noted by the defendant, however, in making this argument, the plaintiff ignores that the Index of Documents included a statement of exemptions claimed for each deletion or withheld document. We thus agree with the defendant that the Index of Documents sufficiently set forth a description of the nature or contents of each withheld document and deletion, that it sufficiently set forth a statement of exemption claimed for each withheld document or deletion, and that the plaintiff has failed to explain how the Index of Documents did not meet the FOIA requirements. *Id.* § 11(e)(i); see also *Barth v. State Farm Fire & Casualty Co.*, 371 Ill. App. 3d 498, 507 (2007) (a conclusory assertion, without a supporting analysis, is insufficient). We thus reject the plaintiff's arguments on appeal with regard to the Index of Documents.

¶ 46 ii. *Production of Additional Documents*

***11** ¶ 47 The plaintiff next argues that the circuit court erred by not requiring the defendant to produce documents that were responsive to his requests and were not proven with clear and convincing evidence to be exempt.

¶ 48 The circuit court explained in its August 23, 2018, judgment that during litigation it had allowed for a greater scope of discovery than that allowed by the FOIA, and the circuit court ruled that the defendant had produced all the required documents. Concluding that the plaintiff's prayers for document production were satisfied, the circuit court held that the plaintiff's additional requests were moot. On appeal, we have reviewed the record and find no error in the circuit court's ruling with regard to document production. Moreover, the plaintiff fails to support his assertions on appeal with logical and reasoned argument. As noted by the defendant, the plaintiff fails to explain or specify what documents or categories of documents were wrongfully denied to him, which ruling on the claimed exemptions he challenged, and which exemptions were not ruled on by the circuit court. "It is a rudimentary rule of appellate practice that an appellant may not make a point merely by stating it without presenting any argument [or appropriate legal authority] in support." *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill. App. 3d 391, 408 (2002). "A court of review 'is not simply a depository into which an appealing party may dump the burden of argument and research.' " *In re Austin C.*, 353 Ill. App. 3d 942, 948 (2004) (quoting *In re Estate of Thorp*, 282 Ill. App. 3d 612, 616 (1996)). We therefore reject the plaintiff's bald assertion.

¶ 49 iii. *Civil Penalty*

¶ 50 Next, the plaintiff takes issue with the circuit court's order imposing a civil penalty against the defendant. The plaintiff essentially argues that the circuit court had no discretion to limit the civil penalty imposed to a single penalty of $2500 and that the circuit court erred when it failed to assess civil penalties with regard to the three FOIA requests that followed his March 4, 2016, request.

¶ 51 The defendant counters that the circuit court determined that penalties were only warranted relating to the March 4, 2016, request because the August 26, 2016, September 9, 2016, and September 20, 2016, FOIA requests were very broad and burdensome, requesting over 4400 days of calendar entries for four different individuals, all internal e-mails for the entire office for 18 days, which covered e-mails for 61 employees, and over 140 days of calendar entries for four individuals. The defendant also notes that it timely produced 184 pages of documents responsive to this last request shortly after it was made; however, the plaintiff refused to accept production in paper format. The defendant argues that these requests were burdensome, not only due to the volume of documents the plaintiff sought but because of the plaintiff's repeated refusal to cooperate in narrowing his requests as well as his refusal to allow the defendant sufficient time to gather the requested voluminous documents.

¶ 52 The record reveals that the circuit court denied civil penalty relief for any request other than the March 4, 2016, request, which resulted in the September 1, 2016, letter in which the PAC determined that some items were improperly withheld pursuant to inapplicable exemptions. We find no error in the circuit court's conclusion that the defendant acted in good faith in response to the August 26, 2016, September 9, 2016, and September 20, 2016, FOIA requests, and the plaintiff fails to specify on what basis civil penalties would be properly awarded with regard to these requests. Accordingly, we find that the circuit court properly declined to award a civil penalty on the bases of these requests.

***12** ¶ 53 On cross-appeal, the defendant takes issue with the circuit court's order imposing a civil penalty against it with regard to the March 4, 2016, request. The defendant argues that the circuit court erred in awarding the plaintiff civil penalties under section 11(j) of the FOIA (**5 ILCS 140**/11(j) (West 2016)) because the evidence did not support a finding of a willful and intentional or a bad faith violation of the FOIA. We agree with the defendant.

¶ 54 On appeal, we review the circuit court's credibility determinations, including the circuit court's factual finding that the defendant willfully and intentionally failed to comply with the FOIA (or otherwise acted in bad faith), under the manifest-weight-of-the-evidence standard. See *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 48 (review of factual finding that school willfully and intentionally failed to comply with the FOIA under manifest-weight-of-the-evidence standard); *Goldberg v. Astor Plaza Condominium Ass'n*, 2012 IL App (1st) 110620, ¶ 60 (a reviewing court should overturn a factual finding only if it is against the manifest weight of the evidence); *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 364 (2007) (whether a person acted willfully is typically a question of fact reserved for the trier of fact). A trial court's finding is against the manifest weight of the evidence when an opposite conclusion

is apparent or when the finding appears to be unreasonable, arbitrary, or not based on the evidence. *Goldberg*, 2012 IL App (1st) 110620, ¶ 60. "Once the trial court finds a willful and intentional failure to comply with the FOIA, or that the party acted in bad faith, it is required to, *i.e.*, 'shall,' impose a penalty." *Rock River Times*, 2012 IL App (2d) 110879, ¶ 49; **5 ILCS 140**/11(j) (West 2016). "However, the amount of the penalty is within the trial court's discretion, so long as it is between $2,500 and $5,000 for each violation." *Rock River Times*, 2012 IL App (2d) 110879, ¶ 49. "Therefore, an abuse-of-discretion standard of review is appropriate for the amount of the penalty." *Id.*

¶ 55 Section 11(j) of the FOIA provides:

> "If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence. In assessing the civil penalty, the court shall consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations of this Act." **5 ILCS 140**/11(j) (West 2016).

¶ 56 Accordingly, to warrant an award of civil penalties against a public body, section 11(j) of the FOIA requires a finding that the "public body willfully and intentionally failed to comply with [the] Act, or otherwise acted in bad faith." *Id.* The Act itself does not define the terms "willfully," "intentionally," or "bad faith." The Merriam-Webster Dictionary defines "willful" as: "done deliberately: intentional." Willful Definition, MERRIAM WEBSTER, http://merriam-webster.com (last visited Aug. 5, 2020). It defines "intentional" as: "done by intention or design." Intentional Definition, MERRIAM WEBSTER, http://merriam-webster.com (last visited Aug. 5, 2020). Finally, it defines "bad faith" as "lack of honesty in dealing with other people." Bad Faith Definition, MERRIAM WEBSTER, http://merriam-webster.com (last visited Aug. 5, 2020). Accordingly, based upon the plain meaning of these terms, to warrant an award of civil penalties under section 11(j), the public body must not only have violated the FOIA but must have done so deliberately, by design, or with a dishonest purpose.

***13** ¶ 57 In *Rock River Times*, 2012 IL App (2d) 110879, the newspaper petitioned under the FOIA for a civil penalty against the school district based on the school district's willful and intentional failure to comply with the FOIA. In its petition, the newspaper alleged that the school district acted in bad faith by attempting to hide the contents of a document despite the PAC's written instructions to release the document. The newspaper alleged that the school district had refused to comply with its request for the document by attempting to invoke a series of exemptions under the FOIA, even after the PAC advised the school district that its exemptions were baseless and directed the school to release the document. Instead of complying with PAC's directive, the school district referred to PAC's determination as "erroneous" and sought to invoke a third, inapplicable exemption before it ultimately released the document, stating that the PAC had orally informed it that the third exemption was inapplicable. The newspaper argued that the trial court should grant its request for attorney fees and a civil penalty because it obtained access to the document only as a result of filing suit. The newspaper also produced an affidavit from the PAC stating it never issued an oral opinion on the third exemption at all. *Id.* ¶¶ 11-14.

¶ 58 In assessing a civil penalty, the trial court found "most troubling" the school district's position that, after its first two claimed exemptions fell through, it could continue to assert additional exemptions. *Id.* ¶ 52. The trial court thus concluded that the school willfully and intentionally violated the FOIA by raising a third exemption after the first two were denied and by looking "for a way to save face" rather than simply admit that it was wrong. *Id.* ¶ 54. The trial court stated that "the school's course of conduct, viewed in its totality, reflected a lack of good faith in responding to the newspaper's request." *Id.* ¶ 23. On appeal, the court found the trial court's decision that the school willfully and intentionally violated the FOIA was not against the manifest weight of the evidence. *Id.* ¶ 54.

¶ 59 In this case, the circuit court found in its August 23, 2018, order awarding civil penalties that "the [d]efendant failed to produce materials in accord with the [PAC's] advisory recommendations," that "some items were produced after considerable delay which was attributed to inexplicable misplacement," and that "the process leading to the loss was entirely unnecessary and reflected on an intent to not produce those materials." The circuit court further found in its December 7, 2018, order denying the parties' posttrial motions that "taken at its most charitable, [the defendant] sequestered all documents for which it had withheld production after claim of exception had been previously denied [and] then delivered the documents to its FOIA [o]fficer, not for production but to raise new objections,

and the FOIA [o]fficer then is alleged to have promptly misfiled/lost the documents thereafter."

¶ 60 However, the record does not support the circuit court's conclusions. Unlike *Rock River Times*, the defendant did not willfully and intentionally violate the FOIA by raising continued exemptions despite the PAC's guidance. Instead, once the PAC opined on September 1, 2016, that some of the withheld documents should be produced to the plaintiff, the defendant complied with the PAC's September 1, 2016, opinion and released those documents. The plaintiff's complaint acknowledged that "[o]n September 13, 2016, [the defendant] mailed further documentation to the plaintiff in response to the letter dated September 1, 2016[,] [with the PAC's opinion]." The defendant conceded to the PAC's opinion and no longer claimed an exemption regarding those documents. With the exception of the misplaced Secretary of State letters, the defendant provided to the plaintiff the documents the PAC opined should be disclosed.

¶ 61 This case is more akin to *Turner*, 2019 IL App (3d) 170819. In *Turner*, the plaintiff filed a FOIA request with the police department seeking his criminal records. *Id.* ¶ 3. The police department responded, granting the request in part and denying it in part, and provided redacted portions of the records pursuant to FOIA exemptions. *Id.* Turner filed a complaint seeking civil penalties and costs, and in its response, the police department acknowledged that it inadvertently missed some of the plaintiff's records, attached the additional records to its motion to dismiss, and served them on Turner. *Id.* ¶ 4. Turner filed a response requesting an *in camera* review of the records and an index, description, and statement of exemptions for the redacted records. *Id.* ¶ 5. The court conducted the *in camera* review, and the police department provided an index and descriptions of the redactions. *Id.* The trial court granted the police department's motion to dismiss with prejudice. *Id.*

***14** ¶ 62 On appeal, the plaintiff argued that the police department's failure to comply was willful and intentional. *Id.* ¶ 8. However, the appellate court held that the plaintiff's complaint lacked "any allegations of willful and intention violation of FOIA" by the police department. *Id.* ¶ 21. The appellate court further found "no evidence of willful and intentional noncompliance" with the plaintiff's FOIA request. The appellate court noted that the police department had asserted the information it had redacted was properly exempted and had submitted to the plaintiff the reasons for denial and a detailed factual basis for the exemptions it claimed. *Id.* ¶ 22. The police department had provided the unredacted documents to the trial court, which viewed them *in camera* and determined that the claimed exemptions applied. *Id.* The appellate court noted that when the exemptions were no longer applicable, the police department released the requested documents to the plaintiff. *Id.* Accordingly, the appellate court found no civil penalty warranted as there was no willful and intentional failure to comply with FOIA's requirements. *Id.*

¶ 63 In this case, the circuit court's award of civil penalties appears to primarily involve the defendant's failure to initially produce complete copies of the 2014 letters sent to the Secretary of State's office. The record reveals that on July 6, 2016, McGuire e-mailed the plaintiff "hop[ing] [to] resolv[e] the pending dispute." In the e-mail, McGuire understood the plaintiff's complaint to the PAC to concern "the letter that was sent to the Secretary of State by our First Assistant in August of 2014." McGuire understood that the plaintiff wanted a copy of that letter as well as a copy of all supporting documents sent along with that letter. McGuire explained that he did not withhold the documents because of any claim of exemptions but because he believed the August 2014 letter and supporting documents were no longer in the defendant's possession but were in the possession of the special state's attorney appointed in June 2015 to represent the State in the plaintiff's traffic case. McGuire proposed that he contact the special state's attorney and ask for a copy of the letter at issue, along with supporting documents, and forward a complete copy with no redactions. McGuire thereafter requested return of the file, but when the documents were not located in the file, he recreated the August 2014 letter with its enclosures, with the exception of the plaintiff's conviction, which had since been vacated and no longer existed. The record reveals that the plaintiff received these documents, including the letters written by the victim's sisters, in July 2016.

¶ 64 Accordingly, there was no evidence before the circuit court that these documents were withheld from production to the plaintiff for any reason other than that they were accidentally misplaced. See *Miller v. United States Department of State*, 779 F.2d 1378, 1386 (8th Cir. 1985) (discovery of additional documents is not conclusive of agency bad faith since belated discovery may result merely from administrative inefficiency or reluctant diligence on the part of the agency); *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (discovery of additional documents indicated "neither artifice nor subterfuge but rather, at wors[t], administrative inefficiency"). Moreover, the defendant's

forthright disclosure that it later located the misplaced file in an unlikely location in June 2017, and its immediate release of those documents to the plaintiff after their discovery, suggested good faith on the part of the agency. See *Maynard v. Central Intelligence Agency*, 986 F.2d 547, 565 (1st Cir. 1993); see also *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986) ("what is expected of a law-abiding agency is that it admit and correct error when error is revealed").

¶ 65 Accordingly, the evidence before the circuit court did not support a conclusion that the defendant willfully and intentionally failed to comply with the FOIA or otherwise acted in bad faith and thus did not warrant a civil penalty imposed against the defendant. Therefore, we reverse that portion of the circuit court's order that imposed a civil penalty against the defendant.

¶ 66 III. CONCLUSION

***15** ¶ 67 For the foregoing reasons, we affirm the judgment of the circuit court in all respects, except we reverse that portion of the circuit court's judgment entering a civil penalty against the defendant.

¶ 68 Affirmed in part and reversed in part.

Presiding Justice Welch and Justice Boie concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (5th) 190016-U, 2020 WL 6955284

Footnotes

1 In 2015, the plaintiff's reckless conduct conviction was vacated, and in March 2016, he was thereafter found guilty of failure to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2012)). However, this court subsequently vacated that conviction and sentence and remanded the cause for a new trial. *Peery*, 2019 IL App (5th) 160255-U.

2020 IL App (1st) 191131-U

Appellate Court of Illinois, First District,
FIRST DIVISION.

MANCINI LAW GROUP, P.C., Plaintiff-Appellant,

v.

SCHAUMBURG POLICE DEPARTMENT, Defendant-Appellee.

No. 1-19-1131
|
October 19, 2020

Appeal from the Circuit Court of Cook County, No. 17 CH 13881, The Honorable Franklin U. Valderrama, Judge Presiding.

ORDER

JUSTICE PIERCE delivered the judgment of the court.

***1** ¶ 1 *Held*: The judgment of the circuit court is affirmed. Defendant did not waive its right to produce redacted accident reports under FOIA by providing unredacted copies of those reports to a third-party vendor for the State of Illinois for the purposes of complying with its mandatory reporting obligations under the Vehicle Code.

¶ 2 Plaintiff, Mancini Law Group, P.C., appeals from the circuit court's entry of summary judgment in favor of defendant, Schaumburg Police Department. The circuit court found that there was no genuine issue of material fact as to whether defendant properly redacted information from the records it provided to plaintiff in response to plaintiff's request under the Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)), and that defendant did not waive its right to produce redacted accident reports to plaintiff after providing unredacted copies of the reports to LexisNexis, a third-party vendor for the State of Illinois. Plaintiff's sole argument on appeal is that defendant waived any right to withhold the unredacted accident report records because it earlier provided unredacted accident reports to LexisNexis. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff sent a FOIA request to defendant seeking "all traffic accident reports for all motor vehicle accidents occurring within the Village of Schaumburg" for a two-week period during 2017. Plaintiff requested that defendant redact personal information—including driver's license numbers, license plate numbers, and dates of birth—from the reports. Defendant granted in part and denied in part plaintiff's request. Defendant asserted that driver's license numbers, personal telephone numbers, home addresses, and license plate numbers were exempt from disclosure under section 7(1)(b) of FOIA (*id.* § 7(1)(b)), and dates of birth and insurance policy account numbers were exempt from disclosure under section 7(1)(c) (*id.* § 7(1)(c)). The names of the persons involved in the accident, both drivers and witnesses, were not redacted. Defendant produced redacted copies of the requested accident reports.

¶ 5 Plaintiff filed a complaint in the circuit court of Cook County, asserting that it had sought nonexempt public records and that defendant's redactions from the accident reports were willful and intentional violations of FOIA. Plaintiff sought declaratory and injunctive relief, civil penalties, and attorney fees. Defendant's motion to dismiss plaintiff's complaint was denied,[1] and the parties engaged in discovery.

¶ 6 The parties filed cross-motions for summary judgment, which were fully briefed. Plaintiff asserted, in relevant part, that the redacted information—including home addresses, home phone numbers, driver's license numbers, dates of birth, policy numbers, and license plate numbers—was not protected information under FOIA and that, even if the information was protected, defendant waived any exemptions to disclosure by providing unredacted versions of the accident reports pursuant to a contract with LexisNexis. Plaintiff further asserted that "for years, [defendant] has produced completely unredacted copies of traffic accident reports

to LexisNexis," and that as recently as January 2018, "LexisNexis was used to purchase a completely unredacted *** traffic accident report." Defendant responded that it provides unredacted versions of the accident reports to LexisNexis, an approved third-party vendor for the State of Illinois, as part of defendant's mandatory reporting requirements under section 408 of the Illinois Vehicle Code (625 ILCS 5/11-408 (West 2016)).[2] After hearing oral argument, the circuit court entered a written order entering summary judgment in favor of defendant and against plaintiff, finding the redacted information was exempt under FOIA and that defendant's furnishing of unredacted accidents reports to LexisNexis did not waive any right to redact the reports because the disclosure to LexisNexis was required by statute. Plaintiff filed a timely notice of appeal.

¶ 7 II. ANALYSIS

*2 ¶ 8 On appeal, plaintiff does not argue that the redacted information is not exempt under sections 7(1)(b) or 7(1)(c). As noted above, in plaintiff's FOIA request, plaintiff requested that defendant redact the driver's license numbers, license plate numbers, and dates of birth from the accident reports. *Supra* ¶ 4. In other words, plaintiff never sought that information. As such, the circuit court was left with deciding whether disclosure of a motorist's home address, home phone number, and insurance policy numbers, constitutes a clearly unwarranted invasion of the personal privacy of those motorists involved in a traffic accident and therefore eligible for an exemption. In its combined response to defendant's cross-motion for summary judgment and reply brief in support of its motion for summary judgment, plaintiff for the first time argued that defendant waived any right to redact information from the reports, thereby entitling plaintiff to the full, unredacted reports containing information that it never originally sought. On appeal, plaintiff's sole argument is that defendant waived its right to claim the names and addresses shown in the accident reports were exempt from disclosure because defendant, pursuant to a contract, provided unredacted accident reports, including names and addresses, to LexisNexis, which in turn sells the unredacted reports to the public, again presumably seeking the entire unredacted accident reports.

¶ 9 Plaintiff relies on our supreme court's decision in *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401 (1997) to argue that the voluntary disclosure of unredacted records in one situation precludes a later assertion that the previously unredacted information can be withheld as exempt from disclosure under FOIA. Plaintiff asks us to reverse the entry of summary judgment in favor of defendant.

¶ 10 Summary judgment is appropriate if the pleadings, depositions, affidavits, and other admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. The purpose of summary judgment is not to try a question of fact, but rather to determine whether one exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). "When parties file cross-motions for summary judgment, they mutually agree that there are no genuine issues of material fact and that only a question of law is involved." *Jones v. Municipal Employees' Annuity & Benefit Fund*, 2016 IL 119618, ¶ 26. We review a circuit court's ruling on summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 11 Section 1 of FOIA provides, in part,

> "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared 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. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.
>
> The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. 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.
>
> This Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information." 5 **ILCS 140**/1 (West 2016).

¶ 12 "All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." *Id.* § 1.2. FOIA is to be liberally construed while its exemptions are to be narrowly construed. *Rushton v. Department of Corrections*, 2019 IL 124552, ¶ 15 (citing *Southern Illinoisian v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006)).

*3 ¶ 13 Section 7(1) of FOIA provides:

> "When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying." **5 ILCS 140**/7(1) (West 2016).

¶ 14 FOIA provides that certain information "shall be exempt from inspection and copying," such as "private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." *Id.* § 7(1)(b). Also exempt from disclosure is

> "Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. 'Unwarranted invasion of personal privacy' means 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. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." *Id.* § 7(1)(c).

¶ 15 In *Lieber*, our supreme court considered whether Southern Illinois University properly denied a FOIA request made by the plaintiff that sought "information about housing inquiries from or on behalf of people who had been accepted as freshman, but who had not yet enrolled." 176 Ill. 2d at 410. Our supreme court found that the specific information sought by the plaintiff was not exempt under a FOIA exemption that applied "to 'other individuals receiving*** educational *** services,' as well as to 'students.' " *Id.* at 410-411 (citing **5 ILCS 140**/7(1)(b)(i) (West 1994)). Additionally, the supreme court rejected the university's claim that the names and addresses of accepted students were private because the university "routinely makes available to other groups, including the local newspaper and religious organizations, lists containing the names and addresses of individuals who have been accepted by the University but who have not yet enrolled." *Id.* at 412-13. The court endorsed federal decisions holding that "voluntary disclosure in one situation can preclude later claims that records are exempt from release to someone else." *Id.* at 413 (citing *Cooper v. United States Department of the Navy*, 594 F.2d 484, 485-86 (5th Cir. 1979)). The court further agreed that "selective disclosure by the government 'is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government the FOIA was intended to obviate.' " *Id.* (quoting *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)). The court found that the principles outlined in *Cooper* and *Andrus* "should be applied here to bar the University from asserting an exemption" under FOIA. *Id.*

*4 ¶ 16 Here, plaintiff concedes that "LexisNexis is acting as a contractor for the State of Illinois and a conduit for [defendant] to fulfill its reporting requirements to the State." Section 11-408 of the Vehicle Code requires the filing of motor vehicle accident reports with the Secretary of State and the Department of Transportation. 625 ILCS 5/11-408 (West 2016). Rather than defendant sending accident reports directly to the State, the State employs LexisNexis as its agent to receive and maintain accident reports. By doing so, we see no reason to find defendant's compliance with a statutory reporting requirement to be the equivalent of a "selective disclosure," or "preferred treatment" as discussed in *Lieber*.

¶ 17 Plaintiff relies on *Lieber* to argue waiver because defendant provides unredacted accident reports to LexisNexis, which, it contends, in turn sells the reports to the public for a profit. Plaintiff asserts that defendant did not establish that it is required to provide unredacted reports to LexisNexis to comply with its reporting obligations because defendant could manually provide the information directly to the State. This argument is unpersuasive where it is undisputed that the Vehicle Code requires defendant to send accident reports to the State and the State, in turn, directs that compliance is accomplished by the defendant sending the reports to the State's agent, LexisNexis.

¶ 18 There is also a contractual agreement between defendant and LexisNexis. Requests for defendant's accident reports are

processed through LexisNexis for a $13 fee, with defendant receiving $5 from LexisNexis. Plaintiff argues that there are no restrictions in the agreement between defendant and LexisNexis on what LexisNexis may do with the unredacted accident reports it receives from defendant when it complies with the Vehicle Code reporting requirement. Plaintiff contends, therefore, that defendant should be barred from providing redacted versions to plaintiff because defendant voluntarily discloses the unredacted reports to LexisNexis while simultaneously withholding certain information from the general public unless the public pays a fee.

¶ 19 We find that, based on the record before us, defendant's provision of unredacted accident reports to LexisNexis occurs in compliance with the reporting requirement under the Vehicle Code. There is no other furnishing of records to LexisNexis other than under the mandatory reporting requirement. As such, defendant's conduct does not amount to a "selective disclosure" or "preferential treatment" as contemplated in *Lieber*. In *Lieber*, it was uncontested that the university "routinely makes available to other groups, including the local newspaper and religious organizations, lists containing the names and addresses of individuals who have been accepted by the University but who have not yet enrolled." *Lieber*, 176 Ill. 2d at 412-13. By voluntarily disclosing the names and addresses of those individuals to others, the university could not assert that the information it withheld from the plaintiff was confidential.

¶ 20 But here, the record clearly reflects that defendant provides the unredacted accident reports to LexisNexis for mandatory reporting purposes. Jennifer Brack, a corporate representative for defendant, testified that defendant had a contract with LexisNexis, "a contracted vendor for the [S]tate [of Illinois]," as part of defendant's obligation to provide all accident reports to the State, which plaintiff does not dispute. Defendant uses LexisNexis to upload unredacted copies of the accident reports to the State. Anyone that wants to obtain a copy of an accident report may request the report in person, by mail, or through the LexisNexis website link provided on defendant's website. Brack stated that "I believe [LexisNexis] ha[s] their own safeguards in place of who can purchase a report," and further stated that "the only parties that can receive [an accident report] through [LexisNexis] are those parties directly involved," such as the drivers or their insurers. Brack testified that it was her understanding that in order to obtain a report through LexisNexis, the requesting party would need to know specific information about the report, including the date of the accident, the location of the accident, and the accident report number. To complete a purchase through LexisNexis, the requesting party was also required to provide a driver's license number that must match a driver's license number in the accident report. Brack explained that defendant would provide a unredacted copy of the accident report to those who were involved in the accident or their insurers, but that defendant would make redactions if the requesting party was not involved in the accident.

*5 ¶ 21 Plaintiff does not direct our attention to any facts in the record to contradict Brack's testimony, or that would call into question that defendant provides unredacted accident reports to LexisNexis to comply with its reporting obligations. Plaintiff's argument that defendant failed to demonstrate that it is required to provide the reports to LexisNexis to comply with its statutory obligations finds no support in the record. Brack testified that defendant could either upload the accident reports to LexisNexis, or that the State could manually enter all the accident report data itself. Plaintiff does not cite any evidence in the record, or to any other authority, to support its contention that defendant's statutorily mandated act of uploading the unredacted accident reports to a third-party State-approved vendor for transmission to the State is a public disclosure of the accident reports. Defendant is required to provide the State with the accident reports and there is nothing in the record to suggest that the availability of an alternative method—manual entry—undermines defendant's invocation of the exemptions claimed.

¶ 22 Plaintiff insists that LexisNexis acts as a third-party reseller of the accident reports. This argument is premised on plaintiff's theory that anyone can pay LexisNexis a $13 fee and obtain a copy of a unredacted accident report, and that defendant receives $5 from each accident report sold by LexisNexis. But plaintiff failed to present any admissible evidence to support its assertion that defendant's unredacted accident reports are available to the public for a fee payable to LexisNexis. Plaintiff's statement of facts directs us to an affidavit of Michael Camarata, an attorney at plaintiff's office. Camarata's affidavit was filed during briefing on defendant's motion to dismiss and was referenced in plaintiff's reply in support of its motion for summary judgment. But plaintiff does not make any argument that (1) the circuit court failed to draw any reasonable inferences from Camarata's affidavit in plaintiff's favor, (2) the affidavit creates a genuine issue of material fact, or (3) Camarata's affidavit entitles plaintiff to summary judgment. These failures result in forfeiture of this argument. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited ***.]").

¶ 23 Forfeiture aside, Camarata's affidavit asserts that in January 2018, during the pendency of this case, he purchased an unredacted version of one of defendant's accident reports from LexisNexis. The accident report and a receipt for his fee were attached to his affidavit. Camarata's affidavit provides little factual insight into what information he provided to LexisNexis to purchase the accident report. As Brack testified, however, Camarata would have had to submit the names of the parties involved in the accident, the date and location of the accident, and the accident report number. The receipt for Camarata's purchase indicates that he provided that information. Furthermore, in a section entitled "Purpose of Use," Camarata listed "Legal." Brack testified that an attorney representing an individual involved in a reported accident would be able to obtain an unredacted copy of that accident report. Absent any indication in Camarata's affidavit as to whether he represented any party named in the accident report, the affidavit does not sufficiently support plaintiff's conclusion that LexisNexis acts as a third-party reseller of unredacted accident reports without limitation. The record before us demonstrates that defendant only provides LexisNexis with unredacted accident reports in order to comply with its mandatory reporting obligations, and that purchases of unredacted copies of those reports—either through defendant directly or through LexisNexis—are limited to those who provide specific information at the time of the request and are entitled—either by way of being involved in the accident, representing someone involved in the accident, or an insurance company identified as insuring someone involved in accident—to the unredacted information therein.

¶ 24 The dissent distorts the state of the record to support its position. To be clear, if there was any admissible evidence that LexisNexis was selling unredacted accident reports, it was incumbent on plaintiff to submit that evidence. Plaintiff offered no credible evidence of LexisNexis's sale policies or practices regarding defendant's accident reports. The dissent repeatedly makes the unsupported assertion that LexisNexis is free to sell unredacted reports to the public (*infra* ¶¶ 32, 34-35, 38), despite Brack's unrebutted testimony that purchasers must demonstrate some connection to an underlying accident before they can purchase an unredacted report through LexisNexis (*supra* ¶ 20). Neither plaintiff nor the dissent identifies any actual evidence in the record showing that LexisNexis sells the reports to the public with no restrictions. And while defendant's contract with LexisNexis might be silent on whether there were restrictions on the distribution of the accident reports, the unrebutted testimony in the record shows that there were restrictions on who could purchase unredacted reports and these restrictions applied whether the request for a report was made to defendant or LexisNexis. If plaintiff wanted to establish an actual lack of restrictions or otherwise demonstrate a genuine issue of material fact—an issue plaintiff never raised or argued, and raised *sua sponte* by the dissent (*infra* ¶¶ 41-49)—it needed to present evidence of that in the circuit court and not rely on this court to fill that gap. It did not, and it is not the function of this court to advance arguments or to speculate on evidence that might have been presented to make plaintiff's case.

***6** ¶ 25 The evidence and arguments advanced in support of plaintiff's waiver argument are not supported by the record and do not demonstrate to our satisfaction that entry of summary judgment in favor of defendant should be reversed. To be clear, we find that, based on the actual record before us, plaintiff has not presented sufficient facts to establish that defendant's conduct amounts to waiver under the rule articulated in *Lieber*. The dissent's assertion that we have "establishe[d] a new rule of law" (*infra* ¶ 52), and that we do "not follow the existing rule of law set forth in *Lieber*" (*infra* ¶ 53), is nothing more than a misreading of our holding. We find no error with the circuit court's entry of summary judgment in favor defendant and affirm the judgment of the circuit court.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.

Justice Griffin concurred in the judgment.

Justice Hyman dissented.

¶ 29 JUSTICE HYMAN dissenting:

¶ 30 I dissent both on the merits and on the majority issuing this decision as an Order under Supreme Court Rule 23(b) (eff. Apr. 1, 2018). On the merits, the majority justifies its conclusion by ignoring material facts, including that the mandatory reporting requirements and the sale of the unredacted reports are interrelated. Making matters worse, the majority cites no authority for its position. On issuing this

decision as a Rule 23 Order, the criteria set out in Rule 23(a) belie the majority's assessment. Moreover, the time has come for the Illinois Supreme Court to amend Rule 23(a) so a single panel member may designate a decision as precedential. This will contribute to the advancement, clarification, and evolution of the law in Illinois for the common benefit of the parties, their lawyers, the bench and bar, and, most of all, the people of the State of Illinois.

¶ 31 SPD Waived Denying FOIA Request

¶ 32 The Schaumburg Police Department contends it did not waive its right to withhold unredacted accident reports from a Freedom of Information Act request because LexisNexis, a non-governmental, third-party vendor, was merely performing SPD's mandatory reporting requirements under section 408 of the Illinois Vehicle Code (625 ILCS 5/11-408 (West 2016)). But, as Mancini has shown, SPD went much further, contracting with LexisNexis to allow it to sell the unredacted accident reports to the public, without restrictions or privacy protections. According to Mancini, by authorizing LexisNexis to sell the unredacted accident reports to the public, SPD waived the right to deny the FOIA request at issue.

¶ 33 An analogous case, *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401 (1997), supports reversal. In *Lieber*, the Illinois Supreme Court held that Southern Illinois University must comply with a FOIA request when it disclosed the same information to other entities, including the local newspaper and religious organizations. *Lieber*, 176 Ill. 2d at 412-13. "Voluntary disclosure in one situation can preclude later claims that records are exempt from release to someone else." *Id.* at 413 (citing *Cooper v. United States Department of the Navy*, 594 F. 2d 484, 485-86 (5th Cir. 1979)). Applying this principle, the court noted, "[p]referential treatment of persons or interest groups fosters precisely the distrust of government the FOIA was intended to obviate." *Id.* (citing *State of North Dakota ex rel. Olson v. Andrus*, 581 F. 2d 177, 182 (8th Cir. 1978)).

¶ 34 Notwithstanding the majority's efforts to dissociate *Lieber* from its holding, *Lieber*'s factual differences do not diminish applying the decision and its reasoning here. The majority attempts to distinguish *Lieber* on the grounds that SPD does not act "voluntarily" in complying with the mandatory administrative function performed by LexisNexis. But the flaw in the majority's reasoning is its refusal to appreciate that SPD separately contracted with LexisNexis to also permit the company to market those unredacted reports to the public for a profit, and that voluntary act constitutes waiver, as in *Lieber*. Moreover, neither SPD nor the majority cite a single case or authority that says a governmental entity can both withhold unredacted records under FOIA, while, at the same time, let a non-governmental, third-party vendor sell the unredacted records to the public.

*7 ¶ 35 The majority believes the analysis stops once LexisNexis satisfies SPD's statutory reporting requirement. Indeed, if that were the sole purpose of providing the unredacted reports to LexisNexis, I would be inclined to agree. But SPD's contract with LexisNexis violates the "selective disclosure," or "preferred treatment" discussed in *Lieber*. The contract, which is in the record, places no restrictions on LexisNexis's use of the unredacted reports or to whom LexisNexis may sell them. Also noteworthy, LexisNexis hands over part of its renumeration to SPD.

¶ 36 The Illinois FOIA Act is patterned after that federal statute and lawmakers intended that federal case law be used in interpreting the Act. *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1012 (1994). Regarding statutorily mandated disclosure and waiver, the Ninth Circuit's decision in *Watkins v. United States Bureau of Customs and Border Protection*, 643 F. 3d 1189 (9th Cir. 2011), is instructive.

¶ 37 In *Watkins*, a copyright and trademarks attorney filed FOIA requests with the U.S. Bureau of Customs and Border Protection, seeking Notices of Seizure of Infringing Merchandise ("Notices of Seizure") sent by CBP to trademark owners after seizing counterfeit merchandise at a port. *Id.* at 1192. By statute, CBP must disclose the Notices of Seizure to the aggrieved trademark owner. See 19 U.S.C. § 1526(e). But CBP imposed no restrictions on the trademark owner's use of the information in the Notice, so the owner could "freely disseminate the Notice to his [or her] attorneys, business affiliates, trade organizations, the importer's competitors, or the media ***." *Id.* The court found that "[t]his no-strings-attached disclosure *** voids any claim to confidentiality and constitutes a waiver" of the exemption. *Id.*

¶ 38 SPD had a statutorily imposed reporting requirement and used LexisNexis to perform that function. But SPD placed no restrictions on LexisNexis's distribution of unredacted accident reports, though it could have, and LexisNexis distributed the unredacted reports to customers willing to pay

for them. As in *Watkins*, this "no-strings attached" disclosure waived the exemption.

¶ 39 Moreover, in claiming the right to refuse to release the same information under the FOIA request, SPD undermined the purpose of the FOIA, which is to "provide the public with easy access to government information." *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 417 (2006). See *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 994 (2007) ("The purpose of the FOIA is to open governmental records to the light of public scrutiny"). To achieve that goal, our supreme court has held that the Act shall be accorded a liberal construction and the exceptions to disclosure narrowly construed. *Southern Illinoisan*, 218 Ill. 2d at 416. Indeed, under the FOIA, public inspection and copying of public records is presumed. **5 ILCS 140**/1.2 (West 2016).

¶ 40 The majority's holding opens a pungent loophole. It lets government entities avoid their responsibilities regarding public records under the FOIA while giving a freehand in marketing and selling unredacted public records to non-government, for-profit third-party vendors.

¶ 41 Disputed Questions of Fact

¶ 42 According to the majority, the record "clearly" reflects that SPD provides unredacted accident reports to LexisNexis for mandatory reporting purposes. The majority quotes the deposition testimony of Jennifer Brack, that she "believe[s] [LexisNexis] ha[s] their own safeguards in place of who can purchase a report," and, to obtain a report through LexisNexis, "her understanding" was that the requesting party would need to know specific information about the report, including the date of the accident, the location of the accident, and the accident report number. According to the majority, Brack's testimony shows that purchasers "must demonstrate some connection to an underlying accident before they can purchase an unredacted report through LexisNexis." But Brack's "belief" and her "understanding" is not evidence of LexisNexis's policies about who can purchase an accident report from LexisNexis. Indeed, SPD's website, of which we can take judicial notice (*Kopnick v. JL Woode Management Co.*, 2017 IL App (1st) 152054, ¶ 26) directs users who want to purchase a traffic accident report to the LexisNexis website. LexisNexis describes itself as "Your go-to source for nationwide access" and its website states that not only involved parties, but "commercial account holders" can purchase crash reports. Presumably, this would include third parties, including insurance companies, but a "commercial account holder" could also be a newspaper, a private investigator, a lawyer, or any other number of private individuals.

***8** ¶ 43 Without more evidence beyond Brack's beliefs about LexisNexis's practices and policies, a material question of fact remains—whether the company sells unredacted reports to its customers.

¶ 44 The majority contends Mancini does not direct the court's attention to any facts in the record to contradict Brack's testimony, or that would call into question that SPD provides unredacted accident reports to LexisNexis to comply with its reporting obligations. Not so. As the majority notes, Michael Camarata, an attorney at Mancini's office, submitted an affidavit asserting he purchased an unredacted version of one of SPD's accident reports from LexisNexis. The majority contends Camarata's affidavit does not state what information he provided to LexisNexis to purchase the accident report. The majority further notes that Brack testified Camarata would have had to submit the names of the parties involved in the accident, the date and location of the accident, and the accident report number. Yet, as noted, Brack testified as to what she believed was LexisNexis's practices. Nothing in the record indicates that LexisNexis follows the procedures Brack "believed" to be in place. The discrepancy between what Brack believed to be LexisNexis's practices and Camarata's first-hand experience in obtaining a police report from LexisNexis created a genuine issue of material fact as to whether LexisNexis sells unredacted reports to the public.

¶ 45 Also, in disclosing unredacted accident reports to LexisNexis without restrictions (as provided in the contract with SPD), SPD fails to protect the privacy of individuals. As the majority says in footnote 2, "the State has a statutory duty to maintain the confidentiality of accident reports in its possession, subject to narrow exceptions. 625 ILCS 5/11-412 (West 2018); *Arnold v. Thurston*, 240 Ill. App. 3d 570, 573-74 (1992)." The contract between SPD and LexisNexis, which, as already noted is in the record, places no restriction on LexisNexis and provides none of the privacy protections the FOIA envisions.

¶ 46 Cross-Motions for Summary Judgment

¶ 47 Where the parties file cross-motions for summary judgment, they invite the court to decide the issue as a matter of law. *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill.App.3d 335, 339 (2005). Nevertheless, the mere filing of cross-motions does not preclude a determination that triable questions of fact exist. *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). A reviewing court has the power to reverse a summary judgment order, including cross-motions for summary judgment, where the record indicates that a material question of fact exists. *Id.*

¶ 48 This court has held that the "waiver rule must not be mechanically applied whenever there is disclosure of information but, rather, requires consideration of the circumstances related to the disclosure, including the purpose and extent of the disclosure, as well as the confidentiality surrounding the disclosure." *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 202 (2004). The record before us shows that material questions of fact exist as to LexisNexis's policies in providing accident reports to third parties and protecting the confidentiality of the subjects of those reports.

*9 ¶ 49 I would reverse the trial court order granting summary judgment for SPD and remand for further proceedings.

¶ 50 Designation as Non-precedential Order

¶ 51 Rule 23(a) allows for publication when a majority of the panel concludes that a decision either "establishes a new rule of law or modifies, explains or criticizes an existing rule of law" or when "the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." Ill. S. Ct. Rule 23(a)(1)-(2) (eff. Apr. 1, 2018). This case should have been published as an opinion under Supreme Court Rule 23(a) (eff. Apr. 1, 2018) because it meets one of the Rule's criteria.

¶ 52 The majority establishes a new rule of law, satisfying a Rule 23(a) criterion for publication. Under the majority opinion, a government entity, like SPD, that is required to disclose information to the State, can release private information to a third party who sells it, yet deny access to the same information under a FOIA request. Neither the FOIA nor any prior Illinois court has so held, as evidenced by the lack of citations to authority in the majority opinion.

¶ 53 Moreover, the majority does not follow the existing rule of law set forth in *Lieber*—that "[v]oluntary disclosure in one situation can preclude later claims that records are exempt from release to someone else." *Lieber*, 176 Ill. 2d at 413. As noted, the majority attempts to distinguish *Lieber* by asserting that SPD was mandated to provide accident reports to the State but does not acknowledge SPD's voluntary act of separately contracting with LexisNexis to allow the company to sell unredacted reports to the public for a profit. This conduct falls squarely under the holding in *Lieber*. A decision that conflicts with established precedent, at minimum, constitutes an attempt to modify existing law, and obligates publication.

¶ 54 I propose the Supreme Court consider amending Rules 23(a) in the same way it recently amended Rule 352. See Ill. S. Ct. Rule 352(a) (eff. July 1, 2018). Now Rule 352 requires oral argument at the request of one justice on the panel. Rule 23(a) should require publication as an opinion at the request of one justice on the panel.

¶ 55 I have written on this issue before. Ironically, I am forced to rely on an unpublished order to help explain my previous thoughts about unpublished orders. I consider it contrary to the purpose of appellate review that a dissent rejecting the result or rationale can be relegated to precedential oblivion, as I explained in *Snow & Ice, Inc. v. MPR Management, Inc.*, 2017 IL App (1st) 151706-U, ¶¶ 27-53 (Hyman, P.J., concurring in part and dissenting in part). Whatever persuasive value a dissent may have on future litigants and courts evaporates as an unpublished order.

¶ 56 There are no pragmatic impediments to amending Rule 23(a). Most likely, the presence of a dissent might split the panel on the question of publication. In the First District during 2018, dissents appeared in 15 of 331 opinions (4.5%) and 27 of 1162 Rule 23 orders (2.3%). While sometimes a dissenter prefers that the majority ruling remain unpublished, even if every unpublished order with a dissent had been published, the total number of published opinions would have increased just 8%. I do not perceive this slight number burdening either counsel or the courts when researching the proper disposition of a given argument. Nor would the addition of a few more Rule 23 orders without dissent have much impact on the number of opinions issued, considering that disagreements occur occasionally, although enough to necessitate a Rule change.

*10 ¶ 57 Alternatively, the court could eliminate unpublished opinions, as some states have done. See Brandon Harrison, *Extra! Extra! Arkansas's High Court Announced Two Changes That Will Affect Thousands of Attorneys*, 44 Ark. Law. 26, 26 (2009) (Arkansas Supreme Court Supreme Court does away with distinction between unpublished and published opinions, making all appellate rulings precedential). Or, like a majority of states, allow unpublished opinions to be cited as persuasive authority. See Sara J. Agne, *A People's History of The Citation of Memorandum Decisions in Arizona,* 51 Ariz. Atty 48 (2015) (noting that more than 30 states permit citation to unpublished decisions as persuasive authority). See also, *Out of Cite, Out of Mind: Navigating The Labyrinth That Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. Balt. L. Rev. 561 (2016) (classifying citations rules in 50 states and the District of Columbia). Yet another possibility, as noted, is allowing a dissenter to override the majority's choice of issuing a Rule 23 order. Any of these options would be preferable to a split decision dictating the result.

¶ 58 On precedent, Lord Mansfield famously observed, "The reason and spirit of cases make law; not the letter of particular precedents." *Fisher v Prince*, 3 Burr. 1362, 1364 (1762). But unless issued as a Rule 23(a) opinion, neither the reason nor the spirit of a case makes law in Illinois. At least, the say of a single panel member should be enough to preserve "the reason and spirit of cases."

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 191131-U, 2020 WL 6151497

Footnotes

1 Defendant's motion to dismiss argued, in part, that defendant did not have the legal capacity to be sued because it was merely a division of the Village of Schaumburg. The circuit court disagreed and concluded that defendant is a "public body" for the purposes of FOIA. Defendant does not challenge the circuit court's conclusion on appeal.

2 The State has a statutory duty to maintain the confidentiality of accident reports in its possession, subject to narrow exceptions. 625 ILCS 5/11-412 (West 2018); *Arnold v. Thurston*, 240 Ill. App. 3d 570, 573-74 (1992).

2020 IL App (4th) 180600-U

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Kevin E. HEMINGWAY, Defendant-Appellant.

NO. 4-18-0600

FILED September 21, 2020

Appeal from the Circuit Court of Champaign County, No. 09CF1438, Honorable Heidi N. Ladd, Judge Presiding.

ORDER

JUSTICE HARRIS delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court did not err by denying defendant's motion for leave to file a successive postconviction petition.

¶ 2 In May of 2018, defendant, Kevin E. Hemingway, *pro se* filed a motion for leave to file a successive postconviction petition, which the trial court denied. Defendant appeals, arguing he demonstrated cause and prejudice as required to file a successive postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 18, 2009, the State charged defendant with armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2008)). The cause proceeded to a jury trial.

¶ 5 At trial, the State adduced the following facts. Terri Herbst was an employee at a McDonald's restaurant in Champaign where her duties included taking cash deposits from the restaurant to the bank. Before any cash deposits were removed from the building, the currency was divided by denomination and "bundled" "[w]ith a rubber band." At approximately 11 a.m. on August 17, 2009, Herbst exited the McDonald's restaurant with that day's cash deposit, estimated to be "[b]etween two thousand and three thousand" dollars. As Herbst neared her car, a man approached her and demanded she "[h]and [him] [the] money." The man pointed a black, semi-automatic handgun at Herbst, who refused to give up the money. Eventually, Herbst's assailant struck her on the head with the handgun, pushed her down, grabbed the deposit bag, and fled.

¶ 6 Soon after the assault, a man wearing clothes matching the description given by Herbst was spotted near the McDonald's restaurant entering "a gold car or a gold-colored car." The police were provided the car's license plate number and drove to the address of the car's owner a short time later. A few minutes after the police arrived at the address, a gold-colored car also arrived. Defendant and two others exited the vehicle. Police searched defendant and found in his possession "four different bundles of currency that were bundled with rubber[ ]bands, in addition to a small amount of change and some other miscellaneous items." Two bundles of currency in defendant's possession contained one-dollar bills, another bundle contained twenty-dollar bills, and the fourth bundle contained a mixture of five and ten-dollar bills. The value of the currency police found in defendant's possession was approximately $1900. The police searched the gold-colored car and discovered a black, semi-automatic handgun and a receipt from Sprint that had been printed at 11:17 a.m. that morning which documented that defendant had paid his $297 cellphone bill in cash.

¶ 7 Defendant was taken to the Champaign Police Department and questioned. Although defendant initially stated he was not involved in the robbery, he later gave a recorded statement in which he confessed to the crime.

¶ 8 During the State's case-in-chief, only two witnesses who observed Herbst being robbed were able to identify defendant as her assailant. The first witness, Jason Townsend, testified he observed a man "run[ ] up, and he pulled up a bandana, and he had a gun in his hand *** [and he] grabb[ed] the [money] bag and point[ed] [the gun] at [Herbst]." Townsend clarified the assailant's face was not covered the entire time Townsend observed him but that "he pulled up the bandana" as he approached Herbst. Townsend testified he "g[o]t a chance

to look at [the] person's face as he was running up towards [Herbst]" and provided an in-court identification of defendant as the person who assaulted Herbst. Sarah Adamson also identified defendant as Herbst's assailant. Adamson testified she was in the drive-thru at McDonald's when she observed a "young, black gentleman" enter the McDonald's parking lot with "a black bandana across his face." Adamson watched the man as he "pull[ed] a gun out of his pocket[,] *** approach[ed] [a] woman in the parking lot[,]" and "started struggling" with the woman. Adamson testified defendant was the man she observed, explaining that although the assailant had a bandana over his face when Adamson saw him, defendant "fit[ ] what [she] remember[ed]."

***2** ¶ 9 The jury convicted defendant and the trial court subsequently sentenced him to 38 years in prison. Defendant later filed a motion to reconsider sentence which the trial court granted, reducing defendant's sentence to 35 years.

¶ 10 Defendant appealed his sentence, arguing the trial court erred in imposing certain fines. *People v. Hemingway*, 2011 IL App (4th) 100701-U, ¶ 4. We remanded for the trial court to make specified adjustments to the amount of defendant's fines but otherwise affirmed the court's judgment. *Id.* ¶ 22.

¶ 11 On August 9, 2012, defendant *pro se* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In his postconviction petition, defendant alleged: (1) the video of defendant's confession, which had been played at trial, was "the fruit of an illegal arrest"; (2) trial counsel "failed to file a pre-trial motion to quash arrest and suppress evidence"; (3) "appellate counsel was ineffective for not raising the argument that trial counsel was ineffective for not filing a pretrial motion to [quash] arrest and suppress any evidence"; and (4) trial counsel erred by "not putting [defendant's] alibi witness on the stand." On October 22, 2012, the trial court dismissed defendant's postconviction petition, finding it "fail[ed] to state the gist of a constitutional claim" and was "frivolous and patently without merit."

¶ 12 Defendant appealed the trial court's dismissal of his postconviction petition. On appeal, defendant argued "(1) his trial counsel rendered ineffective assistance in the jury trial by failing to call an alibi witness, Tiffany Steele, and (2) his appellate counsel rendered ineffective assistance on direct appeal by failing to argue that the sentence was excessive." *People v. Hemingway*, 2014 IL App (4th) 121039, ¶ 1, 14 N.E.3d 1238. We initially rejected both of defendant's contentions. See *id.* ¶ 33. However, at the direction of our supreme court, we later vacated our judgment and reconsidered defendant's claims. *People v. Hemingway*, 2016 IL App (4th) 121039-UB, ¶ 3. We ultimately remanded defendant's case for the trial court to conduct further proceedings on whether trial counsel should have called Tiffany Steele as an alibi witness. *Id.* ¶ 4. Regarding defendant's second claim, we wrote "[t]here is some question of whether the *pro se* petition can be reasonably interpreted as raising [an excessive sentence] claim[ ]" and, on remand, "the appointed postconviction counsel [could] raise that claim more explicitly[ ] in an amended petition, if he or she sees fit to do so." *Id.* ¶ 15.

¶ 13 On remand, defendant's appointed postconviction counsel filed an amended postconviction petition and a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). In the amended petition, defendant alleged trial counsel had been ineffective for failing to call Tiffany Steele as an alibi witness, trial counsel had been ineffective for objecting to a jury request to review certain evidence, and the trial court had erred in denying the jury's request to review certain evidence. The amended petition did not include an allegation that appellate counsel was ineffective for failing to challenge defendant's sentence.

***3** ¶ 14 The trial court conducted an evidentiary hearing on defendant's amended postconviction petition. In support of his claims, defendant testified on his own behalf and presented the testimony of Tiffany Steele. The State presented testimony from defendant's trial counsel. During the State's examination of defendant's trial counsel, the following colloquy occurred:

> "Q. When you took over [defendant's] case, did you have an opportunity to review all the disclosure materials, police reports and other evidence that was provided to you?
>
> A. Yes.
>
> Q. That included police reports, included audio video recordings of the defendant's statement and so on?
>
> A. Yes.
>
> Q. Did you have adequate time to go over those items?
>
> A. Yes, I did.
>
> Q. Did you review those items with your client, Mr. Hemingway?

A. Yes."

At the end of the hearing, the court denied defendant's postconviction petition.

¶ 15 Defendant appealed the denial of his postconviction petition, arguing postconviction counsel acted unreasonably by failing to include in the amended petition a claim that "(1) trial counsel had rendered ineffective assistance in the jury trial by failing to impeach Townsend and Adamson with their prior statements to the police that they would be unable to recognize the robber, and (2) appellate counsel had rendered ineffective assistance on direct appeal by failing to challenge the 35-year prison sentence as excessive." *People v. Hemingway*, No. 4-17-0011 (2017) (unpublished summary order under Illinois Supreme Court Rule 23(c)). We rejected both of defendant's claims, finding postconviction counsel was not obligated to include either allegation in the amended petition because defendant had failed to include them in his original petition. *Id.*

¶ 16 Subsequently, defendant *pro se* filed a motion for leave to file a successive postconviction petition in which he asserted two claims relevant to this appeal. Defendant's first claim was that trial counsel was ineffective for "failing to impeach State[']s witnesses Jason Townsend and Sarah Adamson with their prior statements to detectives." Defendant alleged there was both "cause for [his] failure to raise [this] claim[ ] *** in [his] previous [postconviction] petition" and "prejudice resulting from the failure to bring the claims earlier." Regarding cause, defendant argued he had been unable to raise this contention in his original or amended postconviction petition because he did not "obtain[ ] [the] police reports which contain[ed] [the] evidence [until] after [his] postconviction [petition] was already filed," "had no actual knowledge of the statements contained in the police [report] until [he] received [the] police reports and learned of [the] violations," and postconviction counsel "refused to include the claims in the amended petition." Defendant included in his motion letters he had sent to the trial court requesting access to documents relevant to his case. Defendant also included in his motion letters he had received from his appellate counsel and the appellate court explaining to defendant why they could not provide him with documents relevant to his case. In one such letter dated January 18, 2012, the Fourth District appellate court clerk informed defendant that if he wanted access to "discovery material, witness and police statements, and transcripts of recorded statements," he would have to "make [his] request to the police agency directly and/or the Circuit Court Clerk in Champaign County." On February 27, 2014, defendant issued a Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2012)) request to the City of Champaign for records relating to his case. His request was granted several days later.

***4** ¶ 17 Defendant's final claim included in his motion, and the only other claim relevant to this appeal, stated, in its entirety:

> "Also[,] postconviction counsel was ineffective, or highly unreasonable and was not working in the best interest of the defendant, when she failed to raise the issue of excessive sentencing. She knew of [the] issue[ ] but refused to raise it [because she was] ineffective, neglectful, and her assistance fell way below a reasonable level of assistance."

¶ 18 The trial court later denied defendant's motion, finding defendant "failed to meet the cause and prejudice test for leave to file a successive postconviction [petition]."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues he demonstrated cause and prejudice as required to file his successive postconviction petition. We review the trial court's judgment *de novo* and may affirm the court's judgment on "any basis supported by the record if the judgment is correct." *People v. Green*, 2012 IL App (4th) 101034, ¶ 30, 970 N.E.2d 101.

¶ 22 "The Act provides a procedural mechanism in which a convicted criminal can assert that there was a substantial denial of his or her rights under the Constitution of the United States or the State of Illinois or both, in the proceedings that resulted in his or her conviction." *People v. Gayden*, 2020 IL 123505, ¶ 39. A defendant commences a postconviction proceeding under the Act by filing a petition for relief in the trial court. 725 ILCS 5/122-1(b) (West 2010).

¶ 23 Only a single petition for postconviction relief may be filed under the Act without leave of court. *Id.* § 5-122-1(f).

> "Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to

raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.*

Leave of court to file a successive petition should only be granted where a defendant establishes both prongs of the cause-and-prejudice test. *People v. Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709.

¶ 24 A. Ineffective Assistance of Trial Counsel

¶ 25 Defendant first argues he established cause and prejudice with respect to his ineffective assistance of trial counsel claim and, therefore, should be permitted to file a successive postconviction petition raising that claim. Defendant argues trial counsel provided ineffective assistance by "fail[ing] to impeach the State's star witnesses' identification of [defendant] as the offender." In support of his claim, defendant points to the following statements contained in the police reports he received in response to his FOIA request. In one report, Townsend is reported to have stated he "didn't notice if the [black male] had [a] bandana over his face when he first ran by [Townsend's] drive[-thru] window" and he "would not be able to identify the suspect." In another report, Adamson is reported to have stated "[s]he did not think she could recognize [Herbst's assailant] again." According to defendant, he established cause for his failure to raise this claim in his first postconviction petition because he was "unaware of the witnesses' prior statements until after he obtained [the] police reports on March 13, 2014." Defendant argues he established prejudice because "the identification testimony was a crucial piece of the State's case."

*5 ¶ 26 Contrary to defendant's assertion, he has not established cause for his failure to assert this ineffective assistance of trial counsel claim in his initial postconviction petition. Although defendant claims he was ignorant of the contents of the police reports until March of 2014, the record demonstrates defendant reviewed the police reports before he even went to trial. During the evidentiary hearing on defendant's postconviction petition, defendant's trial counsel testified she both "review[ed] all the disclosure materials, police reports[,] and other evidence" that had been provided to her and "*review[ed] those items with [defendant.]*" (Emphasis added.) Accordingly, defendant was aware of the statements made by Townsend and Adamson long before he filed his initial postconviction petition.

¶ 27 Even assuming, *arguendo*, that defendant was unaware of the statements recorded in the police reports until after he filed his initial postconviction petition, defendant failed to explain why he delayed so long to acquire the records. Defendant was informed in January of 2012 that to obtain his police reports, he would have to request them from the Champaign Police Department, yet defendant inexplicably waited *over two years* before he issued a FOIA request for his records from that agency. That defendant did not obtain the police reports until after he filed his initial postconviction petition is attributable solely to his own inaction and, therefore, does not qualify as an objective factor that impeded him from raising his claim earlier. See *People v. Ortiz*, 235 Ill. 2d 319, 329, 919 N.E.2d 941, 947 (2009) (stating an objective factor is "external" to the defense).

¶ 28 Even if defendant could establish cause, he cannot establish he was prejudiced by trial counsel's failure to impeach Adamson and Townsend in light of the overwhelming evidence against him. At trial, the State established defendant had access to a handgun that matched the description of the weapon used by the assailant, was in possession of currency organized and bundled in the same way as the money taken from Herbst and in the amount estimated to have been taken from Herbst (less the amount defendant spent paying his bill), and confessed to robbing Herbst. Considering the totality of the evidence against defendant, even if defense counsel had impeached Adamson and Townsend, we cannot say a reasonable probability exists that defendant would have been acquitted.

¶ 29 Because defendant failed to establish cause and prejudice necessary to excuse his failure to include this claim of ineffective assistance of counsel in his first postconviction petition, the trial court did not err in dismissing his motion to file a successive postconviction petition.

¶ 30 B. Ineffective Assistance of Appellate Counsel

¶ 31 Defendant next argues he established cause and prejudice sufficient to file a successive postconviction petition asserting that he received ineffective assistance of appellate counsel. This is a different claim from the one defendant raised in his motion for leave to file a successive postconviction petition. In his motion, defendant argued *postconviction*

counsel was unreasonable for failing to argue in his amended postconviction petition that appellate counsel should have raised an excessive sentence claim in defendant's first appeal. Because defendant's motion did not include a claim of ineffective assistance of appellate counsel, he has forfeited review of this issue. See *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004) (matters not raised in postconviction petition may not be argued on appeal). Even if defendant had included his allegation against postconviction counsel in this appeal, his claim would still be barred because defendant already raised that issue in his appeal from the trial court's denial of his amended postconviction petition. See *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005) ("The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal."). As noted above, in that case, we found postconviction counsel was not required to include the excessive sentence claim against appellate counsel in the amended petition because defendant did not include the claim in his original petition. *People v. Hemingway*, No. 4-17-0011 (2017) (unpublished summary order under Illinois Supreme Court Rule 23(c)). Accordingly, we decline to review defendant's second contention of error.

¶ 32 III. CONCLUSION

***6** ¶ 33 For the reasons stated, we affirm the trial court's judgment.

¶ 34 Affirmed.

Justices Turner and Cavanagh concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (4th) 180600-U, 2020 WL 5628682

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2020 IL App (4th) 190409-U

Vincent CARTER, Petitioner-Appellant,

v.

John BALDWIN, in His Official Capacity as Director of Corrections, Respondent-Appellee.

NOS. 4-19-0409, 4-19-0413 cons.

FILED September 2, 2020

Appeal from the Circuit Court of Sangamon County, Nos. 18MR1008, 19MR64, Honorable Rudolph M. Braud Jr., Judge Presiding.

ORDER

JUSTICE TURNER delivered the judgment of the court.

*1 ¶ 1 *Held*: The circuit court's denial of petitioner's request for civil penalties was not against the manifest weight of the evidence.

¶ 2 In December 2018, petitioner, Vincent Carter, filed *pro se* a complaint for *mandamus* (735 ILCS 5/14-101 *et seq.* (West 2018)) against respondent, John Baldwin, in his official capacity as Director of Corrections, in Sangamon County case No. 18-MR-1008 (hereinafter case No. 1008). The court file also contains a petition for declaratory relief, but we do not address it because petitioner does not even mention it in his brief. Petitioner's *mandamus* complaint sought injunctive and declaratory relief, punitive damages, and civil penalties under section 11(j) of the Freedom of Information Act (FOIA) (**5 ILCS 140**/11(j) (West 2018)) for respondent's failure to sufficiently respond to petitioner's FOIA request for the Board's recommendation guidelines for sex offenders on mandatory supervised release (MSR). In April 2019, respondent filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2018)). After a May 2019 hearing, the Sangamon County circuit court granted respondent's motion to dismiss, dismissed the cause with prejudice, and found petitioner was not entitled to civil penalties.

¶ 3 In January 2019, petitioner filed *pro se* another complaint for *mandamus* against respondent in Sangamon County case No. 19-MR-64 (hereinafter case No. 64), again seeking injunctive and declaratory relief, punitive damages, and civil penalties under section 11(j). In this complaint, petitioner alleged respondent failed to sufficiently respond to his FOIA request seeking records related to the water contamination at the Dixon Correctional Center. In April 2019, respondent filed a section 2-619.1 motion to dismiss. After a May 2019 hearing, the circuit court granted respondent's motion to dismiss, dismissed the cause with prejudice, and found petitioner was not entitled to civil penalties.

¶ 4 Petitioner appeals *pro se* both judgments, asserting the circuit court erred by failing to award him mandatory civil penalties based on respondent's failure to comply with petitioner's FOIA requests. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Case No. 1008

¶ 7 The following are the factual allegations in petitioner's December 2018 *mandamus* petition. Petitioner was an inmate in the Dixon Correctional Center. On September 19, 2018, petitioner submitted a FOIA request that stated the following: " 'A copy of "The [Board] Recommendation Guidelines for Sex Offenders that are MSR approved for release." ' " Two days later, the Department of Corrections (Department) responded with the following: " '[The Department] does not maintain or possess records responsive to your request.' " Petitioner was not satisfied with the Department's response because Dana Thompson, a Department field service representative, stated Dixon Correctional Center field service representatives used the Board's guidelines. Petitioner attached Thompson's September 14, 2018, memorandum to his complaint. In the memorandum, Thompson noted " 'no computer/internet access' " was a standard recommendation for all sex offenders per the Board's recommendation guidelines provided to him by the Board. According to Thompson, the Board's recommendation guidelines told

Thompson what he had to recommend, but the Board was the one who actually imposes it. Thompson had no choice in the matter.

*2 ¶ 8 On October 4, 2018, petitioner filed a request for review of the Department's response with the Attorney General's public access committee (PAC). The PAC responded on October 19, 2018. The response was based upon the materials petitioner submitted and pursuant to section 9.5(f) of FOIA (**5 ILCS 140**/9.5(f) (West 2018)), which permits the Attorney General to exercise discretion to resolve the request for review. Petitioner did not set forth the contents of PAC's response in his complaint.

¶ 9 On December 8, 2018, petitioner filed his *mandamus* complaint, which requested injunctive and declaratory relief in the form of compelling the Department to provide records responsive to petitioner's FOIA request, particularly, the document relied upon by Thompson, which contained the standard recommendations for all sex offenders. Petitioner also requested punitive damages and mandatory civil penalties because the Department willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith.

¶ 10 In April 2019, respondent filed a section 2-619.1 motion to dismiss, asserting (1) respondent was not a proper party to this action, (2) the documents had already been provided to petitioner and thus his FOIA request was moot, and (3) petitioner's request for civil penalties failed to state a claim. Respondent filed a memorandum in support of his motion to dismiss, to which he attached the following: (1) the affidavit of Lisa Weitekamp, the Department's FOIA officer; (2) petitioner's September 19, 2018, FOIA request; (3) e-mails by Department employees regarding petitioner's FOIA request; (4) the Department's September 21, 2018, response; (5) Thompson's memorandum; and (6) the Attorney General's April 5, 2019, letter providing petitioner with the guidelines mentioned by Thompson. In response, petitioner filed a motion for leave to amend his complaint, seeking to name the Department as the respondent instead of the Director of Corrections and add the Attorney General as a respondent. Petitioner admitted he had been provided with the documents he had originally sought. However, he contended the issue of whether the Department's failure to provide the requested documents was willful and intentional or otherwise in bad faith was not moot. Petitioner attached the following documents to his motion for leave to amend: (1) his September 13, 2018, letter to Thompson; (2) Thompson's memorandum; (3) petitioner's request for PAC review; and (4) PAC's response to petitioner's request, which found no further inquiry was warranted.

¶ 11 On May 28, 2019, the circuit court held a hearing on respondent's motion to dismiss. A report of proceedings for the hearing is not included in the record on appeal. On June 3, 2019, the court entered a written order granting respondent's motion to dismiss and dismissing the cause with prejudice. The court further found "[the Department] did not willfully and intentionally violate FOIA and as such, [petitioner] is not entitled to civil penalties."

¶ 12 On June 24, 2019, petitioner filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). Thus, this court has jurisdiction of petitioner's appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). On appeal, this court docketed the appeal as case No. 4-19-0413.

¶ 13 B. Case No. 64

¶ 14 The following are the factual allegations in petitioner's January 2019 *mandamus* petition. On August 8, 2018, petitioner submitted a three-part request under FOIA, seeking records related to water contamination at the Dixon Correctional Center in January and February 2016. On August 16, 2018, petitioner received a response that denied two of the parts and stated, "[the Department] does not possess or maintain records responsive to this request." Petitioner was not satisfied with the Department's response because he knew other inmates had received some documents that the Department was claiming it did not possess or maintain.

*3 ¶ 15 On August 21, 2018, petitioner sought review of the Department's denial of his request with the PAC. The PAC responded on September 5, 2018. The response was based upon the materials he submitted and pursuant to section 9.5(f) of FOIA (**5 ILCS 140**/9.5(f) (West 2018)), which permits the Attorney General to exercise discretion to resolve the request for review. The PAC determined no further inquiry was warranted and closed the case.

¶ 16 In his January 2019 *mandamus* complaint, petitioner requested injunctive and declaratory relief in the form of compelling the Department to provide records responsive to petitioner's FOIA request. Petitioner also requested punitive damages and mandatory civil penalties because the

Department willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith.

¶ 17 In April 2019, respondent filed a section 2-619.1 motion to dismiss, asserting (1) respondent was not a proper party to this action, (2) the Department did not possess records responsive to petitioner's request, (3) petitioner's request for test results and notices was moot, and (4) petitioner's request for civil penalties failed to state a claim. In his memorandum in support of his motion to dismiss, respondent attached the following: (1) the affidavit of Joel Diers, a Department attorney who assisted with reviewing and fulfilling FOIA requests; (2) petitioner's August 8, 2018, FOIA request; (3) a January 10, 2016, incident report about a complaint of rusty water by Dennis McCoy; (4) a January 10, 2016, incident report about a complaint of yellow water by Dennis Nauman; (5) e-mails between Department employees about the water softener issue; (6) PDC Laboratories, Inc. analytical results on water samples from the Dixon Correctional Center in March 2016; (7) documents showing the flushing of faucets in January 2016; (8) a January 2016 coliform analysis report on the water at the Dixon Correctional Center by the Illinois Environmental Protection Agency; and (9) the Department's August 16, 2018, response to petitioner's FOIA request. In response, petitioner filed a motion for leave to amend his complaint, seeking to name the Department as the respondent instead of the Director of Corrections. Petitioner admitted he had been provided with the documents he had originally sought. However, he contended the issue of whether the Department's failure to provide the requested documents was willful and intentional or otherwise in bad faith was not moot. He also contended the documents attached to the motion to dismiss show the Department acted in bad faith when it claimed the water at the Dixon Correctional Center was not tested in January and February 2016.

¶ 18 On May 28, 2019, the circuit court held a hearing on respondent's motion to dismiss. A report of proceedings for the hearing is not included in the record on appeal. On June 3, 2019, the court entered a written order dismissing petitioner's complaint with prejudice. The court further found "[the Department] did not willfully and intentionally violate FOIA and as such, [petitioner] is not entitled to civil penalties."

¶ 19 On June 24, 2019, petitioner filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). Thus, this court has jurisdiction of petitioner's appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). On appeal, this court docketed the appeal as case No. 4-19-0409. In January 2020, respondent filed a motion to consolidate the appeals in these two cases, which this court granted on February 4, 2020.

¶ 20 II. ANALYSIS

*4 ¶ 21 In this case, the circuit court denied both of petitioner's requests for civil penalties under section 11(j) of FOIA (**5 ILCS 140**/11(j) (West 2018)) and dismissed the *mandamus* complaints with prejudice. On appeal, petitioner only challenges the court's denial of his requests for civil penalties under section 11(j) which provides, in pertinent part, the following:

> "If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence." **5 ILCS 140**/11(j) (West 2018).

In both cases, the circuit court implicitly found respondent did not willfully and intentionally fail to comply with FOIA or act in bad faith when it found petitioner was not entitled to civil penalties.

¶ 22 Here, we lack a report of proceedings for the dispositive hearing in both cases. As the appellant, petitioner "ha[d] the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959. Based on the record before us, the circuit court considered only written pleadings and attachments in denying petitioner's request for civil penalties. In making its determination, the court still had to resolve factual disputes and make credibility determinations regarding the Department's actions. As such, we apply the same standard of review as in *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 48, 977 N.E.2d 1216, where the Appellate Court, Second District, reviewed the circuit court's factual determination the respondent did not willfully and intentionally fail to comply with FOIA or act in bad faith under the manifest weight of the evidence standard of review. With that standard, a reviewing court will only overturn a factual finding when the opposite conclusion is apparent or when the finding appears to be

unreasonable, arbitrary, or not based on the evidence. *Rock River Times*, 2012 IL App (2d) 110879, ¶ 48.

¶ 23 Section 11 of FOIA provides, in pertinent part, as follows:

> "(a) Any person denied access to inspect or copy any public record by a public body may file suit for injunctive or declaratory relief.
>
> (a-5) In accordance with Section 11.6 of this Act, a requester may file an action to enforce a binding opinion issued under Section 9.5 of this Act." **5 ILCS 140**/11 (West 2018).

With both of petitioner's FOIA requests, the PAC determined no further inquiry was warranted and closed the case. A binding opinion was not issued. "The decision not to issue a binding opinion shall not be reviewable." **5 ILCS 140**/9.5(f) (West 2018). Thus, petitioner cannot challenge the PAC's decisions not to issue a binding opinion by claiming a conflict of interest within the Attorney General's office.

¶ 24 With case No. 1008, petitioner argues the circuit court's finding the Department did not willfully and intentionally fail to comply with FOIA or act in bad faith was erroneous because the requested document clearly existed when he made his request. Thus, he asserts the Department's search of its records was unreasonable. Respondent contends the search was reasonable. We agree with respondent.

***5** ¶ 25 In her affidavit, Weitekamp explained she sent petitioner's FOIA request to Alyssa Schafer-Williams, the manager of the Department's sex offender services unit, because petitioner requested documentation regarding the guidelines for sex offenders who were approved for MSR and she believed the sex offender services unit would possess the requested information. Weitekamp presumed Schafer-Williams, as the manager of the sex offender services unit, would have knowledge regarding the policies, procedures, and documents the Department possessed on this topic. Weitekamp stated Schafer-Williams replied, noting nothing like the requested document existed. A copy of Weitekamp and Schafer-Williams's e-mail exchange is attached to Weitekamp's affidavit. Given Schafer-Williams's response, Weitekamp responded to petitioner's FOIA request in a letter stating the Department does not maintain or possess records responsive to his request. We note petitioner did not mention Thompson or attach Thompson's memorandum to his September 2018 FOIA request. Weitekamp did not receive any communication from petitioner after her letter. The record also does not contain anything indicating the PAC required information from the Department during its review of the Department's response to petitioner's FOIA request. Thus, no evidence showed the Department did not comply with the PAC. In his December 2018 *mandamus* complaint, petitioner mentioned Thompson and attached his memorandum. Thereafter, Thompson was contacted and the responsive document, which was a memorandum on the Board's recommendation guidelines, was located. The document was provided to petitioner in April 2019. The aforementioned facts show a reasonable search on the part of the Department given the information it had before it. When additional information was obtained from petitioner, the responsive document was located and provided to petitioner, which negates a claim of bad faith. The facts also do not show an intentional and willful violation of FOIA.

¶ 26 Regarding case No. 64, petitioner asserts the Department acted in bad faith by stating it did not maintain or possess records related to water testing in January and February 2016 because it is refuted by the records submitted by respondent with his motion to dismiss. Petitioner again asserts the Department did not conduct a reasonable search. Respondent argues the search was reasonable and, if a violation occurred, its actions were not in bad faith or an intentional and willful violation of FOIA.

¶ 27 In his August 2018 FOIA request, petitioner sought the following three things:

> "(1) the toxic; lead and matellic [*sic*] particle levels found in Dixon C.C. water source during January 2016 & February 2016.
>
> (2) the cause for the constant influx of amber colored fiber particles that ran through the Dixon C.C. water system during January & February 2016.
>
> (3) a copy of any NOTICES issued to the inmates or staff (by way of memo, text, e-mail, etc.) at Dixon C.C. regarding contaminated water in 2016." (Emphasis in original.)

In response to the three-part request, the Department stated it did not possess or maintain records responsive to petitioner's first and third requests. As to the second request, the Department provided petitioner with a copy of an e-mail detailing the problems observed with the softening units at the Dixon Correctional Center.

¶ 28 In his affidavit, Diers explained he had received previously a FOIA request similar to petitioner's and had contacted the Department's chief engineer. The chief engineer had given him numerous documents. Those documents were attached to Dier's affidavit. As to the first request, Diers explained he answered the Department did not possess or maintain records responsive to the request because the water was not tested in January or February 2016. We note the water tests in January 2016 referred to by petitioner in his brief were testing for coliform bacteria and not for the toxic lead and metallic particle levels. Thus, those documents were not responsive to petitioner's first request. The Department did respond to the second request by providing an e-mail detailing the problems observed with the softening units. Regarding the third request, Diers noted no notices were issued to staff or inmates. Diers further stated two incident reports were filed out related to the water contamination but he did not believe they were responsive to petitioner's request. Thus, he responded the Department did not possess or maintain records responsive to the third request. The incident reports were also attached to Dier's affidavit. The record does not contain anything indicating the PAC required any information from the Department during its review of the Department's response to petitioner's FOIA request. Thus, no evidence showed the Department did not comply with the PAC. The Department then provided the documents it received from the chief engineer regarding a similar FOIA request with its motion to dismiss petitioner's *mandamus* complaint. In his motion to amend, petitioner acknowledged he had received all the documents he originally sought. The above facts demonstrate a reasonable search on the part of the Department given the specificity of petitioner's request. The Department provided petitioner with a broader array of documents regarding the water contamination than he requested in his August 2018 FOIA request, which negates a claim of bad faith. The facts also do not show an intentional and willful violation of FOIA by the Department.

***6** ¶ 29 Based on the facts before the circuit court, we do not find the court's implicit rulings the Department did not willfully and intentionally fail to comply with FOIA or otherwise act in bad faith were against the manifest weight of the evidence.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the Sangamon County circuit court's judgments.

¶ 32 Affirmed.

Justices Knecht and Harris concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (4th) 190409-U, 2020 WL 5253200

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2020 WL 4933653
Only the Westlaw citation is currently available.
United States District Court, S.D. Illinois.

Deandre FIELDS, #M48598, Plaintiff,

v.

Jeffery DENNISON, Alfonso David, Jane Doe, and Kimberly Johnson, Defendants.

Case No. 20-cv-217-MAB
|
Signed 08/24/2020

Attorneys and Law Firms

Deandre Fields, Vienna, IL, pro se.

MEMORANDUM AND ORDER

BEATTY, Magistrate Judge:

*1 Plaintiff Deandre Fields, an inmate of the Illinois Department of Corrections ("IDOC") who is currently incarcerated at Shawnee Correctional Center ("Shawnee"), brings this action for deprivations of his constitutional rights pursuant to 42 U.S.C. § 1983. He claims that while incarcerated at Shawnee he has received inadequate medical and dental care.

The Complaint is now before the Court for preliminary review pursuant to 28 U.S.C. § 1915A.[1] Under Section 1915A, any portion of a complaint that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or requests money damages from a defendant who by law is immune from such relief must be dismissed. 28 U.S.C. § 1915A(b). At this juncture, the factual allegations of the *pro se* Complaint are to be liberally construed. *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

The Complaint

Fields alleges the following: Prior to incarceration he was diagnosed with cardiomyopathy, a heart disease which causes to him to pass out and experience blackouts, headaches, heart palpitations, and extreme dizziness. (Doc. 1, p. 9, p. 16). Since his arrest in 2013, he has received inadequate treatment and care for his condition. (*Id.* at p. 9). On November 13, 2014, Fields was transferred to Shawnee, where he was not interviewed or treated for his cardiomyopathy, despite that his medical records included information that he suffered from headaches and a heart problem. (*Id.* at p. 11, 18). On March 10, 2015, during an initial interview prior to a teeth cleaning, Fields disclosed his health history to Jane Doe, a dental hygienist. (*Id.* at p. 11-12). Jane Doe immediately went to the health care unit and asked the medical doctor, Alfonso David,[2] if cardiomyopathy would prevent her from cleaning Fields's teeth. The medical doctor responded that "cardiomyopathy" was not a real word or a serious condition that required medical attention. Both the medical doctor and Jane Doe accused Fields of lying. (*Id.* at p. 12). Jane Doe told Fields that if he lied to her again, he would find himself in serious trouble. (*Id.* at p. 13). Out of precaution, however, Jane Doe postponed the teeth cleaning and requested for the doctor to send for Field's medical records from Loyola Hospital, where he was treated prior to incarceration, Cook County Jail, and Stateville Correctional Center. (*Id.* at p. 9, 13). Fields signed a release form for his medical records, but the records were not reviewed until eight months later, around November 2015. During that time, Fields had to wait for adequate dental hygiene care. (*Id.* at p. 15).

*2 Because he did not receive any cardiopathy treatment, his condition worsened and he was unable to "physically operate during the course of any normal day[.]" (*Id.* at p. 18). Fields would experience vertigo and blackouts and fall, injuring himself in his cell. (*Id.*). Dr. David also refused to issue a low bunk permit to Fields. (*Id.* at p. 19, 21).

In February 2019, during a routine asthma clinic visit, Fields described his condition and symptoms to Nurse Practitioner Tammy. (*Id.* at p. 20). Tammy reviewed his medical records and arranged for him to be sent to an outside specialist the same day. (*Id.*). Even after being referred to a specialist, Dr. David still refuses to provide Fields a low bunk permit. (*Id.* at p. 22). Dr. David also does not timely schedule Fields for his treatment with the specialist every six months. (*Id.*). Fields suffers from mental anxiety and emotional distress because he fears that Dr. David still believes that he has made up his illness and will not provide him with adequate treatment. (*Id.* at p. 17, 19). Finally, Dr. David provides inadequate care in an attempt to save on costs. (*Id.* at p. 17).

From March 2015 through December 2019, Fields has repeatedly filed FOIA requests with the State of Illinois to

retrieve his medical records, and his requests were either denied, delayed, or not processed in accordance with state law. (*Id.* at p. 15, 22-26).

Preliminary Dismissal

Fields's only allegation against Warden Dennison is that Dennison violated his rights under the Eighth and Fourteenth Amendments by acting with deliberate indifference to Shawnee prison conditions that are under Dennison's direct supervision. (Doc. 1, p. 28). Alleging liability based on theories of *respondeat superior* or negligent supervision of subordinates is not sufficient to establish a claim against an individual under Section 1983. *Wilson v. City of Chi.*, 6 F.3d 1233, 1241 (7th Cir. 1993). Accordingly, the clams against Warden Dennison are dismissed. Because Fields requests injunctive relief (Doc. 1, p. 29), Dennison shall remain a defendant, in his official capacity only, for the purpose of implementing any injunctive relief that may be ordered.

Furthermore, Fields makes several allegations regarding his medical care while incarcerated prior to arriving at Shawnee and IDOC systemwide policies and practices. All of these claims will be dismissed because they are not asserted against a properly named defendant. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Myles v. United States*, 416 F.3d 551, 551–52 (7th Cir. 2005) (to be properly considered a party a defendant must be "specif[ied] in the caption").

Discussion

Based on the allegations in the Complaint, the Court finds it convenient to designate the following Counts:

Count 1: Eighth Amendment claim of deliberate indifference against Dr. David for failing to provide adequate medical care for Field's heart condition since his arrival at Shawnee.

Count 2: Eighth Amendment claim of deliberate indifference against Jane Doe for delaying Field's dental cleaning treatment.

Count 3: Eighth Amendment claim of cruel and unusual punishment against Dr. David and Jane Doe for falsely accusing Fields of lying about being diagnosed with cardiomyopathy.

Count 4: Fourteenth Amendment due process claim against Kimberly Johnson for delaying, denying, and improperly responding to Fields's requests for medical records.

*3 The parties and the Court will use this designation in all future pleadings and orders, unless otherwise directed by a judicial officer of this Court. **Any other claim that is mentioned in the Complaint but not addressed in this Order should be considered dismissed without prejudice as inadequately pled under the *Twombly* pleading standard.**[3]

Counts 1 and 2

To prevail on a claim of deliberate indifference to a serious medical need, a plaintiff must first show that his condition was "objectively, sufficiently serious" and that the "prison officials acted with a sufficiently culpable state of mind." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005) (citations and quotation marks omitted).

Fields alleges that at least since March 2015, maybe earlier, Dr. David knew that Fields was suffering from cardiomyopathy, which Fields claims had been diagnosed by a physician as requiring treatment in 2013. *See Hayes v. Snyder,* 546 F.3d 516, 522 (7th Cir. 2008). Fields did not receive treatment until 2019, after a nurse practitioner at Shawnee arranged to have Fields see a specialist. (Doc. 1, p. 16, 20). Even after seeing a specialist, Dr. Alfonso has failed to timely schedule Fields for his treatments at the outside hospital, which must occur every six months, and has not issued him a medical permit for a low bunk, resulting in additional injuries. Count 1 will therefore proceed against Dr. Alfonso.

Fields claims that after he informed Jane Doe about his heart condition, she rescheduled his dental cleaning out of precaution. He specifically states that he "was forced to wait more than 8 months to have any form of adequate medical dental hygiene performed[,]" and he was deprived of the right to access dental care. (Doc. 1, p. 15). While a dental condition may be "objectively serious" and the failure to provide needed dental treatment may rise to the level of deliberate indifference, "there is no established constitutional right to routine dental care, including teeth cleaning." *Jones v. Strow,* No. 19-cv-4013-MMM, 2019 WL 5580945, at *3

(C.D. Ill., Oct. 29, 2019) (citing *Taylor v. Christian,* 42 F.3d 1392 (7th Cir. 1994)). Because Fields does not allege the denial or delay of treatment for a serious dental problem, only the "denial of routine dental care[,]" *Taylor,* 42 F.3d at 1, he has not sufficiently stated a constitutional claim. Count 2 will be dismissed.

Count 3

In general, allegations of verbal abuse and threats are insufficient grounds for relief under Section 1983. *See Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015) ("[M]ost verbal harassment by jail or prison guards does not rise to the level of cruel and unusual punishment."); *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) ("Standing alone, simple verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a protected liberty interest or deny a prisoner equal protection of the laws.").

Fields alleges that Dr. David and Jane Doe falsely accused him of lying about his heart condition and Jane Doe threatened to punish him for attempting to share important medical information on March 10, 2015. (Doc. 1, p. 12). The comments frightened Fields, who was only twenty at the time, and caused extreme stress. (*Id.* at p. 13). This single incident of verbal harassment that caused emotional stress is not the kind of severe harassment that could put forth a viable constitutional claim, and therefore, Fields has not sufficiently alleged an Eighth Amendment claim. Additionally, to the extent that Fields is claiming that Dr. David and Jane Doe committed slander and defamed his character (Doc. 1, p. 12, 14, 16), these claims are not actionable under Section 1983. *See Batagiannis v. W. Lafayette Cmty. School Corp.,* 454 F.3d 742 (7th Cir. 2006) ("there is no constitutional right to be free of defamation"). Count 3 will be dismissed.

Count 4

***4** Fields alleges that he submitted multiple requests for his medical records pursuant to the Illinois Freedom of Information Act, ("ILFOIA"), **5 ILCS 140**/1 *et seq.*, and his requests were either denied, responded to with incorrect documents, or the responses were delayed in violation of the statute and the Due Process Clause

To state a claim under the due process clause of the Fourteenth Amendment, a plaintiff must establish a deprivation of liberty or property *without due process of law*; if the state provides an adequate remedy, plaintiff has no civil rights claim. *See Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984). Fields's constitutional rights are not automatically violated when he is not provided his medical records in accordance with Illinois law. *See Scruggs v. Jordan,* 485 F.3d 934, 940 (7th Cir. 2007) (due process rights are not violated where access to medical records is denied as repetitive evidence). Additionally, Fields has not alleged that the State of Illinois has not provided an adequate remedy for retrieving the documents in state court. *See Withrow v. Elk Grove Police Dep't Chief Charles Walsh,* 2015 WL 9259884, at *3 (N.D. Ill. Dec. 18, 2015) ("Simply because Plaintiff alleges that Defendant violated Illinois law in refusing Plaintiff's FOIA request does not furnish him with a basis for invoking federal jurisdiction."). Therefore, the Court finds that he has not asserted a viable due process claim regarding the requests of his medical records.

Furthermore, the Court does not have jurisdiction to address Field's ILFOIA claim. *See Plummer v. Godinez,* No. 13 C 8253, 2015 WL 4910562, at *3 (N.D. Ill. Aug. 17, 2015) (ruling that an ILFOIA is a "purely state-law claim" and the court lacked jurisdiction") (citations omitted). If Fields wishes to compel the release of state agency documents, he must do so by filing in state court. **5 ILCS 140**/11(b) ("suit may be filed in the circuit court for the county where the public body has its principal office or where the person denied access resides."). For these reasons, Count 4 will be dismissed.

Recruitment of Counsel

Fields has filed a Motion for Recruitment of Counsel (Doc. 3), which is **DENIED**.[4] Fields discloses that he has attempted to contact many law offices in an attempt to recruit counsel and includes with his motion two letters from attorneys declining representation. Accordingly, he appears to have made reasonable efforts to retain counsel on his own. With respect to his ability to pursue this action *pro se*, Fields indicates that his knowledge of the law is not extensive enough to handle litigating this case. His limited knowledge of the law, however, is not unique to him as a *pro se* litigant and does not necessarily warrant recruitment of counsel at this time. Fields's Complaint has survived screening and has demonstrated an ability to construct coherent sentences and relay information to the Court. This straightforward case is currently proceeding on a single claim against one defendant and given the early stage of litigation, it is difficult to

accurately evaluate the need for assistance of counsel. Should his situation change as the case proceeds, Fields may file another motion setting forth all the facts that support his request.

Disposition

*5 **IT IS HEREBY ORDERED** that the Complaint survives screening pursuant to Section 1915A. **Count 1** shall proceed against Dr. Alfonso. **Counts 2, 3,** and **4** are **DISMISSED.** Jane Doe and Kimberly Johnson are **DISMISSED** from this action, and the Clerk of Court is **DIRECTED** to terminate them as defendants. All claims against Jeffrey Dennison are also **DISMISSED**, but he shall remain a defendant in his official capacity for the purpose of implementing any injunctive relief that may be ordered.

The Motion for Recruitment of Counsel (Doc. 3) is **DENIED.**

The Clerk of Court shall prepare for Dr. Alfonso David and Jeffrey Dennison (official capacity only): (1) Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), and (2) Form 6 (Waiver of Service of Summons). The Clerk is **DIRECTED** to mail these forms, a copy of the Complaint, and this Memorandum and Order to Defendant's place of employment as identified by Fields. If a defendant fails to sign and return the Waiver of Service of Summons (Form 6) to the Clerk within 30 days from the date the forms were sent, the Clerk shall take appropriate steps to effect formal service on that defendant, and the Court will require the defendant pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

If a defendant cannot be found at the work address provided by Fields, the employer shall furnish the Clerk with the defendant's current work address, or, if not known, his last known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file or disclosed by the Clerk.

Pursuant to Administrative Order No. 244, Defendants need only respond to the issues stated in this Merit Review Order.

If judgment is rendered against Fields, and the judgment includes the payment of costs under Section 1915, he will be required to pay the full amount of the costs, even though his application to proceed in forma pauperis was granted. *See* 28 U.S.C. § 1915(f)(2)(A).

Finally, Fields is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than 7 days after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* Fed. R. Civ. P. 41(b).

IT IS SO ORDERED.

Notice to Plaintiff

The Court will take the necessary steps to notify the appropriate defendants of your lawsuit and serve them with a copy of your complaint. After service has been achieved, the defendants will enter their appearance and file an Answer to the complaint. It will likely take at least **60 days** from the date of this Order to receive the defendants' Answers, but it is entirely possible that it will take **90 days** or more. When all of the defendants have filed Answers, the Court will enter a Scheduling Order containing important information on deadlines, discovery, and procedures. Plaintiff is advised to wait until counsel has appeared for the defendants before filing any motions, to give the defendants notice and an opportunity to respond to those motions. Motions filed before defendants' counsel has filed an appearance will generally be denied as premature. Plaintiff need not submit any evidence to the Court at his time, unless otherwise directed by the Court.

All Citations

Slip Copy, 2020 WL 4933653

Footnotes

1 The Court has jurisdiction to resolve Field's motion and to screen his Complaint in light of his consent to the full jurisdiction of a magistrate judge and the Illinois Department of Corrections' and Wexford's limited consent to the exercise

of magistrate judge jurisdiction as set forth in the Memorandum of Understanding between the Illinois Department of Corrections, Wexford, and this Court.

2 In the statement of claim, Fields does not specifically name Dr. David, but makes allegations towards the healthcare unit's medical doctor at Shawnee, referred throughout the Complaint as "the M.D." (*Id.* at p. 12). Because in listing Alfonso David as a defendant Fields describes him as "Shawnee Medical Doctor" (Doc. 1, p. 1, 2, 27), and the Court is to construe the factual allegations liberally, as previously mentioned, the Court will treat the allegations against "the M.D" in the statement of claim as made towards Dr. Alfonso David.

3 *See Twombly,* 550 U.S. at 555.

4 In evaluating the Motion for Recruitment of Counsel, the Court applies the factors discussed in *Pruitt v. Mote,* 503 F.3d 647, 654 (7th Cir. 2007) and related authority.

End of Document

2020 IL App (3d) 180188-U

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Neil ACKERMAN, Defendant-Appellant.

Appeal No. 3-18-0188

Order filed August 19, 2020

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Circuit No. 09-CF-334, Honorable Carmen Julia Goodman, Judge, Presiding.

ORDER

JUSTICE WRIGHT delivered the judgment of the court.

***1** ¶ 1 *Held*: The court erred by denying defendant leave to file a successive postconviction petition.

¶ 2 Defendant, Neil Ackerman, appeals from the Will County circuit court's denial of his motion for leave to file a successive postconviction petition. Defendant argues the court erroneously denied his motion because it established sufficient cause and prejudice to permit the filing of a successive postconviction petition. We reverse.

¶ 3 I. BACKGROUND

¶ 4 At the outset, we note that we have previously described the facts of defendant's trial in his prior appeals. *People v. Ackerman*, 2011 IL App (3d) 091057-U; and *People v. Ackerman*, 2014 IL App (3d) 120585. The facts are limited to those necessary to make a finding on whether the court properly denied defendant's motion for leave to file a successive postconviction petition.

¶ 5 On January 23, 2009, while in custody of the Will County jail for a charge of domestic battery, the jail placed defendant in a two-person cell with Milton Bass. Bass testified that he and defendant had a conversation where defendant offered to pay Bass to kill Deanna Musilek, defendant's ex-girlfriend. Bass testified that he considered defendant's proposition but ultimately decided against it. On January 24, 2009, Bass wrote a note to jail staff, which indicated that he wanted to talk to a detective about defendant's murder for hire request. On January 26, 2009, Bass spoke with Sergeant Bridget Graham and Detective Jack Ellingham separately. Bass provided a list written by defendant of Musilek's place of employment, a rehabilitation center she used, and her current boyfriend's address and phone number. On February 10, 2009, Bass wore a wire to audio record his conversation with defendant.

¶ 6 Sergeant Graham testified that while working in the Will County jail, she received written notification from Bass reporting that defendant had asked Bass "to kill someone for him." She testified that the note reflected the date it was written as January 24, 2009. On January 26, 2009, Graham spoke to Bass about his allegation.

¶ 7 Detective Ellington testified that on January 26, 2009, he spoke with Bass after Graham notified him of the allegation. During this conversation, Bass showed him the list written by defendant with Musilek's information. Later, Ellington equipped Bass with an audio recording device. He testified that the device began recording on February 10, 2009. The State charged defendant with solicitation of murder for hire on February 11, 2009. 720 ILCS 5-1.2 (West 2008).

¶ 8 Following a guilty verdict by a jury, the court sentenced defendant to 30 years' imprisonment. On direct appeal, we affirmed defendant's conviction and vacated defendant's $200 DNA fee. *Ackerman*, 2011 IL App (3d) 091057-U, ¶ 31.

¶ 9 On May 14, 2012, defendant filed a postconviction petition as a self-represented litigant. Defendant alleged the court denied him conflict-free counsel due to defense counsel's supervisor having had previously worked in the state's attorney's office. He argued that because this supervisor was involved in obtaining the authorization for an overhear to record defendant's conversation with Bass there was a conflict of interest and a claim of ineffective assistance. The court dismissed defendant's petition, and we affirmed that decision on appeal. *Ackerman*, 2014 IL App (3d) 120585, ¶ 33.

*2 ¶ 10 On January 16, 2018, defendant filed a motion for leave to file a successive postconviction petition. First, the motion alleged that defendant acquired new evidence in the form of a Law Enforcement Agency Data System (LEADS) report. Defendant obtained this report through a Freedom of Information Act (**5 ILCS 140**/1 *et seq.* (West 2018)) (FOIA) request to the Illinois State Police. The LEADS report included several sections, specifically, one labeled "States Attorney Section." Listed under this section was the charge of "Solicitation For Murder" with the filing decision, "NOT FILED." The corresponding date for this entry is January 23, 2009.

¶ 11 Defendant argued that the entry for solicitation for murder on January 23, 2009, showed that the State sought to charge him before Bass wrote his note to authorities on January 24, 2009. Defendant reasoned that this documentation showed the State recruited Bass to entrap defendant in a murder for hire plot. Relying on the LEADS report, he argued that the State's witnesses provided fabricated testimony at trial. Further, he argued that the false testimony violated defendant's right to due process by affecting the jury's verdict. Defendant argued that the evidence withheld was favorable to him and should have been disclosed. He concluded that withholding this document amounted to a violation by the State of the rule prescribed in *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¶ 12 The court denied defendant's motion for leave to file a successive postconviction petition, finding that defendant's allegations did not meet the cause and prejudice test for the newly discovered evidence. Defendant appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues the circuit court erred by denying his motion for leave to file a successive postconviction petition. Defendant contends that his petition alleged sufficient cause and prejudice to justify leave to file. Specifically, the State violated *Brady* when it did not disclose a LEADS report that showed a charge against defendant for solicitation of murder. See *Brady*, 373 U.S. 83, 87. The report indicated that the State chose not to file the charge on January 23, 2009. Defendant discovered this document through a FOIA request, and the exclusion of this document from the disclosure of discovery prejudiced defendant because it included evidence of a possible defense and impeachment. Upon review, we conclude that defendant established the requisite cause and prejudice to justify granting leave to file a successive postconviction petition.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) contemplates the filing of a single postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). A claim is waived if not raised in the original or an amended petition. 725 ILCS 5/122-3 (West 2016). However, this waiver rule will be relaxed when fundamental fairness requires it and where a defendant establishes cause and prejudice for his failure to bring the claim in a prior petition. *Ortiz*, 235 Ill. 2d at 329. We take all well-pled factual allegations and supporting evidence as true. *People v. Sanders*, 2016 IL 118123, ¶ 33. To meet the cause and prejudice test for a successive petition defendant must "submit enough in the way of documentation to allow a circuit court to make that determination." *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010).

¶ 16 "A defendant's *pro se* motion for leave to file a successive postconviction petition will meet the *** cause and prejudice requirement if the motion adequately alleges facts demonstrating cause and prejudice." *People v. Smith*, 2014 IL 115946, ¶ 34. Cause is an objective factor external to the defendant that impeded counsel's efforts to raise the claim in a prior proceeding. 725 ILCS 5/122-1(f)(1) (West 2006). The defendant must also show prejudice: the claimed error "so infected the entire trial that the resulting conviction or sentence violates due process." *People v. Pitsonbarger*, 205 Ill 2d 205, 464 (West 2001).

*3 ¶ 17 "[L]eave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." See *Id.* at 463; see also *Smith*, 2014 IL 115946, ¶ 35. The review for leave to file a successive postconviction petition "Is a preliminary screening to determine whether defendant's *pro se* motion for leave to file a successive postconviction petition adequately alleges facts demonstrating cause and prejudice." *People v. Bailey*, 2017 IL 121450, ¶ 24. The screening requires the court to determine whether defendant has made a *prima facie* showing of cause and prejudice. See *id.* If the court finds defendant established a *prima facie* case, the court will grant leave to file the petition. See *id.* We review *de novo* the court's ruling on the defendant's motion for leave. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 18 Defendant's motion for leave to file a successive postconviction petition adequately alleged facts demonstrating cause. The State concedes defendant satisfied the cause requirement for a successive postconviction petition, because, defendant did not receive the attached documents until years after his original postconviction petition by way of a FOIA request. Therefore, he could not have made the allegations in his original petition without such documentation.

¶ 19 Turning to the issue of prejudice, the State argues that defendant has not met the prejudice requirement to allow a postconviction petition to proceed to the second stage. The State contends that the untendered LEADS report failed to support prejudice. Specifically, the *Brady* violation alleged by defendant is insufficient evidence of prejudice and wholly unreasonable.

¶ 20 At trial, Bass testified that he met defendant when they shared a jail cell on January 23, 2009. Beginning on January 23, 2009, Bass had conversations with defendant where defendant offered to pay Bass to kill his ex-girlfriend. On January 24, 2009, Bass notified authorities of defendant's request. On January 26, 2009, two officers spoke to Bass about his allegation. On February 10, 2009, Bass wore a wire and audio recorded his conversations with defendant.

¶ 21 In comparison, under the "States Attorney Section" in the LEADS report there is a solicitation for murder charge with the title "NOT FILED" and listed decision date of January 23, 2009. The LEADS report shows the State pursued a charge against defendant for solicitation of murder on January 23, 2009 and declined to prosecute. The discrepancy between the testified date of January 24, 2009, and the date listed in the LEADS report of January 23, 2009, could be used to discredit the State's witnesses.

¶ 22 Assuming these allegations to be true, defendant adequately alleged facts to demonstrate both cause and prejudice. See *Smith,* 2014 IL 115946, ¶ 34. Defendant provided sufficient documentation to the court to support the finding of a *prima facie* showing that the absence of the LEADS report prejudiced him. The discrepancy between the trial testimony and the LEADS report could have been used to obtain evidence supporting defendant's theory of the case and the impeachment of the State's witnesses. There is no evidence in the record to rebut defendant's claims. See *Pitsonbarger* at 464; see also *Smith* ¶ 37. The evidence is material and sufficient to undermine the confidence in the verdict. See *People v. Beaman*, 229 Ill. 2d 56, 74 (2008).

¶ 23 Therefore, the court erred when it denied defendant leave to file his successive postconviction petition. See *Pitsonbarger*, 205 Ill. 2d at 463; *Smith,* 2014 IL 115946 ¶ 35.

¶ 24 III. CONCLUSION

¶ 25 The judgment of the circuit court of Will County is reversed.

¶ 26 Reversed.

Justices Carter and O'Brien concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (3d) 180188-U, 2020 WL 4820591

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2020 IL App (1st) 190038

Appellate Court of Illinois, First District,
Third Division.

BETTER GOVERNMENT ASSOCIATION, Plaintiff-Appellee,

v.

The CITY OF CHICAGO Office of Mayor and The City of Chicago Department of Public Health, Defendants-Appellants.

No. 1-19-0038
|
August 5, 2020

Synopsis

Background: Investigative journalism non-profit organization brought action against city mayor's office and city department of public health, alleging defendants had violated the Freedom of Information Act (FOIA) by redacting or withholding nonexempt records and failing to inquire whether text messages and e-mails of officials contained responsive records. The Circuit Court, Cook County, Michael T. Mullen, J.. ordered defendants to inquire whether relevant text message and e-mail records existed. Defendants appealed.

Holdings: The Appellate Court, Cobbs, J., held that:

[1] text messages and e-mails of officials were in possession of, prepared for, or used by public body, as necessary for messages to constitute accessible public records under FOIA, and

[2] search for records performed by mayor's office and department of health was inadequate.

Affirmed.

West Headnotes (21)

[1] **Judgment** Particular Cases

Freedom of Information Act (FOIA) cases are typically and appropriately decided on motions for summary judgment. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[2] **Judgment** Nature of summary judgment

Judgment Necessity that right to judgment be free from doubt

Summary judgment is a drastic means of disposing of litigation that should be granted only where the right of the moving party is clear and free from doubt.

[3] **Judgment** Motion or Other Application

Where the parties file cross-motions for summary judgment, they agree that there is only a question of law involved and invite the court to resolve the litigation based solely on the record.

1 Cases that cite this headnote

[4] **Appeal and Error** Summary judgment

A reviewing court may affirm a circuit court's ruling on a motion for summary judgment on any basis in the record, regardless of the reasoning employed by the circuit court.

[5] **Appeal and Error** Cross-motions

Appeal and Error De novo review

A circuit court's ruling on cross-motions for summary judgment is reviewed de novo on appeal.

1 Cases that cite this headnote

[6] **Records** General disclosure requirements; freedom of information

The purpose of the Freedom of Information Act (FOIA) is to open governmental records to the light of public scrutiny. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[7] **Records** ⇐ General disclosure requirements; freedom of information

The Freedom of Information Act (FOIA) is to be construed liberally to promote the public's access to governmental information. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[8] **Records** ⇐ Presumption of disclosure

Under the Freedom of Information Act (FOIA), public records are presumed to be open and accessible. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[9] **Records** ⇐ Sufficiency and Specificity of Response

When a public body receives a proper Freedom of Information Act (FOIA) request for information, it must comply with the request unless one of the narrow statutory exemptions applies. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[10] **Records** ⇐ Presumptions, inferences, and burden of proof

If a party seeking a disclosure under the Freedom of Information Act (FOIA) challenges the public body's denial of a request in a circuit court, the public body has the burden of proving that the records in question are exempt. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[11] **Records** ⇐ Presumptions, inferences, and burden of proof

When a party seeking disclosure under the Freedom of Information Act (FOIA) challenges the public body's denial of a request in a circuit court, to meet the burden of proving that records sought are exempt, and to assist the court in making its determination, the agency must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[12] **Records** ⇐ Nature and definition of "record" or other material subject to requirements

To qualify as a public record under the Freedom of Information Act (FOIA), a record must pertain to public business rather than private affairs; the record also must have been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4) received by a public body, (5) possessed by a public body, or (6) controlled by a public body. 5 Ill. Comp. Stat. Ann. 140/2(c).

1 Cases that cite this headnote

[13] **Records** ⇐ Nature and definition of "record" or other material subject to requirements

Personal text messages and e-mails of officials in city mayor's office and city department of health were in possession of, prepared for, or used by public body, as necessary for messages to constitute accessible public records under Freedom of Information Act (FOIA); officials in question could make unilateral decisions that were binding on their respective public bodies, and messages were likely to be used by officials as public bodies. 5 Ill. Comp. Stat. Ann. 140/2(a), 140/2(c).

[14] **Records** ⇐ Nature and definition of "record" or other material subject to requirements

Communications sent and received from public officials' personal e-mail accounts may be "public records" subject to the Freedom of Information Act (FOIA). 5 Ill. Comp. Stat. Ann. 140/2(c).

[15] **Records** ⇐ Sufficiency and Specificity of Response

The adequacy of a public body's search for records under the Freedom of Information Act (FOIA) is judged by a standard of reasonableness and depends upon the facts of each case. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

[16] **Records** Sufficiency and Specificity of Response

The crucial issue in determining the adequacy of a public body's search for records under the Freedom of Information Act (FOIA) is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.

[17] **Records** Sufficiency and Specificity of Response

In determining adequacy of a public body's search for records requested under the Freedom of Information Act (FOIA), although the public body is not required to perform an exhaustive search of every possible location, the body must construe FOIA requests liberally and search those places that are reasonably likely to contain responsive records.

1 Cases that cite this headnote

[18] **Records** Sufficiency and Specificity of Response

In determining adequacy of a public body's search for records requested under the Freedom of Information Act (FOIA), whether a particular search was reasonable depends on the specific facts and must be judged on a case-by-case basis.

[19] **Records** Presumptions, inferences, and burden of proof

When a public body determines that there are no records responsive to a Freedom of Information Act (FOIA) request, it bears the initial burden of demonstrating the adequacy of its search.

[20] **Records** Sufficiency and Specificity of Response

Records Presumptions, inferences, and burden of proof

After determining that there are no records responsive to a Freedom of Information Act (FOIA) request, an agency typically satisfies its burden of demonstrating the adequacy of its search by submitting reasonably detailed affidavits setting forth the type of search it performed and averring that all locations likely to contain responsive records were searched; only once the agency has submitted such an affidavit does the burden shift to the requester to produce countervailing evidence that the search was not adequate.

1 Cases that cite this headnote

[21] **Records** Particular cases

Search for records performed by city mayor's office and city department of health pursuant to Freedom of Information Act (FOIA) request by investigative journalism non-profit organization was not reasonably calculated to capture all sources where responsive records were likely to exist, and thus search was inadequate; organization sought communications from personal text messages and e-mail accounts of mayor's office and department of health officials, and mayor's office and department of health did conducted no inquiry into these accounts based on erroneous position that accounts did not contain public records within meaning of FOIA. 5 Ill. Comp. Stat. Ann. 140/1 et seq.

Appeal from the Circuit Court of Cook County. No. 17 CH 5181, Honorable Michael T. Mullen, Judge, presiding.

Attorneys and Law Firms

Attorneys for Appellant: Mark A. Flessner, Corporation Counsel, of Chicago (Benna Ruth Solomon, Myriam Zreczny Kasper, and Ellen Wight McLaughlin, Assistant Corporation Counsel, of counsel), for appellants.

Attorneys for Appellee: Joshua Burday, Matthew Topic, and Merrick Wayne, of Loevy & Loevy, Chicago, for appellee.

OPINION

JUSTICE COBBS delivered the judgment of the court, with opinion.

***1** ¶ 1 This matter arises from two Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)) requests submitted by plaintiff, the Better Government Association (BGA) to defendants, the City of Chicago Office of Mayor (Mayor's Office) and the City of Chicago Department of Public Health (CDPH). The BGA's requests sought records related to the discovery of lead in the drinking water at Chicago Public Schools (CPS). Defendants appeal from an order of the circuit court directing them to inquire whether relevant records exist in certain of their officials' personal text messages and e-mail accounts. Defendants primarily argue that these communications are not subject to FOIA because they lack the requisite nexus to a public body. For the following reasons, we affirm the circuit court's order.

¶ 2 I. BACKGROUND

¶ 3 The BGA is a not-for-profit watchdog corporation dedicated to "protect[ing] the integrity of the political process in Chicago." On June 7, 2016, the BGA submitted FOIA requests to both the Mayor's Office and CDPH, requesting "[a]ny and all communication * * * between Public Health Commissioner Julie Morita and anybody in the mayor's office and press office from April 1, 2016 to today." The BGA subsequently narrowed its requests to "anything related to lead and CPS" involving Eileen Mitchell, Adam Collins, Kelley Quinn, or Mayor Rahm Emanuel in the Mayor's Office and "any and all communication" between Morita and CPS officials Forest Claypool, Doug Kucia, Jason Kierna, Emily Bittner, or Michael Passman. In response, defendants produced some records and redacted or withheld others under various exemptions in section 7(1) of FOIA (*id.* § 7(1)).

¶ 4 On April 11, 2017, the BGA filed a complaint in the circuit court, claiming that defendants violated FOIA by improperly redacting or withholding nonexempt records and by failing to inquire whether the personal text messages and e-mails of the officials named in the requests contained responsive records. The complaint alleged that the Mayor's Office was aware that its officials named in the request had used their personal e-mail accounts to discuss public business. In their amended answer, defendants contended that their redactions and withholdings were proper. The Mayor's Office also admitted that the four officials named in the request used their personal e-mail accounts for public business but maintained that it had no obligation or ability to search those accounts for responsive records.

¶ 5 On August 21, 2017, the BGA filed a motion for partial summary judgment on the grounds that some of defendants' redactions were improper. In response, defendants argued that they were entitled to summary judgment because they conducted a reasonable search for records and made only appropriate redactions.

¶ 6 Following a hearing on the parties' cross-motions for summary judgment, the circuit court entered an order requiring defendants to submit supplemental affidavits about the nature of their searches. The court also required defendants to provide unredacted copies of the records they produced for *in camera* review. In response to defendants' supplemental briefing, the BGA produced evidence that Collins, Quinn, and Mayor Emanuel had communicated about public business via text message.

***2** ¶ 7 After a second round of argument, the court found that defendant's redactions were proper. However, the court also found that defendants did not perform a reasonable search because they failed to include the personal text messages and e-mails of the relevant officials. Consequently, the court ordered defendants to "make inquiries as required to email custodians and supply affidavits from custodians regarding same" within 28 days. The court later granted defendants' motion to stay the order and included a finding that the order was appealable under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). This appeal followed.

¶ 8 II. ANALYSIS

[1] **[2]** **[3]** **[4]** **[5]** ¶ 9 "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West

2018). Summary judgment is a drastic means of disposing of litigation that should be granted only where the right of the moving party is clear and free from doubt. *Lewis v. Lead Industries Ass'n*, 2020 IL 124107, ¶ 15, — Ill.Dec. ——, —— N.E.3d ——. Where, as here, the parties file cross-motions for summary judgment, they agree that there is only a question of law involved and invite the court to resolve the litigation based solely on the record. *Illinois Insurance Guaranty Fund v. Priority Transportation, Inc.*, 2019 IL App (1st) 181454, ¶ 53, 438 Ill.Dec. 401, 146 N.E.3d 155. A reviewing court may affirm a circuit court's ruling on a motion for summary judgment on any basis in the record, regardless of the reasoning employed by the circuit court. *Kainrath v. Grider*, 2018 IL App (1st) 172270, ¶ 19, 426 Ill.Dec. 302, 115 N.E.3d 1224. A circuit court's ruling on cross-motions for summary judgment is reviewed *de novo*. *Schroeder v. Sullivan*, 2018 IL App (1st) 163210, ¶ 25, 422 Ill.Dec. 893, 104 N.E.3d 460.

¶ 10 A. FOIA's Applicability to Personal Text Messages and E-mail Accounts

¶ 11 The ultimate issue in this appeal is the adequacy of defendants' search for records. The BGA maintains that the search was inadequate because, at least with respect to the named officials' personal text messages and e-mail accounts, defendants performed no search at all. As they did in the circuit court, defendants contend that they were not required to search their officials' personal accounts because the communications in those accounts are not subject to FOIA. The threshold issue thus becomes whether text messages and e-mails sent from a public officials' personal accounts can qualify as public records under FOIA. For the reasons that follow, we conclude that they can.

[6] **[7]** ¶ 12 Our analysis is guided by the clear purpose of FOIA, which is " 'to open governmental records to the light of public scrutiny.' " *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 405, 331 Ill.Dec. 12, 910 N.E.2d 85 (2009) (quoting *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378, 131 Ill.Dec. 182, 538 N.E.2d 557 (1989)). Specifically, FOIA was enacted to effectuate "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." **5 ILCS 140**/1 (West 2016). Section 1 of FOIA explains that "[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.* Accordingly, FOIA is to be construed liberally to promote the public's access to governmental information. *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 25, 432 Ill.Dec. 638, 129 N.E.3d 1181.

***3** **[8]** **[9]** **[10]** **[11]** ¶ 13 Under FOIA, "public records are presumed to be open and accessible." *Id.* Thus, when a public body receives a proper request for information, it must comply with the request unless one of the narrow statutory exemptions applies. *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463, 274 Ill.Dec. 430, 791 N.E.2d 522 (2003). If the party seeking disclosure challenges the public body's denial of a request in a circuit court, the public body has the burden of proving that the records in question are exempt. *Id.* at 464, 274 Ill.Dec. 430, 791 N.E.2d 522. "To meet this burden and to assist the court in making its determination, the agency must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." (Emphasis omitted.) *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 537, 139 Ill.Dec. 554, 548 N.E.2d 1110 (1989).

[12] ¶ 14 Here, defendants do not argue that a statutory exemption applies to their officials' personal text messages and e-mails but rather that the records sought do not qualify as "public records" within the meaning of FOIA in the first place. Section 2(c) of the FOIA defines "public records" as:

> "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." **5 ILCS 140**/2(c) (West 2016).

Accordingly, there are two criteria a record must satisfy in order to qualify as a public record under FOIA. First, the record must pertain to public business rather than private affairs. *City of Danville v. Madigan*, 2018 IL App (4th) 170182, ¶ 19, 421 Ill.Dec. 792, 101 N.E.3d 774. Second, the record must have been either (1) prepared by a public body, (2) prepared for a public body, (3) used by a public body, (4)

received by a public body, (5) possessed by a public body, or (6) controlled by a public body. *Id.*

¶ 15 Defendants do not necessarily contest that their officials' personal text messages and email accounts contain records pertaining to public business. Nor do defendants dispute that the Mayor's Office and CDPH are public bodies under FOIA. Rather, the crux of defendants' argument is their contention that the individual officials named in the BGA's requests are not themselves public bodies. Thus, defendants conclude that those officials' personal e-mails and text messages are not public records because they were neither prepared for, used by, received by, possessed by, nor controlled by a public body.

¶ 16 FOIA defines a "public body" as:

> "all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof." **5 ILCS 140**/2(a) (West 2016).

¶ 17 The only Illinois case to examine the interplay between "public records" and "public bodies" as those terms relate to personal communications of public officials is the Fourth District's opinion in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, 372 Ill.Dec. 787, 992 N.E.2d 629, a case upon which defendants rely. There, the FOIA requester sought electronic communications relating to public business that were sent and received by individual city council members on their personal devices during city council meetings. *Id.* ¶ 4. On appeal, the City of Champaign argued that those communications were not "public records" under FOIA because the individual city council members were not themselves public bodies. *Id.* ¶ 30. The Fourth District agreed that the individual city council members were not public bodies under FOIA, reasoning that a single council member could not conduct public business alone because "a quorum of city council members is necessary to make binding decisions." *Id.* ¶ 40.

***4** ¶ 18 As an example, the court explained that an e-mail from a constituent received by a lone council member on the member's personal device would not be subject to FOIA because no public body was involved. *Id.* ¶ 41. The court went on to say, however, that such an e-mail would become a public record if it was forwarded to enough council members to constitute a quorum. *Id.* This is so because at that point the e-mail is " 'in the possession of a public body,' " *i.e.* the city council with sufficient numbers to conduct business and make binding decisions. *Id.* The court employed the same logic in holding that the messages the members sent and received on their personal devices during official city council meetings were public records subject to FOIA because they were necessarily sent at a time when the individual members were acting collectively as a public body. *Id.* ¶ 42. The court noted that "[t]o hold otherwise would allow members of a public body, convened as a public body, to subvert * * * FOIA requirements simply by communicating about city business during a city council meeting on a personal electronic device." *Id.* ¶ 43. Consequently, the court held that any messages pertaining to public business sent or received by council members' personal devices during council meetings should be provided to the city's FOIA officer for review and any nonexempt material provided in turn to the FOIA requester. *Id.*

[13] ¶ 19 Defendants argue that *City of Champaign* shows that the communications requested by the BGA lack the requisite nexus to a public body. We reach the opposite conclusion. Although we agree with defendants that the individual officials identified in the requests are not themselves public bodies under FOIA, this does not mean that their communications about public business cannot be public records. Instead, it is sufficient that the communications were either prepared for, used by, received by, or in the possession of a public body. **5 ILCS 140**/2(c) (West 2016); *City of Danville*, 2018 IL App (4th) 170182, ¶ 19, 421 Ill.Dec. 792, 101 N.E.3d 774. As noted, *City of Champaign* held that communications on the personal account of a member of a public body come into the possession of that body when the communications are sent or received at a time when the body is conducting public business. Applying this principle to the facts of that case, the court concluded that the city council was capable of conducting public business only when a quorum of council members was involved. By contrast, as defendants conceded at oral argument, the officials in question here are not limited by a quorum requirement. Rather, defendants—through their individual officials such as those named in the requests at issue—can function as public bodies without any official meeting having been convened. For example, the mayor and the director of CDPH can make unilateral decisions that are binding on their respective public bodies. See *Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶ 10 n.2, 373 Ill.Dec. 804, 994 N.E.2d 573 (the mayor of Chicago is the city's chief executive officer responsible for, *inter*

alia, directing city departments and appointing department heads). Thus, under *City of Champaign*, the e-mails and text messages from those officials' personal accounts are "in the possession of" a public body within the meaning of FOIA. It is also reasonable to conclude that, at a minimum, many such communications are prepared for or eventually used by the public body. Accordingly, the communications that pertain to public business from the named officials' personal accounts are subject to FOIA.

¶ 20 This conclusion comports with the goals of governmental transparency and accountability underlying FOIA and with our supreme court's instruction to construe FOIA liberally in order to further these goals. See *Special Prosecutor*, 2019 IL 122949, ¶ 25, 432 Ill.Dec. 638, 129 N.E.3d 1181. Indeed, the General Assembly expressed a clear intent that FOIA be interpreted to promote the public's access to information, even when applied in situations where advances in communication technology may outpace the terms of FOIA. **5 ILCS 140/1** (West 2016) ("To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption."). As the *City of Champaign* court recognized, the growing use of personal e-mail accounts and text messages by public officials for public business presents such a situation. Allowing public officials to shield information from the public's view merely by using their personal accounts rather than their government-issued ones would be anathema to the purposes of FOIA.

***5** ¶ 21 Although only persuasive authority, our analysis also aligns with those of the few federal courts that have considered the issue under the federal FOIA. See *Special Prosecutor*, 2019 IL 122949, ¶ 55, 432 Ill.Dec. 638, 129 N.E.3d 1181 ("Due to the similarity of the statutes, Illinois courts often look to federal case law construing the federal FOIA for guidance in construing FOIA."). For example, in *Brennan Center for Justice at New York University School of Law v. U.S. Department of Justice*, 377 F. Supp. 3d 428, 436 (S.D.N.Y. 2019), the United States District Court for the Southern District of New York ruled that the Department of Justice was required to ask two of its officials if there were responsive records in their personal e-mail accounts where there was evidence that the officials used their personal accounts for public business. In so ruling, the court stated that it would be inconsistent with the purposes of the federal FOIA to allow the "widespread use of personal devices for official work" to "shunt critical and sensitive information away from official channels and out of public scrutiny." *Id.* Similarly, in *Competitive Enterprise Institute v. Office of Science & Technology Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016), the Court of Appeals for the District of Columbia Circuit also held that documents maintained on an official's private e-mail account were government records subject to FOIA. The court reasoned that:

> "The Supreme Court has described the function of [the federal] FOIA as serving 'the citizens' right to be informed about what their government is up to.' [Citation]. If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, that purpose is hardly served." *Id.*

¶ 22 Additionally, several of the supreme courts of our sister states have reached similar results. See *Toensing v. Attorney General*, 2017 VT 99, ¶ 20, 206 Vt. 1, 178 A.3d 1000 ("Strong public policy reasons support the conclusion that electronic information stored on private accounts is subject to disclosure under [Vermont's FOIA]."); *City of San Jose v. Superior Court*, 214 Cal.Rptr.3d 274, 389 P.3d 848, 859 (2017) ("The whole purpose of [California's FOIA] is to ensure transparency in government activities. If public officials could evade the law simply by clicking into a different email account, or communicating through a personal device, sensitive information could routinely evade public scrutiny."); *Cheyenne Newspapers, Inc. v. Board of Trustees of Laramie County School District Number One*, 2016 WY 113, ¶ 3, 384 P.3d 679 (Wyo. 2016) ("Because school board members use their personal email addresses to conduct school board business, the request required a search and retrieval of emails from personal email accounts of the board members as well as from the School District's computer system."); *Nissen v. Pierce County*, 183 Wash.2d 863, 357 P.3d 45, 49 (2015) (*en banc*) ("We hold that text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone.").

[14] ¶ 23 In line with the foregoing case law and the text of FOIA, we hold that communications sent and received from public officials' personal accounts may be "public records" subject to FOIA. In reaching this conclusion we acknowledge but reject each of the several reasons offered by defendants as to why our interpretation is inconsistent with the legislature's intent in enacting FOIA.

¶ 24 First, defendants observe that the *City of Champaign* court suggested that the legislature should expressly clarify whether it "intends for communications pertaining to city business to and from an individual city council member's personal electronic device to be subject to FOIA in every case." *City of Champaign*, 2013 IL App (4th) 120662, ¶ 44, 372 Ill.Dec. 787, 992 N.E.2d 629. In light of this signal, defendants interpret the legislature's failure to expand the definitions of a public body and public record under FOIA as an indication that the legislature did not intend for the contents of an official's personal accounts to be subject to disclosure. However, defendants' logic cuts both ways: if the legislature intended for officials' personal accounts to never be subject to FOIA, it could have amended FOIA after *City of Champaign*. Because the legislature has declined to amend FOIA in a way relevant here, we may presume that the legislature has acquiesced to *City of Champaign*'s holding that personal account communications are at least sometimes public records. See *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 380, 328 Ill.Dec. 836, 905 N.E.2d 725 (2008) ("[W]here the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent.").

***6** ¶ 25 Second, defendants greatly exaggerate the privacy implications of our ruling. Defendants assert that affirming the circuit court's order would "require public bodies to search their employees' private accounts—and potentially their homes and other private locations—in response to almost any FOIA request for communications about public business." Yet the order before us imposes no such requirements. Instead, defendants will merely be required to ask a limited number of officials whether their personal accounts contain responsive records. This approach poses almost no invasion on the privacy interests of public officials and has been persuasively endorsed by several courts. See *Brennan Center*, 377 F. Supp. 3d at 435-36; *City of San Jose*, 214 Cal.Rptr.3d 274, 389 P.3d at 860; *Nissen*, 357 P.3d at 57-58. If the officials in question have not used their personal accounts to conduct public business, they can so state. Indeed, the BGA concedes that this simple step may well end the litigation because "if the City were to show through legally admissible affidavits following a reasonable search by the relevant employees that no responsive private-account communications exist, case law as it currently stands would often absolve the City of any further responsibility absent a showing to the contrary by BGA."

¶ 26 We further observe that our interpretation of FOIA in no way affects the privacy safeguards that have long been in place. For example, FOIA exempts from disclosure any 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." **5 ILCS 140**/7(1)(c) (West 2016). "Private information" such as the financial information, personal telephone numbers, personal e-mail addresses, and home addresses of public officials also remains exempt. *Id.* §§ 2(c-5), (7)(1)(b). Moreover, any of the statutory exemptions listed in section 7 of FOIA may still apply. We also reiterate that only those communications that pertain to public business are potentially subject to disclosure in the first place. No information concerning the officials' private lives need be disclosed to defendants' FOIA officers. Officials can also avoid any personal account disclosure in the future by simply refraining from the use of personal accounts to conduct public business.

¶ 27 Defendants next observe that the FOIA generally gives a public body five business days to either comply with or deny a records request. See *id.* § 3(d). Defendants' argue that this deadline "cannot be reconciled" with a requirement that they inquire into their officials' personal accounts. However, defendants have shown no reason why they would be unable to ask a handful of their officials whether their private accounts contained responsive records within five business days. Additionally, FOIA contemplates situations in which the production of requested records might require "additional efforts" for a variety of reasons. *Id.* § 3(e). In these situations, the public body is entitled to an extension of five additional business days. *Id.* FOIA also expressly allows the requester and the public body to agree on an extended deadline of their choosing. *Id.* Thus, we find nothing in the statutory disclosure deadlines inconsistent with our interpretation of FOIA.

¶ 28 Finally, defendants raise concerns about the ability of a public body to compel its officials to turn over responsive records contained in their personal accounts. However, there is no indication that the officials in this case will be unwilling to comply with a court order. Additionally, if the officials prove incalcitrant, FOIA provides that the circuit court may help enforce disclosure through its contempt powers. *Id.* § 11(g) ("In the event of noncompliance with an order of the court to disclose, the court may enforce its order against any public official or employee so ordered or primarily responsible for such noncompliance through the court's contempt powers.").

¶ 29 In sum, we hold that the e-mails and text messages sought by the BGA are public records under FOIA because they pertain to public business and share the requisite connection to a public body. This conclusion is entirely consistent with both the letter and purpose of the statute.

¶ 30 B. Adequacy of Defendants' Search

*7 **[15]** **[16]** **[17]** **[18]** ¶ 31 Having determined that the e-mails and text messages in question are generally subject to FOIA, we now turn to the ultimate question on appeal, which is the adequacy of defendants' search for responsive records. The adequacy of a public body's search is "judged by a standard of reasonableness and depends upon the facts of each case." *Maynard v. Central Intelligence Agency*, 986 F.2d 547, 559 (1st Cir. 1993). "The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." (Internal quotation marks omitted.) *Id.* Although a public body is not required to perform an exhaustive search of every possible location, the body must construe FOIA requests liberally and search those places that are "reasonably likely to contain responsive records." *Judicial Watch, Inc. v. U.S. Department of Justice*, 373 F. Supp. 3d 120, 126 (D.D.C. 2019). Whether a particular search was reasonable depends on the specific facts and must be judged on a case-by-case basis. *Rubman v. United States Citizenship & Immigration Services*, 800 F.3d 381, 387 (7th Cir. 2015)

[19] **[20]** ¶ 32 When a public body determines that there are no records responsive to a request, it bears the initial burden of demonstrating the adequacy of its search. *Evans v. Federal Bureau of Prisons*, 951 F.3d 578, 584 (D.C. Cir. 2020). An agency typically satisfies this burden by submitting reasonably detailed affidavits setting forth the type of search it performed and averring that all locations likely to contain responsive records were searched. *Id.* Only once the agency has submitted such an affidavit does the burden shift to the requester to produce countervailing evidence that the search was not adequate. *Bayala v. United States Department of Homeland Security*, 264 F. Supp. 3d 165, 172 (D.D.C. 2017).

[21] ¶ 33 Here, the BGA's requests sought communications from the relevant officials' personal text messages and e-mail accounts. The BGA also presented some initial evidence that the officials in question used their personal accounts for public business. However, defendants conducted no inquiry into these accounts based on their erroneous position that the accounts could not contain public records within the meaning of FOIA. Thus, defendants' search was not reasonably calculated to capture all sources where responsive records were likely to exist.

¶ 34 Even so, defendants maintain that they were not obligated to inquire about the personal accounts of their officials because the BGA did not show that the accounts were likely to contain responsive records. In support, defendants rely on two federal district court cases, *Hunton & Williams LLP v. U.S. Environmental Protection Agency*, 248 F. Supp. 3d 220 (D.D.C. 2017), and *Wright v. Administration for Children & Families*, No. 15-218, 2016 WL 5922293 (D.D.C. Oct. 11, 2016).[1] In both of these cases, the court held that an agency was not required to further inquire into the personal accounts of their officials where the requester merely speculated that the officials might have used their accounts for public business. *Hunton*, 248 F. Supp. 3d at 238; *Wright*, 2016 WL 5922293, at *9. However, both cases are distinguishable for two reasons. First, the question in those cases was whether the requesters overcame the presumption of a good faith search where the agencies carried their initial burdens. *Hunton*, 248 F. Supp. 3d at 238 n.17 (agencies' search presumed adequate where they inquired into some of their employees' personal accounts and submitted declarations attesting that a further search was not likely to be fruitful because all work was done through agency accounts); *Wright*, 2016 WL 5922293, at *8 (presuming officials complied with a federal law requiring them to ensure that any communications related to government business done via their personal accounts were also preserved on agency systems). Here, no such presumption exists because defendants have admittedly performed no inquiry into their officials' personal accounts based on an erroneous interpretation of FOIA. Additionally, defendants never contested in the circuit court that the officials named in the request used their personal accounts for public business. Although on appeal defendants contend that at least CDPH Director Morita only used her government-issued account, there is nothing in the record from Morita to support this proposition. Second, the BGA produced precisely the kind of evidence of personal account usage that was lacking in *Hunton* and *Wright*. *Hunton*, 248 F. Supp. 3d at 237 (suggesting evidence that a specific private e-mail address had been used for agency business is sufficient to require a search); *Wright*, 2016 WL 5922293, at *9 (same). Indeed, defendants have admitted that the named officials in the Mayor's Office used their personal e-mail accounts for public business. The BGA has also submitted evidence that

some of the named officials have communicated about public business via text messages. This evidence was sufficient to require defendants to at least ask its officials whether they used their personal accounts for public business.

¶ 35 III. CONCLUSION

*8 ¶ 36 In sum, we hold that communications pertaining to public business within public officials' personal text messages and e-mail accounts are public records subject to FOIA. The BGA submitted sufficient evidence to establish a reason to believe that defendants' officials used their personal accounts to conduct public business. Defendants' refusal to even inquire whether their officials' personal accounts contain responsive records was therefore unreasonable under the facts of this case. Accordingly, we affirm the order of the circuit court directing defendants to inquire whether the relevant officials used their personal accounts for public business.

¶ 37 Affirmed.

Justices McBride and Howse concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 190038, 2020 WL 4515997

Footnotes

1 We note that both cases cited by defendants support the proposition that FOIA extends to public officials' personal e-mails and text messages. See *Hunton*, 248 F. Supp. 3d at 237; *Wright*, 2016 WL 5922293, at *7-8.

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2020 IL App (3d) 190374-U

Antonio SHERROD, Plaintiff-Appellant,

v.

The CITY OF KANKAKEE, Kankakee Police Department, the Kankakee State's Attorney Office, and the Kankakee County Detention Center, Defendants (The City of Kankakee, Defendant-Appellee).

Appeal No. 3-19-0374

|

Order filed July 29, 2020

Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois. Circuit No. 18-MR-302, Honorable Ronald J. Gerts, Judge, Presiding.

ORDER

JUSTICE SCHMIDT delivered the judgment of the court.

***1** ¶ 1 *Held*: The circuit court did not err when it granted defendant's motion to dismiss plaintiff's complaint for declaratory relief.

¶ 2 Plaintiff, Antonio Sherrod, filed a complaint for declaratory relief against defendant, the City of Kankakee (City). He alleged that the City failed to comply with his Freedom of Information Act (FOIA) requests. He appeals the circuit court's granting of defendant's motion to dismiss.[1] He contends: (1) an issue of material fact exists as the adequacy of the City's search for records pursuant to his FOIA request; (2) the City failed to comply with his FOIA request by providing him with a video in DVD format rather than VHS; (3) the City failed to provide him with enhanced video created by the FBI; and (4) the City failed to respond to one of his many FOIA requests. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A federal jury found plaintiff guilty of several offenses in the murder of Steven Prendergast. Plaintiff received two consecutive life sentences in the Federal Bureau of Prisons. *United States v. Sherrod*, 445 F.3d 980 (7th Cir. 2006). Plaintiff murdered Prendergast at a Kankakee gas station, which a surveillance camera recorded.

¶ 5 On July 25, 2016, while incarcerated, plaintiff filed a FOIA request with the City for records regarding the murder of Prendergast. The request sought the following documents:

> "(A) A copy of the VHS video surveillance tapes that captured the carjacking on 3-16-2003.
>
> (B) Any, and all video enhancements of the VHS tapes done by Quantico FBI specialist, George Skoluba, at the request of KPD Detective Kenneth Lowman on 3-21-2003.
>
> (C) Any, and all reports concerning the yellow Calico lighter located inside the Carhartt jacket that was found.
>
> (D) Any, and all files listed under [plaintiff's] name as a Confidential Informant.
>
> (E) Any, and all reports, memos, or data from Officer Charles E. Johnston, or Officer Willie Hunt concerning their encounter with [plaintiff] when they transferred [plaintiff] from St. Mary's Hospital to Kankakee County Jail on 8-1-2003.
>
> (F) Any, and all reports as to why Detective Patrick Kane became the lead case agent in the murder investigation on 8-1-2003."

¶ 6 Kristine Schmitz, the City's FOIA officer, received the request and forwarded it to Kankakee Police Department Deputy Chief Robin Passwater. Passwater reviewed the department's electronic database and police file. These systems were the most likely to contain the responsive records. Passwater found information responsive to plaintiff's request items A, C, and E. Specifically, Passwater found the surveillance video from the night of the murder, the evidence reports regarding the yellow lighter, and a report from two transportation officers.

¶ 7 As to the video, the City informed plaintiff that it would attempt to find a business that could copy the VHS recording to a DVD format. The City sent plaintiff a letter stating that his FOIA request produced one DVD and included an invoice for $5. Plaintiff responded by requesting that the VHS be copied to a new VHS rather than a DVD. Nevertheless, plaintiff sent the City $5 for the DVD and informed the City that he would be executing a power of attorney so that the VHS tapes and DVD could be sent to his appointed person, and that he would be in touch soon.

*2 ¶ 8 The City provided plaintiff with the responsive documents to his requested items C and E (the yellow lighter evidence reports and a report from the transportation officers). The City denied plaintiff's requests as to items B, D, and F. As to item B (the video enhancements performed by the FBI), the City explained that it did not possess the videos, which were in possession of the FBI. As to items D (files listing plaintiff as a confidential informant) and F (reports as to why Detective Kane became the lead investigator), the City informed plaintiff that no such documents existed.

¶ 9 Subsequently, plaintiff sent the City an amended FOIA request clarifying his request for items D and F. The City denied the request by informing plaintiff that it had already responded to plaintiff's request by informing him no such records existed.

¶ 10 On October 27, 2016, plaintiff appealed the City's response to his FOIA request to the Illinois Attorney General's Office, Public Access Bureau (PAC), seeking item A in a VHS format rather than a DVD. The City responded that it was still waiting for plaintiff's attorney-in-fact to pick up the DVD as it had previously communicated to plaintiff. The City also stated that it did not have the equipment to copy the video to VHS format.

¶ 11 The PAC issued a nonbinding letter on February 27, 2017. The PAC requested the City provide plaintiff with the video in a VHS copy rather than a DVD.

¶ 12 On April 9, 2017, plaintiff sent the City a letter informing the City that he would not be using an attorney-in-fact, but that his prison counselor would receive the videos on his behalf. The City then sent the DVD to plaintiff's prison counselor.

¶ 13 On June 2, 2017, plaintiff sent the City another FOIA request seeking the entire Prendergast murder file, the video surveillance in VHS format, and various police records, including the names of the detective supervisor, case notes, and e-mails during the time period of August 1, 2003, to December 2003. The City denied plaintiff's request, explaining that plaintiff's request for documents had been responded to in the prior FOIA request.

¶ 14 Plaintiff appealed to the PAC again. The PAC declined to review the City's denial, finding that "no further inquiry is warranted."

¶ 15 On August 24, 2018, plaintiff filed a complaint against the City for declaratory relief. Plaintiff alleged that the City failed to properly respond to his FOIA requests. He contended the City failed to adequately search for documents responding to his request. He argued that the City possessed more documents than it tendered to him in response to his FOIA requests. He also argued that the City failed to properly respond to his request for a copy of the video by providing it to him in DVD format rather than VHS. He also alleged that the City possessed the video enhancements created by the FBI, but the City failed to tender the videos to plaintiff.

¶ 16 The City filed a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2018)). The City contended that it complied with plaintiff's FOIA requests and that it performed a reasonable search for the requested records. The City also contended that plaintiff's claim that the City failed to provide him with the video recording was moot because it had previously tendered the DVD to plaintiff. The City argued that it did not have the technology to provide defendant with a copy of the video in VHS format. Last, the City argued that it did not possess the enhanced video created by the FBI.

¶ 17 To support its motion, the City attached the affidavits of Schmitz and Passwater. The City also attached correspondence between the City, plaintiff, and the PAC, as well as the documents it produced in response to plaintiff's FOIA request.

*3 ¶ 18 As to the reasonableness of its search, the City explained the efforts it used to find the information plaintiff requested. Passwater averred that, "[he] reviewed the Police Departments [*sic*] electronic database and located the Police Department file, which was numbered 2003-1038." In the file, the City found all the information plaintiff requested in requested items A, C, and E. The City also explained:

> "a review of the Kankakee Police file 2003-1038 and the electronic database failed to locate any reports or

files which responded to [plaintiff's] requests 'D' and 'F'. There were no files that listed [plaintiff] as a Confidential Informant, and any reports regarding Det. Kane's assignment to [plaintiff's] case. There were no other locations to search within the Kankakee Police Department that would have revealed records responsive to [plaintiff's] request."

¶ 19 As to plaintiff's request for a copy of the video in VHS format rather than DVD, Passwater averred:

"The video, which was [plaintiff's] request 'A', was taken of him on the evening of March 23, 2003, the night of the murder. The video was in VHS form and was found in the police file. Technology has changed in 13 years. In 2016, when the request was made, the police department did not have the capability to copy this to VHS. We searched for and found an outside company which also did not have the capability to copy this to VHS. The company could only copy the video to DVD format. So that is how we proceeded."

¶ 20 With respect to the video enhancements performed by the FBI, the City explained that it did not have the material. According to Passwater:

"There was no enhanced video in the files I reviewed as requested by [plaintiff] in 'B'. The case was prosecuted by the United State's Attorney and the FBI enhanced the video, not the Kankakee Police Department."

¶ 21 Plaintiff responded to the City's motion to dismiss, but he did not attach any counteraffidavits to rebut the evidence contained in the City's motion.

¶ 22 Ultimately, the circuit court granted the City's motion to dismiss. The court found that the City tendered all records, videos, and other documents to plaintiff pursuant to his FOIA request. The circuit court also concluded that the City conducted an adequate search pursuant to FOIA for the requested information not tendered in response.

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiff contends that the circuit court erred in granting defendant's motion to dismiss. Section 2-619(a)(9) of the Code provides for involuntary dismissal of a claim, based on "affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016). A section 2-619 motion to dismiss accepts as true all well-pleaded facts and raises questions of law. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 759 (2008). Our review is *de novo*. *Id.* at 759.

¶ 25 Plaintiff raises several arguments as to why the trial court erred when it dismissed his complaint. He contends: (1) there is an issue of fact as to the adequacy of the City's search for responsive records; (2) the City should have provided him with a VHS copy of the video recording rather than in DVD format; (3) the City failed to produce the enhanced videos created by the FBI; and (4) the City failed to respond to his August 15, 2018, FOIA request. We discuss each argument in turn.

¶ 26 First, plaintiff contends that there exists an issue of fact as to the adequacy of the City's search for records. Plaintiff speculates that more records existed in the City's possession than it provided to him in response to his FOIA requests. Accepting the City's evidence in support of its motion to dismiss, we find that it performed an adequate search for the records plaintiff requested. Therefore, the trial court did not err when it determined that the City performed an adequate search for the requested records.

*4 ¶ 27 When a plaintiff questions the adequacy of the search an agency made in order to satisfy a FOIA request, the factual question raised is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant. *Meeropol v. Meese*, 790 F.2d 942, 950-51; *Weisberg v. U.S. Department of Justice*, 705 F.2d 1344, 1357 (1983). Mere speculation that uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them. *Weisberg*, 705 F.2d at 1351-52; *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (1981).

¶ 28 Here, defendant submitted the affidavit of Passwater detailing his search for records responsive to plaintiff's requests. The affidavit satisfied the City's responsibilities under FOIA. Passwater's affidavit stated that he reviewed the department's electronic database and located the case file which would contain the responsive material. The City then produced the responsive material it found to plaintiff, and explained that for part of his request, there were no responsive records. Passwater's affidavit also affirmatively stated that there "were no other locations to search within the Kankakee Police Department that would have revealed records responsive to [plaintiff's] request."

¶ 29 In response to the City's motion to dismiss, plaintiff needed to submit a counteraffidavit to rebut the City's affidavits. "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.' " *SafeCard Services, Inc. v. Securities & Exchange Comm'n*, 926 F.2d 1197, 1200 (1991) (quoting *Ground Saucer Watch, Inc.*, 692 F.2d at 771). "In order to refute evidentiary facts contained in the defendant's supporting affidavits, the plaintiff must provide a counteraffidavit. [Citation.] If the plaintiff fails to provide a counteraffidavit to challenge the facts alleged in the defendant's supporting affidavits, the facts of defendant's affidavits are deemed admitted." *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 291 (2010). Plaintiff failed to submit a counteraffidavit. To the contrary, plaintiff only offered speculative arguments that additional documents may exist. Plaintiff's unsupported allegations are insufficient to rebut the City's uncontroverted affidavits of its exhaustive search for responsive documents. Thus, there is no issue of fact as to the adequacy of the City's search for documents responding to plaintiff's FOIA requests.

¶ 30 Next, plaintiff contends that the City failed to comply with FOIA when it provided him with a DVD copy of the VHS recording. According to plaintiff, the City should have provided him with a copy of the video in VHS format. As the only method of copying the video available to the City was to use a DVD, we find that the City properly responded to plaintiff's FOIA request. Therefore, we find plaintiff's argument that the City failed to provide him with a proper copy of the video is moot.

¶ 31 FOIA requires public bodies to make public records available to any person for inspection or copying. **5 ILCS 140**/3 (West 2016). "Copying" is defined as "the reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means now known or hereafter developed and *available* to the public body." (Emphasis added.) *Id.* § 2(d).

***5** ¶ 32 Here, the City demonstrated it lacked the capability to copy the video to VHS. The City took possession of the video in VHS form in 2003. Plaintiff then waited 13 years to request a copy of the VHS. As with the passage of time, new technology made it unfeasible for the police department to copy it in VHS format. The City found an outside company that could copy the VHS to DVD, but it did not have the capability of copying it to VHS. Plaintiff failed to file a counteraffidavit to rebut the City's claim. Moreover, plaintiff did not allege the existence of any alternative option for the City to use to copy the video to a VHS. Thus, the City satisfied the requirements of FOIA by providing plaintiff with a copy of the recording in the format available to it.

¶ 33 As a result, plaintiff's claim that the City failed to provide him with a copy of the VHS recording is moot. "A claim is moot when no actual controversy exists or events occur which make it impossible for a court to grant effectual relief." *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1999). Where the plaintiff has received what he sought, his action should be dismissed as moot. *Id.* The mootness doctrine is applied to FOIA claims once the requested records have been produced. *Roxana Community Unit School District No. 1 v. Environmental Protection Agency*, 2013 IL App (4th) 120825, ¶ 42. Here, the City provided plaintiff with the requested video and his claim is now moot.

¶ 34 Next, plaintiff contends that the City failed to provide him with the enhanced videos created by the FBI in 2003. There is no evidence that the City possessed such videos. In fact, Passwater's affidavit stated the department did not have any enhanced videos in its possession. As plaintiff failed to file a counteraffidavit to rebut Passwater's affidavit, we find the City did not violate FOIA by denying plaintiff's request for items it did not possess.

¶ 35 Finally, plaintiff contends that the City failed to respond to a FOIA request he sent to the City on August 15, 2018. This claim is not properly before this court. Plaintiff did not raise this argument in the trial court. Issues not raised in the trial court are waived and may not be raised for the first time on appeal. *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 58. Therefore, we will not address this argument. Accordingly, we find the circuit court did not err when it dismissed plaintiff's complaint.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 38 Affirmed.

Justices Carter and McDade concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (3d) 190374-U, 2020 WL 4346851

Footnotes

1 The court dismissed the complaint against the other defendants for different reasons. Those defendants are not parties to this appeal.

End of Document

2020 IL App (4th) 190347-U

Vincent BOGGAN, Petitioner-Appellant,

v.

FOIA OFFICE OF the DEPARTMENT OF CORRECTIONS, Respondent-Appellee.

NO. 4-19-0347

FILED July 28, 2020

Appeal from the Circuit Court of Sangamon County, No. 17MR1020, Honorable Jack D. Davis II, Judge Presiding.

ORDER

JUSTICE TURNER delivered the judgment of the court.

*1 ¶ 1 *Held*: The circuit court's denial of petitioner's request for civil penalties was not against the manifest weight of the evidence.

¶ 2 In November 2017, petitioner, Vincent Boggan, filed *pro se* a complaint for *mandamus* (735 ILCS 5/14-101 *et seq.* (West 2016)) against respondent, the FOIA Office of the Department of Corrections (Department). In his *mandamus* petition, petitioner sought civil penalties under section 11(j) of the Freedom of Information Act (FOIA) (**5 ILCS 140**/11(j) (West 2016)). Petitioner later filed an amended *mandamus* petition, naming the Director of Corrections as respondent. In April 2018, respondent filed a motion to dismiss petitioner's amended complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)). After an August 2018 hearing, the Sangamon County circuit court ordered the Department to conduct a records search and provide any additional response to petitioner but denied petitioner's additional requests for relief. Respondent filed a notice of compliance with the court's August 2018 order, and petitioner filed a motion for modification of the order, requesting the court order respondent to pay petitioner a mandatory civil penalty. After a May 2019 hearing, the court denied petitioner's motion for modification and dismissed petitioner's complaint with prejudice.

¶ 3 Petitioner appeals *pro se*, asserting the circuit court erred by failing to award him the mandatory civil penalty. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following are the factual allegations in petitioner's *mandamus* petition and/or facts set forth in a March 6, 2017, letter by the Attorney General's Public Access Bureau (Bureau). Petitioner is an inmate in the Dixon Correctional Center. On January 13, 2016, petitioner filed a four-part request under FOIA, seeking records related to " 'the cause for [an] influx of corrosive dirty looking and smelling water running through Dixon C.C. taps during the month of January, 2016, and the constant influx of amber colored fiber like particles that continue[d] to clog the tap regulators ***.' " On January 27, 2016, petitioner received a response stating, " '[the Department] does not possess or maintain records responsive to these requests." In February 2016, petitioner sought review with the Bureau of the Department's denial of his request. With his request, petitioner included a grievance he filed with the Dixon Correctional Center regarding the facility's water quality. In his grievance, petitioner stated the following:

> " 'I informed the Maintenance Man that I noticed the water getting progressively worse over the past 3½ weeks ***. At that time the Maintenance Man confirmed that the Maintenance Department was aware of the contaminance [*sic*] in the water system, by stating that: "a few weeks ago some kind of Water Softener/Filtration System exploded, and caused large quantities of the gritty substance to enter the water system." ' "

¶ 6 On February 29, 2016, the Bureau asked the Department's FOIA officer to " 'describe [the Department]'s search for the requested records, including where and how the records are maintained, and who performed the search.' " That same day, the FOIA officer responded she had asked the FOIA liaison at the Dixon Correctional Center who had in turn asked the chief engineer and the chief engineer stated no records " 'showed the specific information that [petitioner] requested.' " In April 2016, the Bureau sent a copy of petitioner's request for review

to the Department and again asked for a detailed description of its search for responsive records. The Bureau also asked the Department "to clarify if it 'possess[ed] any records regarding any issues with the water quality at the Dixon Correctional Center for the timeframe requested by [petitioner].' " In May 2016, the Department responded as follows:

> *2 "I can now confirm that [the Department] does not possess or maintain records responsive to any portion of the request.
>
> Upon receipt of the request from [petitioner], the [Department's] Freedom of Information Office contacted the Chief Engineer who maintains water reports for the facility, who confirmed that [the Department] does not possess or maintain records which respond to [petitioner]'s request.
>
> The above is a summary of the steps taken to locate responsive records. It is not intended to depict the full search that was under take [*sic*] for these records. The Department has taken reasonable steps to ensure that these records do not exist."

¶ 7 In March 2017, the Bureau made a determination under section 9.5(f) of FOIA (**5 ILCS 140**/9.5(f) (West 2016)), concluding the response by the Department to petitioner's January 13, 2016, request violated the requirements of FOIA. The Bureau stated, in pertinent part, the following:

> "Here, [petitioner]'s request can reasonably be construed to seek records concerning the source and quality of water at the Dixon Correctional Center. [The Department]'s boilerplate assertion that it took reasonable efforts to locate records responsive to this request is conclusory. Despite this office's unambiguous requests for a description of the specific systems that were searched, a detailed description of the search of those systems, and to clarify whether [the Department] maintained or possessed *any* records regarding issues with the quality of water at the Dixon Correctional Center, [the Department]'s response to this office merely stated that [the Department]'s FOIA Office contacted the chief engineer at Dixon Correctional Center, and that the chief engineer simply stated there were no responsive records.
>
> [The Department] neither described how it maintains records about environmental conditions such as the water quality within this prison nor the specific measures that the chief engineer took to search for those records. Although the chief engineer would likely be aware of concerns about water quality, it is not clear that the chief engineer is the only [Department] employee who would generate records or engage in communications about water quality. Based on the available information, it appears possible, if not likely, that [the Department] possesses additional records concerning the water conditions at the Dixon Correctional Center, such as the age and grade of the current water source/infrastructure at the prison, inspection-records, maintenance records, and/or inmate complaint records. Because [the Department] did not provide this office with a sufficient explanation of how it searched for records responsive to [petitioner]'s request, the [Bureau] is unable to conclude that [the Department] performed a reasonable search for responsive records. To remedy this violation, this office asks [the Department] to conduct a search of the applicable recordkeeping systems and issue a supplemental response to [petitioner] that fully complies with section 9 of FOIA (**5 ILCS 140**/9 (West 2014))." (Emphasis in original.)

The Bureau's letter also noted the resolution of the matter did not require the issuance of a binding opinion.

*3 ¶ 8 In his November 2017 *mandamus* petition, petitioner alleged he had still not received a response from the Department to the Bureau's March 2017 letter. Based on the aforementioned facts, petitioner argued the Department had willfully and intentionally failed to comply with his FOIA request on no less than three different occasions or had otherwise acted in bad faith in violation of section 11(j) of FOIA. which mandated the court to impose a civil penalty on the Department of not less than $2,500 nor more than $5,000 for each of the three occurrences. Petitioner also sought injunctive relief requiring the Department to provide the records in response to his request. Additionally, petitioner sought punitive damages for the Department's refusal to provide any information on the contaminated water he was forced to drink and bathe in during January and February 2016. In March 2018, petitioner filed an amended complaint, listing John Baldwin, Director of Corrections, as the respondent and raising the same allegations.

¶ 9 In April 2018, respondent filed a section 2-615 motion to dismiss petitioner's first amended complaint, contending petitioner failed to plead sufficient facts giving rise to a cause of action. Respondent alleged petitioner had access to the materials he seeks because petitioner noted they were in the Dixon Correctional Center's law library. It also argued FOIA did not require a public body to create records and stated the chief engineer confirmed the Department did not have the

records responsive to petitioner's request. Petitioner filed a reply, noting the Dixon Correctional Center's law library did not have the annual reports or notice for the period of January to March 2016. Petitioner also noted he expected documents existed regarding the problems the Dixon Correctional Center was having with the water system during the period of January to March 2016.

¶ 10 On August 6, 2018, the circuit court held a telephone hearing regarding respondent's motion to dismiss. The next day, the court entered an order adopting the Bureau's determination as to only parts one through three of petitioner's January 2016 request and ordering the Department to conduct a records search and provide additional responses to petitioner regarding such search and any responsive records. The court denied petitioner's requests for additional relief.

¶ 11 On August 21, 2018, respondent filed a notice of compliance with the circuit court's August 7, 2018, order. Attached to the notice was the Department's amended response to petitioner's January 2016 FOIA request and 11 pages of documents. Eight days later, petitioner filed a motion for modification of the August 2018 order, contending the court erred by not awarding petitioner the civil penalty under section 11(j) of FOIA (**5 ILCS 140**/11(j) (West 2016)) because it is mandatory when the court finds a willful and intentional failure to comply with FOIA or the party acted in bad faith. Respondent filed a response asserting petitioner's motion should be denied and noting it had complied with the court's order. Petitioner filed a reply disagreeing respondent had complied with the court's order because the Department did not provide copies of any notices sent to inmates or staff regarding the contaminated water (part three of petitioner's January 2016 request). On May 10, 2019, the circuit court held a telephone hearing on petitioner's motion for modification. Six days later, the court denied petitioner's motion.

¶ 12 On June 4, 2019, petitioner filed a timely notice of appeal from the dismissal with prejudice of his petition for *mandamus* in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). Thus, this court has jurisdiction of petitioner's appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 13 II. ANALYSIS

¶ 14 In this case, the circuit court granted petitioner declaratory relief and denied his request for civil penalties under section 11(j) of FOIA (**5 ILCS 140**/11(j) (West 2016)) before it ultimately dismissed his *mandamus* complaint as moot. Contrary to petitioner's assertion, we note the circuit court did not find petitioner's claim for civil penalties was moot. On appeal, petitioner only challenges the court's denial of his request for civil penalties under section 11(j) which provides, in pertinent part, the following:

> ***4** "If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence." **5 ILCS 140**/11(j) (West 2016).

¶ 15 While the circuit court considered only written pleadings and attachments in denying petitioner's request for civil penalties, the court had to resolve factual disputes regarding the Department's actions. As such, we apply the same standard of review as in *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 48, 977 N.E.2d 1216, where the Appellate Court, Second District, reviewed the circuit court's factual determination the respondent did not willfully and intentionally fail to comply with FOIA or act in bad faith under the manifest weight of the evidence standard of review. With that standard, a reviewing court will only overturn a factual finding when the opposite conclusion is apparent or when the finding appears to be unreasonable, arbitrary, or not based on the evidence. *Rock River Times*, 2012 IL App (2d) 110879, ¶ 48.

¶ 16 Section 11 of FOIA provides, in pertinent part, as follows:

> "(a) Any person denied access to inspect or copy any public record by a public body may file suit for injunctive or declaratory relief.
>
> (a-5) In accordance with Section 11.6 of this Act, a requester may file an action to enforce a binding opinion issued under Section 9.5 of this Act." **5 ILCS 140**/11 (West 2016).

Here, the Bureau's March 2017 letter expressly found the matter did not require the issuance of a binding opinion. "The decision not to issue a binding opinion shall not be reviewable." **5 ILCS 140**/9.5(f) (West 2016). Thus, petitioner cannot challenge the Bureau's decision not to issue a binding opinion. Also, since the Bureau did not issue a

binding opinion, section 11.6 of FOIA (**5 ILCS 140**/11.6 (West 2016)), which contains a rebuttable presumption the public body willfully and intentionally failed to comply with FOIA, does not apply in this case. Additionally, petitioner fails to cite any authority in support of his contention the Department's failure to comply with the Bureau's letter should be considered a rebuttable presumption that the Department willfully and intentionally failed to comply with FOIA.

¶ 17 Moreover, in reviewing the circuit court's determination, we will not consider the exhibits attached to petitioner's notice of appeal and any arguments based on those documents. While petitioner asserts he presented them to the circuit court at the May 2019 hearing, the record on appeal lacks a report of proceedings for that hearing, and the record contains no other evidence showing those documents were in fact presented to the circuit court. As the appellant, petitioner "ha[d] the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392, 459 N.E.2d at 959.

Additionally, we point out the civil penalties provided in section 11(j) are mandatory only '[i]f the court determines that a public body willfully and intentionally failed to comply with [FOIA], or otherwise acted in bad faith." **5 ILCS 140**/11(j) (West 2016). Here, the circuit court implicitly found respondent did not willfully and intentionally fail to comply with FOIA or act in bad faith when it denied petitioner's request for additional relief in its August 2018 order. Further, contrary to petitioner's assertion, the record does not show the circuit court denied petitioner's motion for modification based on respondent's compliance with the court's August 2018 order. They were two separate issues the circuit court addressed at the May 2019 hearing.

***5** ¶ 18 Petitioner contends the Bureau's March 2017 letter clearly indicates respondent acted in bad faith and willfully and intentionally failed to comply with FOIA. However, in its letter, the Bureau found the Department did not sufficiently explain how it searched for records and thus the Bureau could not determine if the Department conducted a reasonable search for responsive records. Additionally, the materials the Department did produce in August 2018 were created after January 2016 and would not have been available at the time of petitioner's initial request. Moreover, the Department did reply each time the Bureau asked it to do so, except for after the March 2017 letter. However, at that point, the Department had given essentially the same answer three times. The Bureau's letter indicated a concern with the narrowness of the Department's search for responsive documents and not an utter disregard of petitioner's four-part FOIA request. Based on the facts before the circuit court, we do not find the court's implicit ruling the Department did not willfully and intentionally fail to comply with FOIA or otherwise act in bad faith was against the manifest weight of the evidence.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the Sangamon County circuit court's judgment.

¶ 21 Affirmed.

Justices DeArmond and Holder White concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (4th) 190347-U, 2020 WL 4346867

2020 IL App (1st) 181958

Appellate Court of Illinois, First District,
Sixth Division.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Roberto VELAZQUEZ, Defendant-Appellant.

No. 1-18-1958
|
July 17, 2020

Synopsis

Background: Convicted criminal defendant mailed notice of filing his motion for injunctive or declaratory relief regarding four FOIA requests he had filed to the clerk of the court in Maywood, Illinois, and named the state attorney general and one borough police department as respondents. The Circuit Court, Cook County, Geary W. Kull, J., dismissed the motion believing it did not have jurisdiction to consider defendant's request for relief.

Holdings: The Appellate Court, Sheldon A. Harris, J., held that:

[1] motion was improperly dismissed, rather than transferring to chief judge for reassignment, and

[2] state lacked standing to challenged validity of dismissal order based on a lack of personal jurisdiction.

Vacated and remanded.

West Headnotes (9)

[1] **Courts** Divisions and parts of courts

Trial court improperly dismissed, rather than transferring to the chief judge for reassignment, defendant's motion for injunctive or declaratory relief regarding four Freedom of Information Act (FOIA) requests defendant made to police departments that were involved in his arrest; motion was filed in the criminal division and should have been filed in the chancery division as it was a motion for injunction or declaratory relief. 5 Ill. Comp. Stat. Ann. 140/11.

[2] **Appeal and Error** Subject-matter jurisdiction

Whether the circuit court has subject-matter jurisdiction to entertain a claim is a question of law that is reviewed de novo.

[3] **Courts** Illinois

Excepting the power to review administrative actions, the circuit court's subject-matter jurisdiction is conferred entirely by the state constitution.

[4] **Action** Moot, hypothetical or abstract questions

Subject matter jurisdiction exists for a circuit court as a matter of law if the matter brought before the court by the plaintiff or petitioner is justiciable.

[5] **Action** Moot, hypothetical or abstract questions

A justiciable matter is a controversy that is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests.

[6] **Courts** Divisions and parts of courts

Although the circuit court is comprised of different divisions that hear certain types of cases, that fact does not affect a circuit judge's

authority to hear and dispose of any matter properly pending in the circuit court.

1 Cases that cite this headnote

[7] **Courts** Divisions and parts of courts

Claims transferred or reassigned by a circuit court chief judge to another division after it is determined the case belongs in the other division does not implicate the transferring circuit court's jurisdiction to hear a particular type of action.

1 Cases that cite this headnote

[8] **Courts** Waiver of Objections

Process Necessity and mode of objection in general

Because objections to personal jurisdiction and improper service may be waived, a party may object to personal jurisdiction or improper service of process only on behalf of himself or herself.

[9] **Declaratory Judgment** State or state officers

State lacked standing to challenge validity of the circuit court's order dismissing defendant's motion for injunctive or declaratory relief regarding Freedom of Information Act (FOIA) requests based on a lack of personal jurisdiction over respondents listed in the motion, the attorney general and borough police department, because the state was not a listed respondent; a party may object to personal jurisdiction or improper service of process only on behalf of himself or herself.

Appeal from the Circuit Court of Cook County. No. 06 CR 7494, Honorable Geary W. Kull, Judge Presiding.

Attorneys and Law Firms

Amy P. Campanelli, Public Defender, of Cook County (Elizabeth Ribbeck, Assistant Public Defender, of counsel), for appellant.

Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg and Christine Cook, Assistant State's Attorneys, of counsel), for the People.

OPINION

JUSTICE HARRIS delivered the judgment of the court, with opinion.

***1** ¶ 1 Defendant, Roberto Velazquez, appeals from the order of the circuit court dismissing his motion for injunctive or declaratory relief pursuant to section 11 of the Freedom of Information Act (FOIA) (**5 ILCS 140**/11 (West 2016)). On appeal, defendant contends that the court erred in dismissing the action and instead should have transferred the matter to the presiding judge of the chancery division for reassignment. For the following reasons, we vacate the dismissal and remand for further proceedings.

¶ 2 I. JURISDICTION

¶ 3 The circuit court dismissed the action on June 22, 2018. On September 20, 2018, this court allowed defendant to file a late notice of appeal. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 606(c) (eff. July 1, 2017).

¶ 4 II. BACKGROUND

¶ 5 The following facts are relevant to this appeal. After a jury trial, defendant was convicted of first degree murder in the shooting death of Jesus Escalante-Mendoza and sentenced to 60 years' imprisonment. This court affirmed defendant's conviction and sentence in *People v. Velazquez*, No. 1-08-2154, 374 Ill.Dec. 1078, 996 N.E.2d 773 (2008) (unpublished order under Illinois Supreme Court Rule 23). Defendant filed a postconviction petition alleging ineffective assistance of appellate counsel, which the trial court summarily dismissed. This court affirmed the summary dismissal but directed the clerk of the circuit court to amend

the *mittimus* to reflect pretrial custody credit. *People v. Velazquez*, 2013 IL App (1st) 120285-U, 2013 WL 5435213.

¶ 6 Defendant subsequently made four requests to agencies pursuant to FOIA. On June 26, 2016, defendant filed a FOIA request with the Cicero Police Department (2016 PAC 43654). The Illinois Attorney General's (AG) Office wrote a letter to the town of Cicero inquiring about its failure to respond to defendant's request. In a letter dated September 15, 2016, Cicero informed defendant that it had 72 pages of record in response to his request, that the first 50 pages were free, and upon receipt of a $3.30 copying fee it would "promptly tender the requested" materials. After Cicero informed the AG's Office that it responded to defendant's request, the AG sent a letter to defendant stating that his complaint had been resolved and if he wanted review of the response, he had to file a request for review. A receipt dated October 24, 2016, shows payment of $3.30 was received for defendant's FOIA request.

¶ 7 On June 26, 2016, defendant also filed a FOIA request to the Netcong, New Jersey, police department (2016 PAC 43655), where he was arrested. On July 7, 2016, the Netcong Borough Police Department responded to the request, stating that the incident in which defendant sought records occurred outside their jurisdiction. They suggested defendant contact the New Jersey State Police and provided contact information. On September 8, 2016, the AG informed defendant in a letter that it closed its investigation of his request because it had "no jurisdiction to review denials of requests for records by governmental entities of the State of New Jersey."

***2** ¶ 8 Defendant filed a request for review with the AG on November 14, 2016, alleging that the town of Cicero did not send requested records after he paid the fee (2016 PAC 45101). The attorney for Cicero informed the AG that the town received defendant's check on October 24, 2016, and mailed the requested records that same day. The AG apprised defendant that if it did not hear from him by March 21, 2017, it would "assume that [he] received the records and close [his] file without further action or notification to you."

¶ 9 On February 20, 2017, defendant filed a FOIA request to the Cicero Police Department seeking all police reports related to his case (2017 PAC 47563). Defendant appealed the denial of his request to the AG on April 17, 2017. In a letter dated May 4, 2017, the AG informed defendant that "no further inquiry is warranted."

¶ 10 On June 14, 2018, defendant placed in the mail his notice of filing of his motion for injunctive or declaratory relief. Defendant's motion listed himself as plaintiff and Attorney General Lisa Madigan and "Net-Cong Borough PD" as respondents. For case numbers, defendant entered the PAC numbers for the four FOIA requests he had filed. Defendant requested relief pursuant to section 11(f) of FOIA, which provides that the court "shall conduct [an] in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act." **5 ILCS 140**/11(f) (West 2016). The notice of filing was sent to the "Clerk of the Court" in Maywood, Illinois, and to "Kimberley M. Foxx."

¶ 11 At the hearing on defendant's motion, the circuit judge stated that defendant "requested certain things in the Freedom of Information Act that I have read. Some of which he may be entitled to, some of which not. He also asked for actual photographs of evidence. I believe he is entitled to that." The circuit judge, however, concluded "I'm not the place to send this. I don't necessarily know who is, but I'm going to dismiss it today, because I don't have jurisdiction on it." The court believed that the matter belonged in "maybe the chief judge's court." Defendant appeals from the trial court's dismissal.

¶ 12 III. ANALYSIS

[1] **[2]** ¶ 13 The circuit court dismissed defendant's motion because it believed it did not have jurisdiction to consider defendant's request for relief. Whether the circuit court has subject-matter jurisdiction to entertain a claim is a question of law that we review *de novo*. *McCormick v. Robertson*, 2015 IL 118230, ¶ 18, 390 Ill.Dec. 142, 28 N.E.3d 795.

[3] **[4]** **[5]** ¶ 14 Excepting the power to review administrative actions, the circuit court's subject-matter jurisdiction is conferred entirely by our state constitution. *In re M.W.*, 232 Ill. 2d 408, 424, 328 Ill.Dec. 868, 905 N.E.2d 757 (2009). Thus, our supreme court determined that for circuit courts, "subject matter jurisdiction exists as a matter of law if the matter brought before the court by the plaintiff or petitioner is 'justiciable.' " *Id.* A justiciable matter is a controversy that "is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335, 264 Ill.Dec. 283, 770 N.E.2d 177 (2002).

[6] [7] ¶ 15 The circuit court below, however, did not determine that no definite controversy existed between the parties. Rather, the court believed that it was not the place for defendant's action. Although the circuit court is comprised of different divisions that hear certain types of cases, that fact does not affect a circuit judge's authority "to hear and dispose of any matter properly pending in the circuit court." *Fulton-Carroll Center, Inc. v. Industrial Council of Northwest Chicago, Inc.*, 256 Ill. App. 3d 821, 823, 195 Ill.Dec. 657, 628 N.E.2d 1121 (1993). If a case before a circuit judge belongs in another division, the chief judge has the general administrative authority to transfer the matter to another division in the circuit. See Ill. S. Ct. R. 21(c) (eff. Dec. 1, 2008). Such transfers or reassignments do not implicate the circuit court's jurisdiction to hear a particular type of action. *Fulton-Carroll*, 256 Ill. App. 3d at 823, 195 Ill.Dec. 657, 628 N.E.2d 1121.

*3 ¶ 16 Accordingly, the general orders of the Cook County circuit court provide that "[n]o action shall be dismissed * * * because the action was filed, tried or adjudicated in the wrong department, division or district." Cook County Cir. Ct. G.O. 1.3(b) (Aug. 1, 1996). Instead, any action that the circuit court determined was filed in the

> "wrong department, division, district or section of the Circuit Court of Cook County, shall be transferred to the Presiding Judge of the division or district in which it is pending for the purpose of transferring the action to the Presiding Judge of the proper division or district, or for reassignment to the proper section." Cook County Cir. Ct. G.O. 1.3(c) (Aug. 1, 1996).

¶ 17 Defendant's action for relief pursuant to section 11 of FOIA was filed in the criminal division, and he acknowledged on appeal that it should have been filed in the chancery division as it is a motion for injunction or declaratory relief. See Cook County Cir. Ct. G.O. 1.2, 2.1(b)(1) (Jan. 1, 2008). The circuit court recognized that it was filed in the wrong division, and also recognized that the matter belonged in "maybe the chief judge's court." Rather than dismiss defendant's action, however, the court should have transferred it to the chief judge for reassignment. *Fulton-Carroll*, 256 Ill. App. 3d at 823, 195 Ill.Dec. 657, 628 N.E.2d 1121. Therefore, we vacate the circuit court's dismissal and remand the matter so the circuit court can transfer defendant's action to the chief judge. See *id.* at 823-24, 195 Ill.Dec. 657, 628 N.E.2d 1121 (it is not for the reviewing court "to direct that cases be heard in one division of a circuit court as opposed to another").

[8] [9] ¶ 18 The State argues that the circuit court below lacked personal jurisdiction over the respondents because there is no evidence in the record that they were properly served. The State urges this court to affirm the circuit court's dismissal on this basis. However, because objections to personal jurisdiction and improper service may be waived, " 'a party may object to personal jurisdiction or improper service of process only on behalf of himself or herself.' " (Internal quotation marks omitted.) *People v. Matthews*, 2016 IL 118114, ¶ 19, 412 Ill.Dec. 775, 76 N.E.3d 1233 (quoting *In re M.W.*, 232 Ill. 2d at 427, 328 Ill.Dec. 868, 905 N.E.2d 757). Therefore, the State "lacks standing to challenge the validity of the circuit court's dismissal order based on lack of personal jurisdiction" over respondents. *Id.* ¶ 20.

¶ 19 IV. CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court is vacated, and the cause remanded for further proceedings.

¶ 21 Vacated and remanded.

Presiding Justice Mikva and Justice Cunningham concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 181958, 2020 WL 4038859

End of Document

2020 IL App (1st) 191414-U

Appellate Court of Illinois, First District,
FIRST DIVISION.

John A. SCATCHELL, Plaintiff-Appellant,

v.

VILLAGE OF MELROSE PARK, and Board of Police and Fire Commissioners of Melrose Park, Defendants-Appellees.

No. 1-19-1414
|
July 6, 2020

Appeal from the Circuit Court of Cook County, Chancery Division. No. 18 CH 0785, Honorable Pamela McLean-Meyerson, Judge Presiding.

ORDER

PRESIDING JUSTICE GRIFFIN delivered the judgment of the court.

***1** ¶ 1 *Held*: The dismissal of plaintiff's second amended-complaint for declaratory judgment with prejudice pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)) was warranted; plaintiff can prove no set of facts under the pleadings that would entitle him to relief.

¶ 2 Plaintiff John A. Scatchell filed a declaratory judgment action against defendants Village of Melrose Park (Village) and Board of Police and Fire Commissioners (BOFPC) in the circuit court of Cook County claiming the BOFPC lacked the authority to hear disciplinary charges filed against him. Plaintiff alleged the BOFPC was: (1) abolished by the Village in a municipal ordinance adopted on July 9, 2012; and in the alternative, (2) improperly constituted in violation of Illinois statute. Defendants moved to dismiss the declaratory judgment action pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2018)) (Code). The trial court held a hearing and dismissed the action with prejudice. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 Plaintiff was a police officer for the Melrose Park Police Department. The police chief and deputy police chief of the Melrose Police Department filed disciplinary charges against plaintiff for allegedly violating department rule and policies. The matter was set for an administrative hearing. While the charges were pending, plaintiff challenged the administrative body's authority to adjudicate the matter in a separate declaratory judgment action filed on July 19, 2018, in the circuit court of Cook County. Plaintiff amended his complaint two times on July 30, 2018 and October 24, 2018.

¶ 5 In his second-amended complaint, plaintiff alleged the administrative body hearing his charges, the BOFPC, was abolished by the Village in municipal ordinance no. 1613 adopted on July 9, 2012 (Ordinance 1613) and derived it's authority from nowhere such that any action it undertook would be void. Alternatively, plaintiff claimed the BOFPC lacked authority to hear the charges because it was improperly constituted in violation of the Fire and Police Commissioners Act (65 ILCS 5/10-2.1 *et seq.* (West 2018)) (Commissioners Act), which requires board members to serve three-year terms (*id.* § 10-2.1-1) and limits the number of board members who belong to the same political party (*id.* § 10-2.1-3).

¶ 6 Plaintiff attached the following exhibits to his second-amended complaint: (1) a copy of Ordinance 1613; (2) a letter entitled "Notice of Hearing"; (2) the minutes from a special meeting; (3) a Freedom of Information Act (**5 ILCS 140**/1 *et seq.* (West 2018)) (FOIA) denial letter from the Village; (4) copies of the Village's budget and schedules of expenditures; and (5) copies of resolutions passed by the Village.

¶ 7 Ordinance 1613 amended chapter 2.76 of the Village municipal code. It abolished the BOFPC ("[t]he Village Board hereby abolishes the Board of Police and Fire Commissioners for the Village") and created the Personnel Board ("[t]here is hereby created the 'Personnel Board' of the Village of Melrose Park, which shall consist of no greater than five (5) members appointed by the Mayor with the advice and consent of the Board of Trustees"). Members of the Personnel Board served three-year staggered terms "so that no more than two

(2) appointments expire on April 30 of any year." The then-current members of the BOFPC (Michael Caputo (Caputo), Pasquale Esposito (Esposito) and Mark Rauzi (Rauzi)) were "appointed to serve as members of the Personnel Board for the remainder of their respective terms of office." The Personnel Board "assume[d] all of the powers and duties of the Board and Fire and Police Commissioners."

*2 ¶ 8 The letter attached to plaintiff's second-amended complaint was written on BOFPC letterhead, listed plaintiff and his attorneys as addressees, and was entitled "Notice of Hearing." The body of the letter read as follows: "YOU ARE HEREBY NOTIFIED that charges have been filed against you before the Board of Fire and Police Commissioners of the Village of Melrose Park, Illinois ("Board") *** by police Chief Sam Pitassi and Deputy Police Chief Michael Castellan *** and that said Board has ordered that a hearing be had on the said charges *** on the 25th day of April, 2018." The letter was signed by the secretary of the BOFPC, Pat Esposito, and dated April 3, 2018.

¶ 9 The minutes were dated May 10, 2014, entitled "**SPECIAL MEETING** [,] BOARD OF THE POLICE AND FIRE COMMISSIONERS" and read in pertinent part as follows: "EMPLOYEE DISCIPLINE (Consider charges and set hearing on disciplinary charges filed on April 25, 2018 (Castellan))". The FOIA denial letter informed plaintiff that his request for public records from the Personnel Board was denied because "the Village does not have a personnel board." The Village's 2012 budget and its schedules of expenditures from 2012 to 2018 showed that funds were appropriated for the BOFPC and its chairman, commissioner, and secretary. The Personnel Board did not appear in the budget or any of the schedules of expenditures.

¶ 10 Finally, the text of the resolutions attached to plaintiff's second-amended complaint showed the Village appointed the same three members to the BOFPC from 2012 to 2018. In 2012, 2013 and 2014, the Village passed resolutions appointing Caputo, Esposito, and Rauzi as members to the BOFPC to serve one-year terms. The resolutions passed in 2015 and 2016 authorized the Village President to extend the terms of those appointments until such time as he deemed appropriate. In 2017 and 2018, the Village again appointed the same individuals to the BOFPC to serve one-year terms. Each resolution contained a "superseder" provision, indicating that "[a]ll code provisions, ordinance, resolutions, and orders, or parts thereof, in conflict herewith, are to the extent of such conflict hereby superseded."

¶ 11 On November 16, 2018, defendants moved to dismiss plaintiff's second-amended complaint pursuant to section 2-615 of the Code, which provides for the dismissal of a complaint that fails to state a claim for relief. In their motion, defendants acknowledged that Ordinance 1613 abolished the BOFPC on July 9, 2012, but pointed out that the ordinance also established the Personnel Board, vested the Personnel Board with the powers of the BOFPC and appointed the then-current members of the BOFPC to the Personnel Board. Defendants contended that the "BOFPC" was just a label, and its former members were fully empowered to hear the charges filed against plaintiff pursuant to Ordinance 1613.

¶ 12 Defendants took the following alternative positions with respect to Villages' resolutions: (1) they were valid and superseded the conflicting provisions of Ordinance 1613 "with respect to the name of the Board and the terms of its members" such that Caputo, Esposito, and Rauzi were still acting with the authority granted to them by Ordinance 1613, but under a new name and with one-year terms; or (2) they were invalid and Caputo, Esposito, and Rauzi remained members of the Personnel Board as statutory holdovers pursuant to section 3.1-30-5 of the Illinois Municipal Code (65 ILCS 5/3.1-30-5 (West 2018)) because no one was "appointed and qualified to replace them." Either way, defendants argued, the members hearing the charges against plaintiff did not lack authority. Defendants argued that plaintiff's alternative challenge to the composition of the BOFPC (or the Personnel Board) was a non-starter because the Village was a home-rule municipality and could adopt an ordinance that conflicted with requirements of the Commissioners Act (65 ILCS 5/10-2.1 *et seq.* (West 2018)).

*3 ¶ 13 On June 25, 2019, the trial court held a hearing on defendants' motion to dismiss plaintiff's second-amended complaint. The trial court found the BOFPC was abolished by Ordinance 1613. However, it concluded that the resolutions passed by the Village post-abolishment "superseded" the conflicting provisions of Ordinance 1613 and operated to "revive" the BOFPC. The trial court further found the BOFPC was not improperly constituted because the Village was a home-rule municipality and therefore not bound by the requirements of the Commissioners Act (65 ILCS 5/10-2.1 *et seq.* (West 2018)). The trial court granted defendants' motion and dismissed plaintiff's second-amended complaint with prejudice pursuant to Section 2-615.

¶ 14 Plaintiff filed a notice of appeal on July 8, 2019. Jurisdiction is proper under Illinois supreme court rules 301 (eff. Feb. 1, 1994) and 303 (eff. July 1, 2017). On appeal, plaintiff asks us to reverse the trial court's judgment because the facts alleged in his second-amended complaint taken as true establish his entitlement to declaratory relief. Defendants ask us to affirm the judgment on any basis in the record because the trial court's judgment was correct.

¶ 15 ANALYSIS

¶ 16 The issue on appeal is whether plaintiff can prove no set of facts under the pleadings that would entitle him to relief. Our review is *de novo. Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25.

¶ 17 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Jane Doe-3 v. McLean County Unit Dist. No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. Under section 2-615, the critical question is whether the allegations in the complaint, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* ¶ 16. In making the determination, all well-pleaded facts and the reasonable inferences drawn therefrom must be taken as true. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 18. A court should not dismiss a complaint pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 18 The essential requirements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests. *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003). "The declaratory judgment procedure allows ' " 'the court to take hold of a controversy one step sooner than normally—that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can then learn the consequences of their action before acting.' " ' " *Id.* at 372-73 (quoting *Kaske v. City of Rockford*, 96 Ill. 2d 298, 306 (1983), quoting *Buege v. Lee*, 56 Ill. App. 3d 793, 798 (1978), quoting Ill. Ann. Stat., ch. 110, ¶ 57.1, Historical and Practice Notes, at 132 (Smith-Hurd 1968)).

¶ 19 Plaintiff claims the facts alleged in his second-amended complaint, taken as true and liberally construed, establish that the BOFPC, not the Personnel Board, was hearing the disciplinary charges against him and lacked the authority to do so because the BOFPC was either abolished by Ordinance 1613, or improperly constituted in violation of the Commissioners Act (65 ILCS 5/10-2.1 *et seq.* (West 2018)). Plaintiff further argues that the resolutions passed by the Village after July 9, 2012, were invalid and failed to "revive" the BOFPC (as the trial court found) because a resolution cannot supersede or amend an ordinance. According to plaintiff, the BOFPC is "illegal" and we should reinstate his second-amended complaint so that he may defend the charges before an administrative body with the authority to make a binding decision.

*4 ¶ 20 Defendants counter, and argue that Caputo, Esposito and Rauzi derived their authority from Ordinance 1613 and none of the allegations or exhibits attached to plaintiff's second-amended complaint, taken as true, demonstrate otherwise. Defendants take alternative positions as to the validity of the resolutions passed by the Village after Ordinance 1613 was adopted. Defendants claim the resolutions were either: (1) valid and superseded the conflicting provisions of Ordinance 1613 by changing the name of the Personnel Board back to the BOFPC and re-appointing Caputo, Esposito and Rauzi as members of the BOFPC to serve one-year terms; or (2) invalid and failed to appoint members to the Personnel Board, in which case Caputo, Esposito and Rauzi remained in their positions as "statutory holdovers" pursuant to Illinois law until someone was appointed in their place.

¶ 21 We hold that the dismissal of plaintiff's second-amended complaint with prejudice pursuant to section 2-615 of the Code was warranted. Plaintiff can prove no set of facts under the pleadings that would entitle him to declaratory relief. The judgment of the circuit court of Cook County must be affirmed.

¶ 22 The plain text of Ordinance 1613 makes clear, and the parties do not dispute, that on July 9, 2012, the Village replaced the BOFPC with the Personnel Board, vested the powers of the BOFPC in the Personnel Board, and appointed the members of the BOFPC to the Personnel Board to serve out the remainder of their terms in office. The central question here is what happened when those terms expired, as provided in plaintiff's second-amended complaint, on April 30, 2013. We find the allegations and exhibits attached

to plaintiff's second-amended complaint, taken as true and liberally construed, establish that the Village never appointed anyone to succeed the members of the Personnel Board.

¶ 23 The resolutions passed by the Village were invalid and ineffectual. First, the resolutions expressly appointed members to a non-existent entity: the BOFPC. Second, the resolutions could not, contrary to the trial court's finding, supersede the conflicting provisions of Ordinance 1613 because a municipal ordinance may only be repealed, modified or amended through the passage of an ordinance. See *Naperville Police Union, Local 2233, American Federation of State, County & Municipal Employees AFL-CIO v. City of Naperville*, 97 Ill. App. 3d 153, 156 (1981) ("[a]n ordinance may be repealed, modified or amended only by municipal action of like dignity and, therefore, may not be amended or modified by resolution since a resolution is an act of lesser dignity than an ordinance"). Accordingly, the Village never appointed any successors to the Personnel Board and the BOFPC was not "revived."

¶ 24 Because no successors were chosen, the members of the Personnel Board remained in office by operation of law. See 65 ILCS 5/3.1-30-5 (West 2018) ("[i]f there is a failure to appoint a municipal officer, or the person appointed fails to qualify, the person filling the office shall continue in office until a successor has been chosen and has qualified"); see also *City of Pekin v. Industrial Commission*, 341 Ill. 312, 319 (1930) ("[w]here the tenure of an office is vested for a specified period of time and until a successor shall be elected or appointed and qualifies, the mere expiration of the specified period of time for the duration of the term of office does not operate to vacate the office or to impair the powers of the officer to continue to act"). By remaining in office, Caputo, Esposito, and Rauzi continued to exercise the powers of Personnel Board (which "assume[d]" the powers of the BOFPC under Ordinance 1613) and possessed the requisite authority to hear and act upon plaintiff's disciplinary charges.

¶ 25 We reject plaintiff's contentions that the exhibits attached to his second-amended complaint establish his entitlement to declaratory relief. None of the exhibits, including those showing that the Personnel Board did not have a budget and that a Village FOIA officer indicated the Village did not have a Personnel Board, demonstrate that Caputo, Esposito, and Rauzi lacked or somehow lost their authority under Ordinance 1613. Accordingly, plaintiff's initial claim for declaratory relief must fail under section 2-615 of the Code.

*5 ¶ 26 Plaintiff's additional claim that the BOFPC was improperly constituted fares no better. The Village is a home rule unit of local government under the Illinois Constitution of 1970 and pursuant to section 6(a) of article VII, "may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." Ill. Const.1970, art. VII, § 6(a). Our supreme court has "consistently held that an ordinance enacted by a home rule unit under the grant of power found in section 6(a) supersedes a conflicting statute enacted prior to the effective date of the Constitution." *Stryker v. Village of Oak Park*, 62 Ill. 2d 523, 527 (1976).

¶ 27 Pursuant to its section 6(a) authority, the Village adopted Ordinance 1613 and did not include in its text a provision limiting board membership based on political affiliation. As plaintiff points out, the absence of a provision so limiting board membership conflicted with section 10-2.1-3 of the Commissioners Act (65 ILCS 5/10-2.1-3 (West 2018)), which provides in pertinent part that "[n]o more than 2 members of the board shall belong to the same political party." However, the conflict was of no consequence. As a home rule municipality, the Village's adoption of Ordinance 1613 superseded the conflicting provisions of the Commissioners Act. *Stryker*, 62 Ill. 2d at 527. Accordingly, plaintiff's additional claim fails under section 2-615 of the Code as well.

¶ 28 Accordingly, the dismissal of plaintiff's second-amended complaint with prejudice was warranted. Plaintiff can prove no set of facts under the pleadings that would entitle him to relief. The judgment must be affirmed.

¶ 29 CONCLUSION

¶ 30 Accordingly, we affirm.

¶ 31 Affirmed.

Justices Pierce and Walker concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 191414-U, 2020 WL 3803533

End of Document

2020 IL App (1st) 190011

Appellate Court of Illinois, First District, SIXTH DIVISION.

Mansour MOHAMMAD, Plaintiff-Appellant,

v.

The CHICAGO POLICE DEPARTMENT, Defendant-Appellee.

No. 1-19-0011

June 30, 2020

Appeal from the Circuit Court of Cook County. No. 17 CH 16963, Honorable Peter Flynn, Judge Presiding.

ORDER

PRESIDING JUSTICE MIKVA delivered the judgment of the court.

***1** ¶ 1 *Held*: Where plaintiff failed to show that there was a genuine issue of material fact as to whether defendant complied with his FOIA request, the circuit court's grant of summary judgment in favor of defendant is affirmed.

¶ 2 Plaintiff, Mansour Mohammad, appeals from the circuit court's grant of summary judgment in favor of defendant, the Chicago Police Department (CPD), finding that no genuine issue of material fact existed as to whether the CPD complied with Mr. Mohammad's request under the under the Illinois Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)). On appeal, Mr. Mohammad argues that this grant of summary judgment was in error because (1) the CPD has not fully discharged its obligation to him under FOIA, (2) the documents that the CPD provided to Mr. Mohammad were improperly redacted, (3) the CPD intentionally violated FOIA in bad faith and therefore should incur civil penalties, and (4) there is outstanding discovery material relating to a genuine factual issue. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following chronology is taken from Mr. Mohammad's complaint, the CPD's motion for summary judgment, Mr. Mohammad's response to that motion, and relevant attachments to those filings.

¶ 5 In September 2016, Mr. Mohammad filed a FOIA request with the CPD, asking for all police reports for case No. 09 CR 08678. The CPD responded on September 28, 2016, providing 60 pages of responsive records. On October 26, 2016, Mr. Mohammad filed another FOIA request with the CPD, specifically asking for "all inventory reports, general progress reports, general offense case reports, investigative reports, patrol division canvass worksheets, supplementary reports, written notes, written statements, not limited to, but including all responsive records prepared by or for, or used by, received by, in the possession of, or under the control of any public body," and "any and all emails relating to" case No. 09 CR 8678.

¶ 6 After requesting multiple extensions, on December 27, 2016, Officer Gary Rubenstein, a CPD FOIA officer, responded to Mr. Mohammad's second request. In the letter accompanying the response, Officer Rubenstein indicated that his request was interpreted "to be for the Bureau's Area Investigative File," and that the CPD was releasing 242 pages of responsive records. He further stated that "[s]hould specific information listed in our request not be found in this record, it means that CPD has no responsive record for that specific request." Officer Rubenstein also stated that the 242 pages had been redacted pursuant to sections 7(1)(b), (c), and (d) of FOIA (**5 ILCS 140**/7(1)(b), (c), (d) (West 2016)), and listing the specific types of information that had been redacted and why.

¶ 7 Mr. Mohammad requested review of his FOIA request by the public access counselor at the Illinois Attorney General's Office, explaining that he did not receive all of the responsive records he requested. A representative of the Public Action Bureau (PAB) sent a letter to the general counsel of the CPD, asking the CPD to "provide detailed written explanation of why CPD construed the request as limited to the Area Investigative File and whether CPD possesses the records

Mr. Mohammad identified as missing from his Request for Review." The CPD did not respond.

*2 ¶ 8 On July 20, 2017, the PAB representative wrote to both the general counsel of the CPD and to Mr. Mohammad, stating in part that "although it [wa]s unclear whether CPD possesses the records Mr. Mohammad claims he should have received," the CPD's lack of response to the PAB inquiry "did not demonstrate that it conducted a reasonable search for the responsive records." She thus found that the CPD had violated the requirements of FOIA. She also stated, however, that resolution of the matter did not require "the issuance of a binding opinion" and the letter served to close the matter.

¶ 9 No further action was taken with respect to this FOIA request by any party until December 26, 2017, when Mr. Mohammad filed his FOIA complaint against the CPD in the circuit court requesting that the CPD be (1) enjoined from withholding the records he requested, (2) ordered to fully release the requested records, and (3) civilly penalized for between $2500 and $5000 under section 11 of FOIA (**5 ILCS 140**/11 (West 2016)), for acting in bad faith or willfully or intentionally failing to comply with FOIA.

¶ 10 On August 14, 2018, the CPD filed its motion for summary judgment. In it, the CPD argued it was entitled to summary judgment because (1) it had fully discharged its obligations under FOIA by providing Mr. Mohammad with the records that were responsive to his request, (2) any redactions made were permitted by FOIA, and (3) no civil penalty was appropriate since it did not violate FOIA. The CPD attached to that motion an affidavit from Officer Rubenstein, in which he attested that he had been the CPD FOIA officer since July 2016, that the FOIA officer has the responsibility of "reviewing, analyzing and responding to" FOIA requests, that upon receipt of a FOIA request he "analyze[s] the plain language of the request to determine if CPD maintains the documents requested and if so, whether CPD is still in possession of the requested records and finally, whether any portions of those records are exempt from disclosure pursuant to available FOIA exemptions." Officer Rubenstein stated that he was the officer originally assigned to Mr. Mohammad's FOIA request and that he noted the records Mr. Mohammad was requesting concerned his murder case and that, in his experience as the CPD FOIA officer, "when a FOIA request concerns major crimes, like [Mr. Mohammad's] murder case, the documentation will be found with the Detectives Division." Officer Rubenstein explained that each case is identified with a unique Records Division (RD) number and he learned the RD number associated with Mr. Mohammad's case was HP445128. He then requested the "full Investigative File" associated with that RD number from the Bureau of Detectives. After redacting information exempt from release under FOIA, Officer Rubenstein "forwarded copies of the 242 pages of responsive records to Mr. Mohammad."

¶ 11 Also attached to the CPD's summary judgment motion was the request that Officer Rubenstein sent to the Bureau of Detectives and the response from the chief of the Bureau of Detectives. In his request, Officer Rubenstein asked for records that "relate[d] to a 2009 homicide investigation under RD-HP445128," including the investigative file and the "Permanent Retention File" which he indicated would include "Inventory Reports, General offense case reports, investigative reports, canvass worksheets, Supplementary Reports, written notes, [and] written statements." The response to that request stated: "Attached please find the responsive reports obtained from records in regard to the request for a copy of the homicide file under RD#HP445128."

*3 ¶ 12 Mr. Mohammad responded to the motion for summary judgment, arguing that (1) the CPD had not discharged its duty under FOIA, (2) the records produced by the CPD were unresponsive to his request and too heavily redacted, and (3) the CPD's "bad faith" in responding to his requests required the civil penalties Mr. Mohammad asked for in his complaint. Mr. Mohammad also argued that the circuit court should deny summary judgment to the CPD because there was "outstanding discovery material to a genuine factual issue."

¶ 13 On November 28, 2018, the circuit court entered a three-page written order granting the CPD's motion for summary judgment. In the order, the court noted that the PAB representative's issue with the CPD was "its failure to communicate whether it had conducted a reasonable search and its failure to respond" to the representative's inquiry. The court said, however, the CPD had "remedied that failure by providing the affidavit of the FOIA officer overseeing the search." Although it acknowledged that it would have been "preferable" for the CPD to have provided that information to the PAB representative, the circuit court concluded that "the approach taken by CPD, though not desirable, was adequate under the circumstances." This appeal followed.

¶ 14 II. JURISDICTION

¶ 15 Mr. Mohammad timely filed his notice of appeal from the circuit court's dismissal of his complaint against the CPD on December 24, 2018. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments entered by the circuit court in civil cases.

¶ 16 III. ANALYSIS

¶ 17 On appeal, Mr. Mohammad contends that the circuit court erred in granting summary judgment in favor of the CPD because (1) the CPD has not fully discharged its obligation to him under FOIA, (2) the documents that the CPD provided to Mr. Mohammad were improperly redacted, (3) the CPD intentionally violated FOIA in bad faith and therefore should incur civil penalties, and (4) there is outstanding discovery material relating to a genuine factual issue.

¶ 18 "Summary judgment is proper when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 20 (quoting 735 ILCS 5/2-1005(c) (West 2012)). "The purpose of summary judgment is not to try an issue of fact but to determine whether one exists." *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Id.* "In ruling on a motion for summary judgment, we must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22. We review a grant of summary judgment *de novo. Id.*

¶ 19 Pursuant to FOIA, the public policy in Illinois is 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 the Act." **5 ILCS 140**/1 (West 2018). "The General Assembly patterned FOIA after the federal FOIA." *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 54 (comparing **5 ILCS 140**/1 *et seq.* (West 2014), with 5 U.S.C. § 522 (2012)). "Due to the similarity of the statutes, Illinois courts often look to federal case law construing the federal FOIA for guidance in construing FOIA." *Id.* ¶ 55. We consider each of Mr. Mohammad's arguments in turn.

¶ 20 A. The CPD Fully Discharged Its Obligations Under FOIA

***4** ¶ 21 Mr. Mohammad's primary argument is that the CPD has not provided all responsive records that are in its possession. According to Mr. Mohammad, despite his "descriptive and clear" request, the 242 pages supplied in response to his request did not include crime scene photographs prepared or created by the CPD, any copies of handwritten or typed records made by reporting/responding Officers Deborah Bollinger or Ladonna Simmons, copies of the CPD event query, any handwritten or typed notes created by the CPD detectives from their interviews with complaining witness Bobby Peak, or copies of emails produced by the CPD pertaining to Mr. Mohammad's case number. However, this argument rests on a misperception about what FOIA requires.

¶ 22 "The adequacy of an agency's search for documents under the FOIA is judged by a standard of reasonableness and depends on the facts of each case." *Maynard v. C.I.A.*, 986 F.2d 547, 559 (1st Cir. 1993). "[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). "An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, not conclusory, and submitted in good faith." *Miller v. U.S. Department of State*, 779 F.2d 1378, 1383 (8th Cir. 1985). "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." (Internal quotation marks omitted.) *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Despite this presumption, "the burden remains on the government to demonstrate that it has thoroughly searched for the requested documents where they might reasonably be found." *Miller*, 779 F.2d at 1383. Ultimately, "[t]he crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." (Internal quotation marks

omitted.) *Maynard*, 986 F.2d at 559. If the government shows "by convincing evidence that its search was reasonable, *i.e.*, that it was especially geared to recover the documents requested, then the burden is on the requester to rebut that evidence by a showing that the search was not in fact in good faith." *Miller*, 779 F.2d at 1383.

¶ 23 The CPD has met its burden in this case of showing that its search was reasonable. Officer Rubenstein detailed in his affidavit his process for reviewing FOIA requests, that in his experience all of the documents Mr. Mohammad requested would be found with the Detectives Division, and that he then requested the "full Investigative File" for Mr. Mohammad's case from that division, resulting in the 242 pages sent to Mr. Mohammad. The facts in the affidavit are supported by Officer Rubenstein's request for the records from the Bureau of Detectives, and the response from the bureau indicating that it contained the "responsive reports" associated with Mr. Mohammad's case.

¶ 24 Because the CPD showed that its search was reasonable, the burden then shifted to Mr. Mohammad to show that Officer Rubenstein's search was not in good faith. To do so, Mr. Mohammad must have "raise[d] a substantial and material factual issue in regard to the reasonableness of the search" by either "contradicting the defendant['s] account of the search procedure or by raising evidence of the defendant['s] bad faith." *Miller*, 779 F.2d at 1384. Mr. Mohammad failed to do so here.

¶ 25 Mr. Mohammad attempts to meet this burden by arguing that there were records presented in his criminal trial that were not provided to him in response to his FOIA request, such as photographs and videos of the crime scene. However, the fact that such documents may have at one point existed and were not included in the FOIA response does not demonstrate a failure to comply with FOIA. The plaintiff in *Miller* made a similar argument to the one Mr. Mohammad makes here, but the Eighth Circuit Court of Appeals was unconvinced, noting:

> ***5** "[T]he standard of reasonableness which we apply to agency search procedures does not require exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. Thus, the Department is not required by the Act to account for documents which the requester has in some way identified if it has made a diligent search for those documents in the places in which they might be expected to be found." *Id.* at 1384-85.

¶ 26 The documents Mr. Mohammad seeks and did not receive may have existed, but that does not mean the CPD currently possesses them or has a reasonable method to access them and provide them to Mr. Mohammad. Based on the evidence before us, the CPD has shown it discharged its obligation to Mr. Mohammad to conduct a reasonable search for the documents requested.

¶ 27 B. The CPD's Redactions Did Not Violate FOIA

¶ 28 Mr. Mohammad also argues that the CPD violated FOIA because the documents provided were "so heavily redacted [he] could not determine what or whom the record pertained to." He argues that the information contained in these redactions was not exempt from disclosure under FOIA and the redactions "denied [his] right for access" to public records.

¶ 29 The CPD relies on three FOIA exemptions for these redactions; sections 7(1)(b), (c), and (d). These provisions specifically exempt "[p]rivate information, unless disclosure is required by another provision of this Act" (**5 ILCS 140**/7(1)(b) (West 2016)), "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (*id.* § 7(1)(c)), and records in the possession of a law enforcement agency created for law enforcement purposes, "but only to the extent that disclosure would" either "endanger the life or physical safety of law enforcement personnel or any other person" or "unavoidably disclose the identity of a confidential source, confidential information disclosed by a confidential source, or persons who file complaints with" the law enforcement agency (*id.* § 7(1)(d)(iv), (vi)). FOIA specifically defines an "unwarranted invasion of personal privacy," for the purposes of section 7(1)(c), 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.* § 7(1)(c).

¶ 30 In Illinois, FOIA exemptions "are to be construed narrowly." *Perry v. Department of Financial & Professional Regulation*, 2018 IL 122349, ¶ 34. "If the public body seeks to invoke one of the exemptions in section 7 as grounds for refusing disclosure, it is required to give written notice

specifying the particular exemption claimed to authorize the denial." (Internal quotation marks omitted.) *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003). "Thereafter, if the party seeking disclosure of information under the Act challenges the public body's denial in circuit court, the public body has the burden of proving that the records in question fall within the exemption it has claimed" by clear and convincing evidence. *Id.*; **5 ILCS 140**/1.2 (West 2016).

¶ 31 Officer Rubenstein provided a detailed explanation for the redactions in the letter that accompanied the responsive records: under section 7(1)(b) of FOIA he redacted "[a]ny unique identification number of an arrestee, and any CPD personnel unique identification numbers like employee user code numbers and unique handwritten signatures"; under section 7(1)(c) he redacted "any names identified as victims and witnesses, and the identifying information of these individuals," including their birth dates; and under section 7(1)(d) he redacted "[c]ertain factual information and the names of individuals who provided information" to the CPD.

***6** ¶ 32 Mr. Mohammad does not dispute that the redactions fall within these exemptions. Rather, he argues that the CPD's exemptions under section 7(1)(b) were overridden by two other exemptions—sections 7(1)(e-9) and (e-10)—because 7(1)(b) provides that private information is exempt "unless disclosure is required by another provision of this Act." Sections 7(1)(e-9) and (e-10), however, are not FOIA provisions that require disclosure such that they could override the section 7(1)(b) exemption. Rather, sections 7(1)(e-9) and (e-10) are exemptions for records requested by a person "committed to the Department of Corrections" that pertain to victims or law enforcement records of other people which are exempt from disclosure "except as may be relevant to a requester's current or potential case or claim." **5 ILCS 140**/7(1)(e-9), (e-10) (West 2016). The CPD did not rely on the exemptions in section 7(1)(e-9) or (e-10) and they have nothing to do with Mr. Mohammad's FOIA request.

¶ 33 Mr. Mohammad also argues that because the CPD disclosed "the very same records" that he sought to the Cook County State's Attorney's Office "subject to full disclosure of the records' content and information," which were then disclosed to the defense upon prosecution of case No. 09 CR 8678, the CPD waived its right to claim that same information is exempted from FOIA disclosure. This court has held, however, that whether waiver applies " 'requires consideration of the circumstances related to the disclosure, including the purpose and extent of the disclosure as well as the confidentiality surrounding the disclosure.' " *Chicago Alliance For Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 202 (2004) (quoting *Mobil Oil Corp. v. United States Environmental Protection Agency*, 879 F.2d 698, 700 (9th Cir. 1989)).

¶ 34 The fact that information was provided in discovery in a criminal case does not mean that information loses its FOIA exempt status. *Cvijanovich v. United States Secret Service*, 410 F. Supp. 3d 1085, 1092 (D.N.D. 2019). As the United States District Court for North Dakota in *Cvijanovich* observed when considering a similar argument to the one Mr. Mohammad makes here:

> "The Supreme Court has held that a document may be exempted from disclosure under FOIA even if it was discoverable in previous litigation. [Citation.] Moreover, the distinction between criminal and civil proceedings is significant: '[D]isclosure in criminal trials is based on different legal standards than disclosure under FOIA, which turns on whether a document would usually be discoverable in a civil case. Similar documents, in other words, are not—indeed must not be—treated similarly in the two different types of proceedings.' " *Id.* at 1092-93 (quoting *Williams & Connolly v. S.E.C.*, 662 F.3d 1240, 1245 (D.C. Cir. 2011)).

See also *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, ¶¶ 15-16 (noting that Illinois Supreme Court Rule 415(c) (eff. Oct. 1, 1971) "prohibits a criminal defendant represented by counsel from possessing discovery documents, such as police reports," and that therefore the fact that documents were disclosed to an attorney in a criminal case did not mean they could not be exempt under FOIA.)

¶ 35 In short, even if the CPD provided unredacted versions of some records that Mr. Mohammad is now requesting to the State's Attorney's Office which then provided them to the defense during the prosecution of case No. 09 CR 8678, that does not mean that the CPD has waived its right to claim an exemption from disclosure in response to Mr. Mohammad's FOIA request. The CPD has shown, as a matter of uncontested fact, that the redactions were proper under the FOIA exemptions cited.

¶ 36 C. Mr. Mohammad is Not Entitled to Penalties or Discovery

¶ 37 Because Mr. Mohammad has not established a violation of FOIA by the CPD, he is not entitled to civil penalties. In addition to his arguments for penalties based on an insufficient search and overbroad redactions, Mr. Mohammad argues that the CPD's response of 60 pages to his September 2016 request for "all police reports," when it sent 242 pages in response to his later request, proves that the CPD acted in bad faith in responding to his initial request. But Mr. Mohammad's later request was far broader and more detailed in specifying a number of documents other than the police reports he was requesting in his September 2016 request. The more limited response to a more limited request is not evidence that the CPD acted in bad faith.

*7 ¶ 38 Mr. Mohammad's final claim is that summary judgment was improper because "there is outstanding discovery material to a genuine factual issue." Mr. Mohammad argues that discovery might have revealed that the CPD had other responsive records in a "permanent retention file" or in some other files that were not searched or produced.

¶ 39 "A trial court is vested with broad discretion in ruling on discovery matters," and a court's exercise of that discretion will not be reversed on appeal unless it was abused. (Internal quotation marks omitted.) *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 996 (2007). In addition, because agency affidavits are accorded a presumption of good faith, " 'discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face.' " *Id.* at 997 (quoting *Carney v. United States Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). "When this is the case, the trial court may 'forgo discovery and award summary judgment on the basis of affidavits.' " *Id.* (quoting *Carney*, 19 F.3d at 812).

¶ 40 Mr. Mohammad's reliance on Officer Rubenstein's reference to a "permanent retention file" and to the possibility that responsive records might be in other files is not persuasive. In Officer Rubenstein's request for records from the Bureau of Detectives, he asked for the "Investigative File and Permanent Retention File." In his affidavit, however, Officer Rubenstein explained that he knew all the responsive records that the CPD had were in the investigative file, which is what he gave to Mr. Mohammad. Nothing in the affidavit, or in the stray reference to a "permanent retention file," suggests that other responsive records could have been or would have been located there or elsewhere.

¶ 41 Here, since we agree with the circuit court that Officer Rubenstein's affidavit and the explanatory letter that accompanied the 242 pages of records that were provided in response to Mr. Mohammad's FOIA request were sufficient to meet the CPD's burden of showing a reasonable search and Mr. Mohammad's response was insufficient to call that into question, we find no abuse of discretion in the circuit court's decision to not require discovery.

¶ 42 IV. CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 44 Affirmed.

Justices Connors and Harris concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 190011, 2020 WL 3577083

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2020 IL App (1st) 190925

Appellate Court of Illinois, First District,
Fourth Division.

Dr. Judy KING, Plaintiff-Appellee,

v.

The COOK COUNTY HEALTH AND HOSPITALS SYSTEM, Defendant-Appellant.

No. 1-19-0925

|

June 18, 2020

Synopsis

Background: Records requestor brought action against hospital pursuant to the Freedom of Information Act (FOIA), seeking unredacted zip code information for individuals who had received mental health services while detained at the county jail. The Circuit Court, Cook County, Celia Gamrath, J., denied hospital's motion for summary judgment and granted requestor's motion for summary judgment. Hospital appealed.

Holdings: The Appellate Court, Reyes, J., held that:

[1] unredacted zip codes constituted confidential information under the Mental Health and Developmental Disabilities Confidentiality Act;

[2] requestor was not entitled to disclosure of unredacted zip codes; and

[3] the Confidentiality Act did not preempt the Health Insurance Portability and Accountability Act (HIPAA).

Reversed and remanded.

West Headnotes (8)

[1] **Statutes** Presumptions, inferences, and burden of proof

In construing a statute, a court presumes that the Legislature, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice.

[2] **Records** Rules of construction

The exemptions to disclosure of records under the Freedom of Information Act (FOIA) are read narrowly. 5 Ill. Comp. Stat. Ann. 140/7.

[3] **Records** Sufficiency and Specificity of Response

When a public body receives a proper request for information under the Freedom of Information Act (FOIA), it must comply with that request unless one of the narrow statutory exemptions applies. 5 Ill. Comp. Stat. Ann. 140/7.

[4] **Health** Records and duty to report; confidentiality in general

Records Health and medical information

Unredacted zip codes of individuals who received mental health services while detained at county jail constituted confidential information under the Mental Health and Developmental Disabilities Confidentiality Act, for purposes of records request pursuant to the Freedom of Information Act (FOIA); Health Insurance Portability and Accountability Act (HIPAA) regulations required deidentification of the zip codes prior to disclosure. 45 C.F.R. §§ 164.502(d)(2), 514; 5 Ill. Comp. Stat. Ann. 140/1 et seq.; 740 Ill. Comp. Stat. Ann. 110/2.

[5] **Health** Records and duty to report; confidentiality in general

Records Health and medical information

Individually identifiable health information that is required to be deidentified under the Health Insurance Portability and Accountability Act (HIPAA) is protected from disclosure under the Mental Health and Developmental Disabilities Confidentiality Act. 740 Ill. Comp. Stat. Ann. § 110/1 et seq.

[6] **Health** ⇐ Records and duty to report; confidentiality in general

Records ⇐ Health and medical information

Records requestor was not entitled to disclosure from hospital of unredacted zip codes of individuals who had obtained mental health services while detained at the county jail, pursuant to the Freedom of Information Act (FOIA) and Mental Health and Developmental Disabilities Confidentiality Act; Health Insurance Portability and Accountability Act (HIPAA) regulations, which were incorporated into the Confidentiality Act, provided that private health information for a county of this size could only be disclosed if the last three digits of zip codes were removed. 45 C.F.R. §§ 164.502(d)(2), 514; 5 Ill. Comp. Stat. Ann. 140/1 et seq.; 740 Ill. Comp. Stat. Ann. 110/2.

[7] **Health** ⇐ Preemption

States ⇐ Particular cases, preemption or supersession

The Mental Health and Developmental Disabilities Confidentiality Act did not conflict with the Health Insurance Portability and Accountability Act (HIPAA) as to whether unredacted zip codes of individuals who received mental health services in jail were protected health information, and thus the Confidentiality Act did not preempt HIPAA as to allow Freedom of Information Act (FOIA) disclosure of the zip codes; the Confidentiality Act directly relied on HIPAA to establish what constituted private health information and provided that the zip codes were protected. 5 Ill. Comp. Stat. Ann. 140/1 et seq.; 740 Ill. Comp. Stat. Ann. 110/2.

[8] **Privileged Communications and Confidentiality** ⇐ Mental health records

Significant public and private interests are served by preserving the confidentiality of mental health records and communications.

Appeal from the Circuit Court of Cook County, No. 17 CH 10748, Honorable Celia G. Gamrath, Judge Presiding.

Attorneys and Law Firms

Attorneys for Appellant: Kimberly M. Foxx, State's Attorney, of Chicago (Cathy McNeil Stein, Martha Victoria Jimenez, and James Beligratis, Assistant State's Attorneys, of counsel), for appellant.

Attorneys for Appellee: Joshua Burday, Matthew Topic, and Merrick Wayne, of Loevy & Loevy, of Chicago, for appellee.

OPINION

JUSTICE REYES delivered the judgment of the court, with opinion.

***1** ¶ 1 This appeal involves the circuit court of Cook County's order granting a Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2016)) request by plaintiff Dr. Judy King to the defendant Cook County Health and Hospitals System (CCHHS). Dr. King's FOIA request provided, in pertinent part, that CCHHS disclose the zip codes used to create a map of the locations of individuals who had previously received mental health services while detained in the Cook County Jail. On appeal, CCHHS maintains that the zip code information of mental health recipients is exempt from disclosure pursuant to sections 7(1)(a) and 7(1)(b) of FOIA (7(1)(a), (b)) because the information is specifically prohibited from disclosure by federal and state law or, in the alternative, constitutes private information. Because we conclude that the unredacted zip code information for these individuals is protected information under the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act) (740 ILCS 110/1 *et seq.* (West 2016)), we reverse the judgment of the circuit court and remand the matter to the circuit court for proceedings consistent with this opinion.

¶ 2 I. BACKGROUND

¶ 3 On January 26, 2017, Dr. King submitted a FOIA request to CCHHS for "the data (including records that show the data source) CCHHS used to determine that the Roseland area had the highest concentration 'of people that leave the detainee situation and go to live in the community' when compared to other community areas and records that identify the other five (5) community or geographic areas under consideration for future [community triage centers]." Dr. King's FOIA request stemmed from information presented at a CCHHS finance committee meeting that was used to support the argument that Chicago's Roseland community would be an appropriate site for a new community triage center. The information presented to the finance committee consisted of various internally generated maps demonstrating that the Roseland area contained the greatest concentration of patients who had previously received mental health services at CCHHS facilities while they were detainees at the Cook County Jail.

¶ 4 CCHHS responded to Dr. King's FOIA request by producing the maps upon which the committee based its decision. The maps were color-coded and indicated ranges of individuals residing in certain demarcated areas. The demarcated areas, while representative of zip codes, did not have the zip code identified on the maps.

¶ 5 Dr. King subsequently sought review of CCHHS's decision from the Illinois Attorney General's Public Access Counselor, arguing that CCHHS did not properly respond to her FOIA request where it had not provided her with the data used to create the maps—namely, the zip code information of the former patients. The Public Access Counselor issued a nonbinding letter recommending that CCHHS disclose the responsive data to Dr. King. However, the Public Access Counselor acknowledged that if the records contained any information identifying the individuals, "that information may be properly redacted as non-responsive because Dr. King has clarified that she is not seeking such information."

*2 ¶ 6 CCHHS did not provide any zip code information to Dr. King (redacted or otherwise), and, consequently, Dr. King filed suit in the circuit court of Cook County seeking this information in response to her FOIA request. The parties filed cross-motions for summary judgment. CCHHS maintained (1) that it had already adequately responded to Dr. King's FOIA request by supplying her with the maps upon which the finance committee had based its decision and (2) that, in any event, the zip code information was exempt under section 7(1)(a) of FOIA pursuant to federal regulations implementing the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of Titles 18, 26, 29, and 42 of the United States Code)) and the Confidentiality Act. CCHHS further argued that the zip codes represented private information under section 7(1)(b) of FOIA and were thus exempt from disclosure. Dr. King asserted that the zip code information was not exempt from disclosure under FOIA, since it could not be used to identify the individuals who received mental health treatment.

¶ 7 After a hearing on the cross-motions for summary judgment, the circuit court entered and continued the matter for CCHHS to confirm that the residential zip codes were the only data used to create the maps. Thereafter, CCHHS was granted leave to file additional authority in support of its summary judgment motion. In this motion, CCHHS confirmed that the data used to create the maps were the residential zip codes of the former patients and maintained that, nonetheless, this zip code information was protected under HIPAA regulations and the Confidentiality Act.

¶ 8 Upon consideration of CCHHS's additional argument, the circuit court denied CCHHS's motion for summary judgment, granted Dr. King's motion for summary judgment, and ordered CCHHS to produce to Dr. King the complete zip codes used to create the maps. Subsequently, CCHHS filed a motion to clarify the circuit court's order maintaining that the circuit court did not render an opinion as to whether the zip code information was exempt under section 7(1)(a) of FOIA. The circuit court construed the motion as a motion to reconsider and denied the motion, stating it considered both section 7(1)(a) and section 7(1)(b) of FOIA. After Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) language was added to the order granting summary judgment in Dr. King's favor, this appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, CCHHS asserts that the circuit court erred when it ordered the zip code information of individuals who received mental health treatment while detained in the Cook County Jail to be disclosed under FOIA. CCHHS maintains that this information is exempt under sections 7(1)(a) and 7(1)(b) of FOIA where disclosing it would be in violation

of federal and state law, thereby constituting a disclosure of private information. Specifically, CCHHS maintains that the zip codes are exempt under the Confidentiality Act (740 ILCS 110/1 *et seq.* (West 2016)) and the federal regulations implementing HIPAA (45 C.F.R. §§ 160, 164 (2016)). CCHHS contends that the proper disclosure of this information is through "de-identified" zip codes, *i.e.*, zip codes where only the first three digits are identified. See *id.* § 164.514 (2016); 740 ILCS 110/2 (West 2016).

¶ 11 In response, Dr. King stresses that the purpose of FOIA is to facilitate governmental transparency and that such transparency requires the courts to apply a liberal construction of the FOIA exemptions in favor of disclosure in this instance. While Dr. King generally asserts (without any citation or argument) that HIPAA does not prohibit the disclosure of zip codes standing alone, she maintains that FOIA requires disclosure where HIPAA defers to FOIA to determine which information is exempt.

¶ 12 A. Standard of Review

[1] ¶ 13 Whether the zip codes derived from the mental health records are exempt from disclosure under FOIA (**5 ILCS 140/7** (West 2016)) is a matter of statutory construction and our review proceeds *de novo*. *City of Chicago v. Janssen Pharmaceuticals, Inc.*, 2017 IL App (1st) 150870, ¶ 13, 413 Ill.Dec. 454, 78 N.E.3d 446; *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 404, 331 Ill.Dec. 12, 910 N.E.2d 85 (2009) ("*De novo* review is also appropriate because this appeal arises from an order granting summary judgment."). Our review is guided by several well-established principles of statutory construction. It is well settled that the primary objective of this court when construing the meaning of a statute is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415, 300 Ill.Dec. 329, 844 N.E.2d 1 (2006). In determining legislative intent, our inquiry begins with the plain language of the statute, which is the most reliable indication of the legislature's objective in enacting a law. *In re Madison H.*, 215 Ill. 2d 364, 372, 294 Ill.Dec. 86, 830 N.E.2d 498 (2005). A fundamental principle of statutory construction is to view all provisions of a statutory enactment. *Southern Illinoisan*, 218 Ill. 2d at 415, 300 Ill.Dec. 329, 844 N.E.2d 1. Accordingly, words and phrases should not be construed in isolation, but must be interpreted considering other relevant provisions of the statute. *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504, 247 Ill.Dec. 473, 732 N.E.2d 528 (2000). In construing a statute, we presume that the legislature, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice. *Burger v. Lutheran General Hospital*, 198 Ill. 2d 21, 40, 259 Ill.Dec. 753, 759 N.E.2d 533 (2001).

¶ 14 B. Public Policy

***3** ¶ 15 The issue in this case involves the intersection of two strong public policies: the open disclosure of government records as relayed in FOIA and the confidentiality of mental health records and communications as stated in the Confidentiality Act. We begin our analysis by explaining the purpose of FOIA, which is "to open governmental records to the light of public scrutiny." *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378, 131 Ill.Dec. 182, 538 N.E.2d 557 (1989); see **5 ILCS 140/1** (West 2016). We are, therefore, directed by our legislature to view FOIA from the standpoint that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." **5 ILCS 140/1.2** (West 2016). In addition, "[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." *Id.* Our legislature has further intended that, "[r]estraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information." *Id.* § 1.

[2] **[3]** ¶ 16 As stated by our supreme court:

> "Based upon the legislature's clear expression of public policy and intent set forth in section 1 of the FOIA that the purpose of that Act is to provide the public with easy access to government information, this court has held that the FOIA is to be accorded 'liberal construction to achieve this goal.' " *Southern Illinoisan*, 218 Ill. 2d at 416, 300 Ill.Dec. 329, 844 N.E.2d 1 (quoting *Bowie*, 128 Ill. 2d at 378, 131 Ill.Dec. 182, 538 N.E.2d 557).

Although FOIA outlines several exemptions to disclosure, those exemptions are read narrowly. *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73, 327 Ill.Dec. 758, 902 N.E.2d 1144 (2009) (citing *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407, 223 Ill.Dec. 641, 680 N.E.2d 374 (1997)). "Thus, when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in

section 7 of the Act applies." *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463, 274 Ill.Dec. 430, 791 N.E.2d 522 (2003). One of these exemptions is, of course, that disclosure is prohibited by federal or state law. **5 ILCS 140**/7(1)(a) (West 2016).

¶ 17 In contrast, the Confidentiality Act, which concerns mental health or developmental disabilities service records and communications, protects certain health information from being publicly disclosed. As stated in the Confidentiality Act, "All records and communications shall be confidential and shall not be disclosed except as provided in [the Confidentiality] Act." 740 ILCS 110/3(a) (West 2016). The "records" made confidential under the Confidentiality Act are defined to include "any record kept by a therapist or by an agency in the course of providing mental health or developmental disabilities service to a recipient concerning the recipient and the services provided." *Id.* § 2. The "communications" made confidential under the Confidentiality Act are defined to include "any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient." *Id.* A "recipient" is defined as "a person who is receiving or has received mental health or developmental disabilities services." *Id.*

¶ 18 In *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 60, 262 Ill.Dec. 394, 765 N.E.2d 1002 (2002), our supreme court set forth the public policy behind the Confidentiality Act:

> "The Act represents a comprehensive revision and repeal of previous statutes pertaining to psychotherapeutic communications. [Citation.] When viewed as a whole, the Act constitutes a strong statement by the General Assembly about the importance of keeping mental-health records confidential. [Citation.] Confidentiality motivates persons to seek needed treatment. Further, by encouraging complete candor between patient and therapist, confidentiality is essential to the treatment process itself. [Citation.]
>
> ***4** The legislature carefully drafted the Act to maintain the confidentiality of mental-health records except in the specific circumstances explicitly enumerated. In each case where disclosure is allowed under the Act, the legislature has been careful to restrict disclosure to that which is necessary to accomplish a particular purpose. Exceptions to the Act are narrowly crafted. [Citation.] 'Consequently, anyone seeking the nonconsensual release of mental health information faces a formidable challenge and must show that disclosure is authorized by the Act.' [Citation.]"

¶ 19 These sentiments have been echoed throughout our jurisprudence. See *Johnston v. Weil*, 241 Ill. 2d 169, 187, 349 Ill.Dec. 135, 946 N.E.2d 329 (2011) ("This court has repeatedly recognized that the Confidentiality Act constitutes 'a strong statement' by the legislature about the importance of keeping mental health records confidential."); *Wisniewski v. Kownacki*, 221 Ill. 2d 453, 458-59, 303 Ill.Dec. 818, 851 N.E.2d 1243 (2006) (same); *Garton v. Pfeifer*, 2019 IL App (1st) 180872, ¶ 20, 432 Ill.Dec. 750, 130 N.E.3d 1 (same); *Doe v. Williams McCarthy, LLP*, 2017 IL App (2d) 160860, ¶ 25, 419 Ill.Dec. 196, 92 N.E.3d 607 (same); *Sangirardi v. Village of Stickney*, 342 Ill. App. 3d 1, 16, 276 Ill.Dec. 28, 793 N.E.2d 787 (2003) ("We are mindful that the Act constitutes a strong statement by the General Assembly about the importance of keeping mental health records confidential and that confidentiality motivates people to seek needed treatment and is essential to the treatment process."); *Norskog v. Pfiel*, 197 Ill. 2d 60, 72, 257 Ill.Dec. 899, 755 N.E.2d 1 (2001) (observing "[t]hat a high value is placed on privacy is evidenced by the fact that the privilege afforded a recipient of mental health treatment continues even after the recipient's death").

¶ 20 In sum, while FOIA promotes transparency in the operations of government, the Confidentiality Act encourages the procurement of mental health services for its citizens by protecting their mental health records from disclosure.

¶ 21 HIPAA, which was implemented by the federal government in 1996, has public policy considerations that are similar to that of the Confidentiality Act. As a brief overview, HIPAA was enacted, in part, to "improve the efficiency and effectiveness of the health care system by facilitating the electronic exchange of information with respect to financial and administrative transactions carried out by health plans, heath care clearinghouses, and health care providers." Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14,776 (Mar. 27, 2002) (to be codified at 45 C.F.R. §§ 160, 164). HIPAA mandated that it was a federal offense to disclose "individually identifiable health information." 42 U.S.C. §§ 1320d-5, 1320d-6 (2012). The Department of Health and Human Services promulgated regulations to protect the privacy of this information. 45 C.F.R. § 164.500 *et seq.* (2016). This complex regulatory

scheme, known as the "Privacy Rule," works to safeguard confidential patient health information. See *id.* (containing detailed definitions and rules for protection of health information). This scheme reflects a societal understanding of the legitimacy of patients' right to privacy in information relating to their medical health and shared with providers such as hospitals and physicians—despite the fact that they must entrust this information with providers as an incident to receiving care. See *Giangiulio v. Ingalls Memorial Hospital*, 365 Ill. App. 3d 823, 839, 302 Ill.Dec. 812, 850 N.E.2d 249 (2006); see also *Moss v. Amira*, 356 Ill. App. 3d 701, 710-12, 292 Ill.Dec. 565, 826 N.E.2d 1001 (2005) (Quinn, J., specially concurring).

¶ 22 C. Exceptions to FOIA

¶ 23 Having set forth the public policy considerations of FOIA, the Confidentiality Act, and HIPAA, we now turn to the main claim of this appeal. At issue here is whether one of the exceptions recognized by FOIA applies in this case. Section 7(1)(a) states in pertinent part:

> ***5** "When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:
>
> (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." **5 ILCS 140**/7(1)(a) (West 2016).

¶ 24 D. The Confidentiality Act

¶ 25 We begin our analysis by addressing whether the zip codes constitute confidential information under the Confidentiality Act to be prohibited from disclosure under section 7(1)(a) of FOIA. As previously discussed, "The [Confidentiality] Act imposes stringent protections on the disclosure of mental health records for litigation purposes, identifies who may request the records and for what purposes, and regulates how the request for disclosure should be made and handled." *Garton*, 2019 IL App (1st) 180872, ¶ 17, 432 Ill.Dec. 750, 130 N.E.3d 1. Notably, the plain language of the Confidentiality Act provides that "*[a]ll* records and communications *shall* be confidential and *shall* not be disclosed" unless an exception within the Confidentiality Act applies, none of which are at issue here. (Emphases added.) 740 ILCS 110/3(a) (West 2016). In its definition section, the Confidentiality Act expounds on this broad statement by providing *any* records or communications made or created in the course of providing mental health or developmental disabilities services are to be kept confidential unless an exception applies. *Id.* § 2. The word "any" has broad and inclusive connotations. See *People ex rel. Scott v. Silverstein*, 94 Ill. App. 3d 431, 434, 50 Ill.Dec. 93, 418 N.E.2d 1087 (1981). The Confidentiality Act further provides in its definition of "communication" that it "includes information which indicates that a person is a recipient." 740 ILCS 110/2 (West 2016). Indeed, this court has observed that "[t]he protection of the Confidentiality Act is broader than the physician-patient privilege, and all communications and records generated in connection with providing mental health services to a recipient are protected unless excepted by law." *People v. Kaiser*, 239 Ill. App. 3d 295, 301, 179 Ill.Dec. 863, 606 N.E.2d 695 (1992).

¶ 26 Pertinent to this appeal, the Confidentiality Act provides that a confidential "communication" or "record" does not "include information that has been de-identified in accordance with HIPAA, as specified in 45 CFR 164.514." 740 ILCS 110/2 (West 2016). The Confidentiality Act further provides that "HIPAA" means "the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, and any subsequent amendments thereto and any regulations promulgated thereunder, including the Security Rule, as specified in 45 CFR 164.302-18, and the Privacy Rule, as specified in 45 CFR 164.500-34." *Id.* The Confidentiality Act thus relies in part on HIPAA to define what is and is not considered to be confidential information.

¶ 27 Therefore, to determine whether the zip codes are confidential information under the Confidentiality Act, we must examine HIPAA and its pertinent regulations, particularly the Privacy Rule. As previously addressed, HIPAA is a complicated regulatory scheme, and, as such, it provides numerous definitions that are applicable in this case.[1] HIPAA prohibits covered entities from using or disclosing protected health information except as provided in the HIPAA regulations. 45 C.F.R. § 164.502(a) (2016). The term "protected health information" is defined as that information being "individually identifiable heath

information," which is further defined as "information that is a subset of health information." See *Haage v. Montiel Zavala*, 2020 IL App (2d) 190499, ¶ 8, — Ill.Dec. ——, —— N.E.3d ——. This includes demographic information provided by the health recipient as follows:

> *6 "The term 'individually identifiable health information' means any information, *including demographic information collected from an individual*, that —
>
> (A) is created or received by a health care provider ***; and
>
> (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—
>
> (i) identifies the individual; or
>
> (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual." (Emphasis added.) 42 U.S.C. § 1320d(6) (2012).

[4] ¶ 28 The Privacy Rule, like the Confidentiality Act, allows a covered entity to disclose health information if the information is "de-identified" before it is released. 45 C.F.R. § 164.502(d) (2016); 740 ILCS 110/2 (West 2016). To prevent health information from being linked with individuals, the Privacy Rule sets forth standards for de-identifying health information, which are incorporated into the Confidentiality Act by reference. 45 C.F.R. § 164.514 (2016); 740 ILCS 110/2 (West 2016). Pertinent to this appeal, section 164.514 specifies that a covered entity may determine that health information is not individually identifiable and may be disclosed if several specific identifiers, including geographic identifiers like street addresses and zip codes, are removed from the information prior to disclosure. 45 C.F.R. § 164.514 (2016). Specifically, the following demographic information is to be removed:

> "*All geographic subdivisions smaller than a State, including* street address, city, county, precinct, *zip code*, and their equivalent geocodes, *except for the initial three digits of a zip code if*, according to the current publicly available data from the Bureau of the Census:
>
> (*1*) *The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people*; and
>
> (*2*) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000." (Emphases added.) *Id.*

Accordingly, in regard to zip codes, the Privacy Rule thus provides that, in geographic units of more than 20,000 people where the same three initial digits of the zip codes are employed, the last three digits of the zip codes must be redacted, or deidentified, to preserve an individual's privacy. *Id.*

[5] ¶ 29 When read together, the Confidentiality Act, and the Privacy Rule incorporated therein, demonstrate that the complete or unredacted zip codes, as ordered to be disclosed by the circuit court, are to be deidentified prior to being disclosed. Thus, the unredacted zip codes are confidential information and protected under the Confidentiality Act. Our legislature and Congress have recognized that there is a privacy interest only in "individually identifiable medical records" and not redacted medical records. When the medical records are "de-identified" all the identifying medical information is removed and any privacy interest in the medical records is eliminated. Therefore, once the zip codes are redacted, they no longer contain "individually identifiable health information." See *id.* § 164.514(a). Thus, the Confidentiality Act and the HIPAA regulations themselves provide that there is no protected privacy interest in non-identifiable health information. See 740 ILCS 110/2 (2016); 45 C.F.R. § 164.502(d)(2) (2016); see also *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 934 (7th Cir. 2004) (Manion, J., concurring in part, dissenting in part). The HIPAA regulations confirm this conclusion:

> *7 "*Uses and disclosures of de-identified information.* Health information that meets the standard and implementation specifications for de-identification under § 164.514(a) and (b) is considered not to be individually identifiable health information, *i.e.*, de-identified. The requirements of this subpart *do not* apply to information that has been de-identified in accordance with the applicable requirements of § 164.514 ***[.]" (Emphasis added.) 45 C.F.R. § 164.502(d)(2) (2016).

Accordingly, as the HIPAA regulations recognize that there is no loss of privacy where the medical records are deidentified, the same is true under the Confidentiality Act, which expressly incorporates those regulations. It necessarily

follows that the opposite is also true; individually identifiable health information that is required to be deidentified under HIPAA, would be protected from disclosure under the Confidentiality Act. See 740 ILCS 110/2 (West 2016) (a confidential record or communication "does not include information that has been de-identified in accordance with HIPAA").

[6] ¶ 30 Dr. King, however, argues that the zip codes at issue here are incapable of identifying the individual mental health recipients. Yet, contrary to her argument, she also recognizes that both HIPAA and the Confidentiality Act allow only for the disclosure of de-identified zip codes. Indeed, plaintiff appears to accept that the de-identified zip codes will fulfill her FOIA request where she argues that "CCHHS offers no facts at all, let alone clear and convincing facts, as to why deidentified records could not be produced." Indeed, CCHHS is not opposed to providing the de-identified zip codes to Dr. King.

¶ 31 Despite acknowledging that the deidentified zip codes satisfy her FOIA request, Dr. King asserts that the sheer number of Cook County residents and zip codes located therein support her argument that she is entitled to complete and unredacted zip codes, as they cannot serve to individually identify the mental health recipients. However, plaintiff cannot refute the fact that HIPAA regulations account for these figures in determining when zip codes should be deidentified. As previously discussed, HIPAA regulations provide that a covered entity may determine that private health information is not individually identifiable only if the last three digits of a zip code are removed, where the geographic unit formed by combining all the zip codes with the same three initial digits contains more than 20,000 people. 45 C.F.R. § 164.514(b)(2)(i)(B) (2016). In this instance, Cook County falls within these parameters; thus, it is within CCHHS's purview not to provide full, complete zip codes to Dr. King.

[7] ¶ 32 Dr. King maintains, however, that FOIA requires disclosure where HIPAA defers to FOIA to determine which information is exempt. In doing so, Dr. King relies on out-of-state jurisprudence wherein she maintains the courts recognized that Congress did not intend to preempt state and federal laws requiring disclosure with the HIPAA regulations. See *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 25; *Abbott v. Texas Department of Mental Health & Mental Retardation*, 212 S.W.3d 648, 664, 659-60 (Tex. App. 2006) (noting that HIPAA's "commentary makes it clear that when determining whether to release protected health information in response to a Freedom of Information Act request, an agency must look to the limits and exemptions in the Act," and not to the limits in HIPAA). Dr. King thus asserts that CCHHS must produce the unredacted zip codes because FOIA requires the disclosure of such records and HIPAA defers to state law FOIA statutes.

*8 ¶ 33 Based on our analysis set forth above, Dr. King's argument is not persuasive. Our decision finding the unredacted zip codes to be protected information is not solely based on HIPAA, but on the Confidentiality Act. The Confidentiality Act, in turn, relies on HIPAA to establish what constitutes private health information. 740 ILCS 110/2 (West 2016). In this instance, HIPAA is not in conflict with the Confidentiality Act, but is incorporated therein. Accordingly, there is no preemption, and Dr. King's argument fails.

¶ 34 In reaching our conclusion, we further observe that Dr. King's reliance on several cases that allowed the disclosure of certain information is misplaced because those cases involved neither mental health records nor the Confidentiality Act. See *Cincinnati Enquirer*, 108 Ohio St. 3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶¶1-2 (finding a reporter's request for copies of lead-contamination notices issued to property owners of units reported to be the residences of children whose blood tests indicated elevated lead levels did not contain a request for protected health information as defined by HIPAA and that HIPAA does not supersede state disclosure requirements); *Abbott*, 212 S.W.3d at 664 (finding a reporter's request for statistics regarding alleged incidents of abuse and sexual assault occurring at the Texas Department of Mental Health and Mental Retardation must be produced under Texas' Public Information Act, where, assuming the statistics constituted protected health information, no law considered the statistics to be confidential); *Bowie*, 128 Ill. 2d at 379, 131 Ill.Dec. 182, 538 N.E.2d 557 (holding that the school district defendant was obligated to disclose a masked record of achievement test scores under FOIA because a masked record, which deletes individual identifying information, does not fall within the definition of a school student record and is not prohibited from disclosure under the Illinois School Student Records Act (Ill. Rev. Stat. 1985, ch. 122, ¶ 50-1 *et seq.*)); *Southern Illinoisan*, 218 Ill. 2d at 420-21, 426-27, 300 Ill.Dec. 329, 844 N.E.2d 1 (concluding the Illinois Health and Hazardous Substances Registry Act (Registry Act) (410 ILCS 525/4(d) (West 1998)), which was enacted to "provid[e] public access to meaningful information about potential 'cancer clusters,' " did not prohibit the disclosure of the zip codes of individuals

diagnosed with neuroblastoma where that information did not "tend[ ] to lead to [their] identity" within the meaning of the Registry Act). None of these cases involved information derived from mental health records or communications, and none of the courts in these cases were asked to consider an act similar to the Confidentiality Act. Thus, we find these cases to be inapplicable and unpersuasive.

¶ 35 Specifically, Dr. King's reliance on *Cincinnati Enquirer* is misplaced. In that case, a newspaper, the Cincinnati Enquirer, sought to obtain copies of the Cincinnati Health Department's lead-contamination notices issued to property owners of units reported to be the residences of children whose blood tests indicated elevated lead levels. *Cincinnati Enquirer*, 108 Ohio St. 3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 1. The Cincinnati Health Department declined to release notices relying on the HIPAA regulations. *Id.* ¶ 1. The Ohio Supreme Court determined that these notices did not contain protected health information, as defined by federal law and HIPAA, and therefore were subject to disclosure. *Id.* ¶ 2. In the alternative, the Ohio Supreme Court found that even if the notices contained protected health information and the Cincinnati Health Department qualified as a covered entity, the notices would still be subject to disclosure under the "required by law" exception to the HIPAA privacy rule because the Ohio Public Records Law (a statute similar to our FOIA) required disclosure of these reports and federal law did not supersede state disclosure requirements. *Id.*

*9 ¶ 36 In explaining this decision, the Ohio Supreme Court first disclosed what the notices entailed. Specifically, the lead-citation notices issued consisted of a multipage form. *Id.* ¶ 14. Only one sentence in the 14-page narrative made any reference to medical information or conditions and it stated, " 'This unit has been reported to our department as the residence of a child whose blood test indicates an elevated lead level.' " *Id.* In addition, the Ohio Supreme Court observed that the purpose of the lead-citation notices was to advise the owners of real estate about the results of department investigations and to apprise them of violations relating to lead hazards. *Id.* ¶ 16. The reports did not contain any identifying information such as names, ages, birth dates, social security numbers, telephone numbers, family information, photographs, or any specific medical examinations, assessments, diagnoses, or treatments of any medical condition. *Id.* When comparing the information contained in the lead-citation notices to the HIPAA definition of protected health information, the Ohio Supreme Court concluded that the lead-risk notices did not contain protected heath information. *Id.* ¶ 18. In contrast, the conclusion we reach herein is not strictly based on the HIPAA definition of protected health information. Our conclusion is based on the language of the Confidentiality Act that explicitly protects demographic information as defined under HIPAA. See 740 ILCS 110/2 (West 2016).

¶ 37 The *Cincinnati Enquirer* case is further distinguishable from the case at bar as it involved lead-citation notices that the parties and the court deemed to be "public records" of the Cincinnati Health Department. In contrast, the zip codes at issue here were pulled from mental health records of former detainees. In addition, the information at issue in *Cincinnati Enquirer* involved a public health issue—lead exposure, an exigent public safety issue. In this case, there is no similar public need for the zip codes of mental health recipients argued by Dr. King. Finally, we observe that there was no Ohio statute at issue in *Cincinnati Enquirer* that protected the sanctity of mental health records so voraciously as the Confidentiality Act. This case is inapposite.

¶ 38 Also inapposite is *Abbott*. That case involved a reporter's request for information under Texas's version of FOIA, the Public Information Act, seeking statistics regarding alleged incidents of abuse and sexual assault occurring at facilities operated by the Texas Department of Mental Health and Mental Retardation (Department). *Abbott*, 212 S.W.3d at 651. Specifically, the request sought information from the last five years about (1) alleged incidents of sexual assault and patient-client abuse at state hospitals and Department facilities, (2) subsequent investigation of the allegations, (3) the names of the facilities in which the incidents allegedly occurred, (4) the dates the events allegedly occurred, and (5) the disposition of any investigations. *Id.* at 651-52. After receiving the request, the Department released a statistical report of all abuse allegations and subsequent investigations in Texas for the pertinent years, but the report did not provide information regarding individual facilities. *Id.* at 652.

¶ 39 Thereafter, the Department requested that the Texas Attorney General issue an opinion regarding whether releasing the requested statistical information from the individual facilities would violate HIPAA and the federal rules implementing HIPAA. *Id.* The Department contended that, because the information concerns alleged sexual and other types of abuse at various facilities and because the request asks for the names of the facilities where the alleged incidents occurred, it was prohibited from disclosing the information because it is "individually identifiable

health information." *Id.* The Attorney General disagreed, finding that the disclosure was required by law, the information requested in this case was not considered to be confidential under the Privacy Rule, and the information was therefore subject to disclosure. *Id.* The Department filed suit challenging the opinion of the Attorney General. The district court found that the information requested was confidential and therefore exempt from disclosure under the Public Information Act. *Id.* at 652-53.

¶ 40 On appeal, the reviewing court found that the information requested was subject to disclosure. *Id.* at 664. Specifically, the reviewing court determined that section 164.512(a) of the Privacy Rule permitted disclosure of protected health information if required by law, as long as the disclosure comported with the requirements of that law. *Id.* The Texas Public Information Act required disclosure of public information unless an exception applied. *Id.* In *Abbott*, no exception to the disclosure in the Public Information Act applied to the release of statistical information regarding abuse at individual government facilities. *Id.* The court further found that the confidentiality exception listed in the Public Information Act did not apply because no law rendered the information confidential. *Id.* Notably, in rendering this determination, the court emphasized that its "construction [of the statutes at issue] comports with the policy of this State to disclose information regarding abuse and neglect at facilities caring for the mentally ill or mentally retarded" and that it was further consistent "with the public's interest in having access to information about the operation of these facilities." *Id.* at 663.

***10** ¶ 41 Here, however, there is a strong public policy in Illinois to protect the confidentiality of mental health records. See *Reda*, 199 Ill. 2d at 60, 262 Ill.Dec. 394, 765 N.E.2d 1002. Although the *Abbott* court concluded that an exception to its version of FOIA did not apply, we find the opposite in the case at bar. Illinois's Confidentiality Act clearly sets forth what can be disclosed under the Act, and the unredacted zip codes at issue here are not to be disclosed. 740 ILCS 110/2 (West 2016) (a confidential communication or record "does not include information that has been de-identified in accordance with HIPAA"). Indeed, even the *Abbott* court recognized that, under HIPAA regulations, a government agency may release protected health information only "if potential identifiers are redacted or if a statistician determines that release of the information cannot be used to identify an individual." *Abbott*, 212 S.W.3d at 662 (citing 45 C.F.R. § 164.514 (2016)).

¶ 42 Lastly, Dr. King relies upon *Southern Illinoisan* for the proposition that "[t]he fact that one of the exemptions here derives from another statute like HIPAA, and that it involves a privacy interest, does not change FOIA's presumption in favor of disclosure or its requirement that exemptions be narrowly construed." In *Southern Illinoisan*, our supreme court considered whether a newspaper's request of the Illinois Department of Public Health (IDPH) to release from the Illinois Health and Hazardous Substances Registry (cancer registry) certain data about incidents of neuroblastoma was exempt from disclosure under section 7(1)(a) of FOIA. *Southern Illinoisan*, 218 Ill. 2d at 393, 300 Ill.Dec. 329, 844 N.E.2d 1. The newspaper specifically sought information regarding the type of cancer, zip code, and date of diagnosis of neuroblastoma. *Id.* at 394, 300 Ill.Dec. 329, 844 N.E.2d 1. The IDPH maintained that disclosure of such information violated section 4(d) of the Registry Act because it " 'tends to lead to the identity, of any person whose condition or treatment is submitted to the Illinois Health and Hazardous Substances Registry.' " *Id.* at 418, 300 Ill.Dec. 329, 844 N.E.2d 1 (quoting 410 ILCS 525/4(d) (West 1998)).

¶ 43 Our supreme court ultimately concluded that the IDPH failed to demonstrate that the release of the cancer registry information requested by plaintiff tended to lead to the identity of the specific person described in the data and therefore allowed the disclosure of the information. *Id.* at 426-27, 300 Ill.Dec. 329, 844 N.E.2d 1. In reaching this determination, our supreme court noted the competing interests of providing public access to meaningful information about cancer clusters and the interest in minimizing the risk of invading the privacy of cancer patients. *Id.* at 420-21, 300 Ill.Dec. 329, 844 N.E.2d 1. The court further noted that these competing interests are captured by the legislature in section 4(d) of the Registry Act, which prohibits the disclosure of otherwise publicly available information if it "tends to lead to the identity" of the cancer patients listed in the registry. *Id.* at 421, 300 Ill.Dec. 329, 844 N.E.2d 1. The court then engaged in statutory construction of the term "tends to lead to the identify" stating the following:

> "We observe, however, that by employing the word 'tends,' the legislature deliberately allowed for flexibility, to the extent that, in some instances, disclosure of Registry information will be permissible and in other instances such disclosure will be prohibited. As stated above, there are competing interests—and therefore an inherent tension —within the Registry Act: the purpose of the Act is to provide the public with information about hazardous substances and cancer, while at the same time the Act

is intended to protect the identity of those patients afflicted with this disease. The use of the term 'tends' indicates that the General Assembly wished to impose a somewhat heightened standard of confidentiality by prohibiting disclosure of Registry information other than just information that simply 'leads to the identity' of cancer patients. However, at the same time, the use of the word 'tends' also indicates that the legislature did not intend to erect a *per se* bar to the disclosure of Registry information, and we must, therefore, be mindful not to interpret this term too broadly. In our view, by choosing to use the word 'tends,' the legislature has allowed for case-specific determinations with the respect to the release of Cancer Registry information, with the analysis meant to be adaptable to the particular circumstances presented." *Id.* at 421-22, 300 Ill.Dec. 329, 844 N.E.2d 1.

***11** ¶ 44 In contrast to the Registry Act, the General Assembly has chosen to uphold the sanctity of mental health records and communications in the Confidentiality Act. See 740 ILCS 110/3 (West 2016); *Johnston*, 241 Ill. 2d at 187, 349 Ill.Dec. 135, 946 N.E.2d 329. As previously discussed, the General Assembly employed the use of the words "all" and "shall" when constructing the statute—"*All* records and communications *shall* be confidential and *shall* not be disclosed except as provided in [the Confidentiality] Act." (Emphases added.) 740 ILCS 110/3(a) (West 2016). This demonstrates the legislature's intent to restrict the disclosure of such information. See *Reda*, 199 Ill. 2d at 60, 262 Ill.Dec. 394, 765 N.E.2d 1002. Such a restriction was not codified within the Registry Act, and therefore *Southern Illinoisan* is inapplicable to the case at bar.

[8] ¶ 45 Along with the plain language of the Confidentiality Act, it is Illinois's strong public policy in favor of the confidentiality of mental health information that informs and guides this opinion. As recognized by our supreme court, "It has been universally recognized that significant public and private interests are served by preserving the confidentiality of mental health records and communications. To that end, our legislature has enacted laws which place strict controls on the disclosure of mental health records and communications." *Norskog*, 197 Ill. 2d at 86, 257 Ill.Dec. 899, 755 N.E.2d 1. The Confidentiality Act thus represents a "strong statement by the General Assembly about the importance of keeping mental-health records confidential." *Reda*, 199 Ill. 2d at 60, 262 Ill.Dec. 394, 765 N.E.2d 1002. And while FOIA serves to promote transparency in government actions (see *Bowie*, 128 Ill. 2d at 378, 131 Ill.Dec. 182, 538 N.E.2d 557), even FOIA recognizes that there are exceptions to this rule (see **5 ILCS 140**/7(1) (West 2016)). In this case, where the zip codes sought were culled from the mental health records of former detainees, it is apparent to this court that the Confidentiality Act serves to protect this information.

¶ 46 We thus conclude that the circuit court erred when it ordered the disclosure of the unredacted zip codes of the mental health recipients. This information falls within the state law exception to FOIA (*id.* § 7(1)(a)), where the Confidentiality Act and the HIPAA regulations incorporated therein protect the unredacted zip codes from disclosure. It is for these reasons that we reverse the judgment of the circuit court of Cook County and remand the matter for the circuit court to enter an order providing that deidentified zip codes be produced to Dr. King in response to her FOIA request.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated above, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this opinion.

¶ 49 Reversed and remanded.

Presiding Justice Gordon and Justice Lampkin concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2020 IL App (1st) 190925, 2020 WL 3287316

Footnotes

1 We acknowledge that HIPAA applies to "covered entities" and the parties do not dispute that CCHHS is one such covered entity. See 45 C.F.R. § 160.103 (2016) (a "covered entity" includes "[a] health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter").

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2020 IL 124831

Supreme Court of Illinois.

The CITY OF CHICAGO, Appellee,

v.

FRATERNAL ORDER OF POLICE, Chicago Lodge No. 7, Appellant.

Docket No. 124831

Opinion filed June 18, 2020

Synopsis

Background: City filed a petition to vacate an arbitration award that arose out of grievance with police union under collective bargaining agreement (CBA) that ordered the city to destroy records of alleged police misconduct that were more than five years old. Union filed a counterpetition to enforce the arbitration award. The Circuit Court, Cook County, Sanjay T. Tailor, J., 2017 WL 11318382, granted city's petition and denied union's counterpetition. Union appealed. The Appellate Court, 430 Ill.Dec. 574, 126 N.E.3d 662, affirmed. Union petitioned for leave to appeal.

Holdings: The Supreme Court, Karmeier, J., held that:

[1] there was a well-defined and dominant public policy rooted in state law concerning the procedures for the proper retention and destruction of government records;

[2] arbitrator's award violated Illinois's well-defined and dominant public policy concerning the procedures for the proper retention and destruction of government records; and

[3] arbitration award was not nevertheless enforceable under the Illinois Public Labor Relations Act.

Affirmed.

Kilbride, J., filed a dissenting opinion.

West Headnotes (13)

[1] **Alternative Dispute Resolution** ⇐ Scope and Standards of Review

Judicial review of an arbitrator's award is extremely limited and the award must be construed, if possible, as valid.

[2] **Labor and Employment** ⇐ Public Policy

Under the public-policy exception allowing vacatur of arbitration awards that are based on collective bargaining agreements (CBAs), if an arbitration award is derived from the essence of the CBA, the court will vacate the award if it is repugnant to established norms of public policy; such vacatur is rooted in the common-law doctrine that a court may refuse to enforce contracts that violate law or public policy.

[3] **Labor and Employment** ⇐ Public Policy

The public-policy exception allowing vacatur of arbitration awards that are based on collective bargaining agreements (CBAs) is a narrow one, one that is to be invoked only when a party clearly shows enforcement of the contract, as interpreted by the arbitrator, contravenes some explicit public policy.

[4] **Labor and Employment** ⇐ Public Policy

The initial question of the two-part analysis used to determine whether to vacate an arbitration award based on a collective bargaining agreement (CBA) under the public-policy exception is whether a well-defined and dominant public policy can be identified through a review of the constitution, statutes, and relevant judicial opinions.

1 Cases that cite this headnote

[5] **Labor and Employment** Public Policy

When determining whether to vacate an arbitration award based on a collective bargaining agreement (CBA) under the public-policy exception, if the court establishes the existence of a well-defined and dominant public policy, the court must then determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy.

1 Cases that cite this headnote

[6] **Labor and Employment** Public Policy

Labor and Employment Scope of Inquiry

Because the court's inquiry when determining whether to vacate an arbitration award based on a collective bargaining agreement (CBA) pursuant to the public-policy exception is whether the arbitrator's construction of the CBA, as reflected in his award, is unenforceable due to a predominating public policy, which is a question of law, the court's review is de novo.

1 Cases that cite this headnote

[7] **Labor and Employment** Discipline

Labor and Employment Particular decisions

Records Particular Records

For purposes of the initial question of the two-part analysis used to determine whether to vacate an arbitration award based on a collective bargaining agreement (CBA) under the public-policy exception, there was a well-defined and dominant public policy rooted in state law concerning the procedures for the proper retention and destruction of government records, which was at issue in action brought by city to vacate arbitration award that arose out of grievance with police union under CBA that ordered city to destroy records of alleged police misconduct that were more than five years old; the Local Records Act and State Records Act both required agencies to seek the approval of the relevant records commission prior to destruction of records. 5 Ill. Comp. Stat. Ann. 160/17; 50 Ill. Comp. Stat. Ann. 205/7, 205/10.

[8] **Labor and Employment** Discipline

Labor and Employment Particular decisions

Arbitrator's award upholding collective bargaining agreement (CBA) provision requiring city to destroy records of alleged police misconduct that were more than five years old violated Illinois's well-defined and dominant public policy concerning the procedures for the proper retention and destruction of government records; CBA provision only required that disciplinary documents "will be destroyed" after a finite period of time, but made no reference to any of the mandatory review procedures codified in the Local Records Act, and if Local Records Commission were to deny city's request for destruction, city would be in a situation where it would violate the CBA if it retained the records, but would violate the Commission's binding order if it destroyed the records. 50 Ill. Comp. Stat. Ann. 205/7, 205/10.

[9] **Contracts** Contravention of law in general

Doctrine stating that when a conflict exists between a contract provision and state law, state law prevails, is based on the common-law notion that courts will not lend judicial power to the enforcement of private agreements that are immoral or illegal.

[10] **Labor and Employment** Discipline

Labor and Employment Particular decisions

Arbitration award upholding collective bargaining agreement (CBA) provision requiring city to destroy records of alleged police misconduct that were more than five years old, which violated explicit state law, was not nevertheless enforceable under the Illinois Public Labor Relations Act; if relevant provision

of the Illinois Public Labor Relations Act established a public policy in favor of enforcing labor arbitration awards over any other laws, the public-policy exception would cease to exist. 5 Ill. Comp. Stat. Ann. 315/15; 50 Ill. Comp. Stat. Ann. 205/7, 205/10.

[11] **Records** ⇐ Expiration or termination of obligation to preserve or retain records

Fact that the General Assembly had introduced, but failed to pass proposed bills that would have required retention of records of alleged police misconduct and employee discipline, was not evidence of legislative intent that such a public policy mandating indefinite retention of such types of records should not be established; there were several equally tenable inferences that could be drawn from such inaction.

[12] **Statutes** ⇐ Passage of Bills

The introduction of a bill that is never passed or signed into law has no legal effect whatsoever, as the legislature cannot express its will or intent by a failure to legislate.

[13] **Labor and Employment** ⇐ Validity or Propriety

As with any contract, a court may not enforce a collective-bargaining agreement in a manner that is contrary to public policy.

OPINION

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

*1 ¶ 1 This appeal presents a single issue: whether a provision in a collective bargaining agreement (CBA) that, contrary to the provisions of the Local Records Act (50 ILCS 205/1 *et seq.* (West 2016)), requires the destruction of disciplinary files after a fixed period of time violates public policy. The issue arises in the context of an action brought by the Fraternal Order of Police, Chicago Lodge No. 7 (FOP), against the City of Chicago (City) for failing to destroy records of police misconduct as required under the CBA. The matter went to arbitration, where the arbitrator held that the CBA should prevail and directed the parties to come to an agreement regarding the destruction of the documents. The City sought to overturn the arbitration award in the Cook County circuit court and was successful on public policy grounds. The appellate court affirmed, and this court allowed the FOP's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2018). For the reasons that follow, we affirm the judgment of the appellate court.

¶ 2 PRINCIPAL STATUTES INVOLVED

¶ 3 Section 4 of the Local Records Act states in relevant part:

"(a) Except as otherwise provided in subsection (b) of this Section, all public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. Any person who knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony." 50 ILCS 205/4(a) (West 2016).

¶ 4 Section 6 of the Local Records Act provides for the creation of a local records commission (Commission) to administer the requirements set forth in the Act. *Id.* § 6.

¶ 5 Section 7 of the Local Records Act states in relevant part:

"Disposition rules. Except as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained.

The Commission shall issue regulations which shall be binding on all such officers. Such regulations shall establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal; procedures for the physical destruction or other disposition of such public records; procedures for the management and preservation of electronically generated and maintained records; and standards for the reproduction

of such public records by photography, microphotographic processes, or digitized electronic format." *Id.* § 7.

¶ 6 Section 10 of the Local Records Act states:

"§ 10. The head of each agency shall submit to the appropriate Commission, in accordance with the regulations of the Commission, lists or schedules of public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation. The head of each agency shall also submit lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency. The Commission shall determine what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof. No public record shall be destroyed or otherwise disposed of by any Local Records Commission on its own initiative, nor contrary to law. This Section shall not apply to court records as governed by Section 4 of this Act." *Id.* § 10.

¶ 7 BACKGROUND

***2** ¶ 8 Since January 1981, the City of Chicago and the Fraternal Order of Police, Chicago Lodge No. 7, have been parties to a collective bargaining agreement. Central to this case is section 8.4 of the 2007-12 CBA, which mandates the destruction of disciplinary and investigation records like complaint register files. These files are produced in the course of investigations by the Civilian Office of Police Accountability (COPA) and the Chicago Police Department's Bureau of Internal Affairs of alleged misconduct by Chicago Police Department (CPD) officers. COPA and the bureau had the authority to recommend to the CPD superintendent disciplinary action for violations of CPD rules and regulations. The relevant terms of section 8.4 have remained substantially unchanged over the decades since it was implemented in the initial CBA. Section 8.4 of the 2007-12 CBA reads in relevant part:

"All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer * * *."

¶ 9 Until 1991, the City destroyed records subject to section 8.4 in accordance with that provision. That changed in 1991 when a federal district judge entered an order in a civil rights case requiring the City to cease destroying complaint register files. Other federal district judges also began entering similar orders as a matter of routine. Thereafter, the City was unsuccessful in its multiple attempts to eliminate section 8.4 from the CBA during negotiations with the FOP. As such, the provision remains included in the CBA.

¶ 10 In 2011 and 2012, the FOP filed two grievances over the City's failure to destroy complaint register files in excess of five years old and otherwise not excepted from destruction pursuant to section 8.4 of the CBA. The City denied both of the FOP's grievances, and the FOP initiated arbitration.

¶ 11 Subsequently, in October 2014, the City notified the FOP that the City intended to comply with requests under the Freedom of Information Act (FOIA) (**5 ILCS 140**/1 *et seq.* (West 2014)) from the Chicago Tribune and Chicago Sun-Times for information related to complaint register files dating back to 1967. The FOP sought a preliminary injunction in the circuit court on the basis that disclosure of the complaint register files during arbitration would interfere with the FOP's ability to obtain relief in arbitration. In December 2014, the circuit court granted the FOP's request for a preliminary injunction barring the release of the complaint register files until the FOP's claims under the CBA were adjudicated. The City and Chicago Tribune filed separate interlocutory appeals challenging the preliminary injunction. In May 2015, the circuit court entered a second preliminary injunction enjoining the City from releasing any complaint register files more than four years old[1] as of the date of the FOIA request, and the City filed an interlocutory appeal.

¶ 12 In December 2015, the United States Department of Justice (DOJ) announced that, pursuant to the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. § 13701 *et seq.* (2006)), it had opened a civil pattern or practice investigation of the CPD focusing on allegations of use of excessive force and discriminatory policing. In connection with the investigation, the DOJ sent the City a document preservation request and document preservation notice requesting the City and the CPD to preserve all existing documents related to all complaints of misconduct against Chicago police officers, including documents related to the

investigations into and discipline imposed because of such alleged misconduct. In a follow-up communication, the DOJ clarified that its document preservation request was intended to cover all officer misconduct complaint and disciplinary files maintained by the CPD, including those that were the subject of the two pending arbitration cases. In light of the letter, the City informed the arbitrator of the pendency of the DOJ investigation and requested guidance on how the City should respond to the DOJ's requests for the production of misconduct and disciplinary records.

*3 ¶ 13 A month later, in January 2016, the arbitrator issued his initial opinion and interim award, which found that the City violated section 8.4 of the CBA and directed the parties to meet and attempt to establish a procedure for compliance. The arbitrator remanded the matter to the parties to negotiate a timeline and method on how "to destroy all records covered by Section 8.4 [of the CBA]," except for files related to pending litigation or arbitration.

¶ 14 In February 2016, an assistant United States attorney sent letters to the City specifically stating that, "for the duration of DOJ's pattern and practice investigation," the City and CPD must "preserve all existing documents related to all complaints of misconduct," including those that were the subject of the arbitration.

¶ 15 On April 28, 2016, the arbitrator issued a second award, altering his previous interim award and denying the plaintiff's grievances "for the reasons of the public policy involved in the request of the U.S. Department of Justice, and only for this reason."

¶ 16 In response to a motion filed by the FOP requesting reconsideration or clarification of the second award, on June 21, 2016, the arbitrator issued a third and final award, incorporating the prior awards and clarifying that public policy would not prevent enforcement of the initial January 2016 award once the DOJ had completed its investigation.

¶ 17 On July 8, 2016, the appellate court in the FOP's preliminary injunction action vacated the circuit court's 2014 and 2015 orders granting the FOP's requests. *Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, ¶ 55, 405 Ill.Dec. 803, 59 N.E.3d 96. The appellate court found that, although the parties' CBA mandated destruction of complaint register files that were more than four years old, an arbitration award seeking enforcement of this provision would violate FOIA and the public policy underlying the General Assembly's enactment of the FOIA. Accordingly, the appellate court held that there was no legal basis to enjoin the City and CPD from releasing the requested records in order to allow the FOP to pursue a legally unenforceable remedy at arbitration. *Id.* ¶ 38.

¶ 18 On July 26, 2016, the City filed a petition in the circuit court to vacate the arbitration award on the grounds that it violated Illinois public policy favoring the proper retention of important public records. In August 2016, the FOP filed a counterpetition to confirm the arbitration award.

¶ 19 On January 13, 2017, while the case remained pending in the circuit court, the DOJ issued its comprehensive report. Among its many conclusions, the DOJ found that section 8.4's "document destruction provision not only may impair the investigation of older misconduct, but also deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct."

¶ 20 Around the same time, a local police accountability task force (Task Force) was formed to evaluate CPD's practices separately from the DOJ's investigation. The Task Force also concluded that section 8.4 is problematic and likely violates Illinois law because "[e]xpunging records contradicts best practices, impedes the development of early intervention systems and deprives the public of information that is rightfully theirs." The Task Force further stated that section 8.4 "also deprives police oversight bodies of evidence of potential patterns of bad behavior" and "it may also deprive wrongfully convicted persons of exonerating information." Consequently, the Task Force recommended:

> *4 "The provision requiring destruction of records should be eliminated. The rule is in tension if not outright conflict with general principles of public record-keeping, and deprives the public of important information that is rightfully theirs and may include the destruction of information that serves numerous operational and public policy objectives."

¶ 21 In October 2017, the circuit court granted the City's petition to vacate the arbitration award and denied the FOP's counterpetition to enforce the award, ruling that enforcement of the award "violated a well-defined and dominant public policy to preserve government records." The court stated:

> "To hold otherwise would (i) violate the public policy of maintaining public records for the benefit of the municipality and the general public; (ii) infringe on the

> municipality and general public's ownership interest in public records; (iii) usurp the municipality's right to determine for itself what records are required for the transaction of business, including legal and administrative matters; and (iv) commandeer the authority of a local records commission as the exclusive arbiter of whether and what public records may be destroyed."

¶ 22 Referencing the reports published by the DOJ, the circuit court agreed with the Task Force's findings that

> "destruction of important public records, such as the police disciplinary files at issue here, undermines principles of government transparency that are so vital to the preservation of the rule of law. If the City is to be responsive to the citizenry, it must have access to historical police disciplinary and investigative records to make better-informed decisions on policing, a point echoed in the DOJ and Task Force reports."

¶ 23 The FOP appealed, and the appellate court affirmed, holding that the statutory framework the General Assembly constructed in the Local Records Act (50 ILCS 205/1 *et seq.* (West 2016)), the State Records Act (5 ILCS 160/1 *et seq.* (West 2016)), and FOIA (**5 ILCS 140**/1 *et seq.* (West 2016)) establishes "a well-defined public policy favoring the proper retention of important public records for access by the public." 2019 IL App (1st) 172907, ¶ 27, 430 Ill.Dec. 574, 126 N.E.3d 662. The appellate court explained that these acts mandate that the destruction of public records "occur only after consideration by and with the approval of the head of the governmental agency and the [Local Records] Commission and in a well-regulated process established by the Commission." *Id.* ¶ 32. The appellate court found that the arbitrator's award requiring the City to destroy all records related to alleged police misconduct without consideration of whether the records have administrative, legal, research, or historical value ignored the requirements of the Local Records Act and resulted in diminishing the Commission's authority to determine what records should be destroyed or maintained. *Id.* ¶ 36.

¶ 24 ANALYSIS

[1] **[2]** **[3]** ¶ 25 It is well established that judicial review of an arbitrator's award is extremely limited and the award must be construed, if possible, as valid. *American Federation of State, County & Municipal Employees v. State of Illinois*, 124 Ill. 2d 246, 254, 124 Ill.Dec. 553, 529 N.E.2d 534 (1988) (*AFSCME I*). This court, however, has recognized a public-policy exception to vacate arbitration awards that are based on collective bargaining agreements. *American Federation of State, County & Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 306, 219 Ill.Dec. 501, 671 N.E.2d 668 (1996) (*AFSCME II*). Under the public-policy exception, if an arbitration award is derived from the essence of the collective-bargaining agreement, this court will vacate the award if it "is repugnant to established norms of public policy." *Id.* at 307, 219 Ill.Dec. 501, 671 N.E.2d 668. Such vacatur is rooted in the common-law doctrine that a court may refuse to enforce contracts that violate law or public policy. *Id.* at 306-07, 219 Ill.Dec. 501, 671 N.E.2d 668. The public-policy exception is a narrow one—one that is to be invoked only when a party clearly shows enforcement of the contract, as interpreted by the arbitrator, contravenes some explicit public policy. *Id.* at 307, 219 Ill.Dec. 501, 671 N.E.2d 668.

***5** **[4]** **[5]** **[6]** ¶ 26 In order to vacate an award under the exception, this court applies a two-step analysis. *Id.* The initial question is whether a well-defined and dominant public policy can be identified through a review of our constitution, statutes, and relevant judicial opinions. *Id.* (citing *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 193, 91 N.E. 1041 (1910)). If we establish the existence of a well-defined and dominant public policy, we must then determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy. *Id.* at 307-08, 219 Ill.Dec. 501, 671 N.E.2d 668. Because our inquiry is whether the arbitrator's construction of the CBA, as reflected in his award, is unenforceable due to a predominating public policy, which is a question of law, our review is *de novo*. *Country Preferred Insurance Co. v. Whitehead*, 2012 IL 113365, ¶ 27, 365 Ill.Dec. 669, 979 N.E.2d 35. With these principles in mind, we turn to the issue presented.

¶ 27 Central to this case is section 8.4 of the 2007-12 CBA, which requires the destruction of "[a]ll disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases" after five years from the date of the incident or the date upon which the violation is discovered, whichever is longer.

¶ 28 As to the initial inquiry of our public policy exception, we must first examine whether our constitution, statutes, or judicial opinions shed light on a well-defined and dominant public policy regarding the challenged provision.

¶ 29 To support its argument that there is a "well-defined and dominant public policy," the City cites various sections of the Local Records Act, which set forth the mandatory procedures a governmental body must follow prior to the destruction of government records. The City argues that section 8.4's document destruction requirement in the CBA directly conflicts with the plain language of the Local Records Act.

¶ 30 In response, the FOP argues that there is no well-defined, dominant public policy that would allow Illinois courts to set aside a provision within a collective bargaining agreement mandating document destruction of governmental records like police disciplinary and investigation records. The FOP contends that the City's reliance on the Local Records Act as well as the State Records Act is misplaced because these legislative acts do not specifically preclude the City from entering into an independent document destruction agreement. The FOP's arguments do not withstand scrutiny.

[7] ¶ 31 The Local Records Act, which undisputedly applies to the City, directs that local public records "shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law" and even goes so far as to make it a Class 4 felony to "knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alter[ ], destroy[ ], deface[ ], remove[ ], or conceal[ ] any public record." 50 ILCS 205/4(a) (West 2016).

¶ 32 Section 7 requires that "no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." *Id.* § 7. Section 7 further vests in the Commission the authority to issue binding regulations and procedures to "establish procedures for compiling and submitting to the Commission lists and schedules of public records proposed for disposal"; to regulate "the physical destruction or other disposition of such public records"; to manage the "preservation of electronically generated and maintained records"; and to create "standards for the reproduction of such public records by photography, microphotographic processes, or digitized electronic format." *Id.*

***6** ¶ 33 Under the requirements of section 10 of the Local Records Act, the head of each local governmental agency must submit to the Commission "lists or schedules of public records in his custody that are not needed in the transaction of current business and that do not have sufficient administrative, legal or fiscal value to warrant their further preservation" and "lists or schedules proposing the length of time each records series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency." *Id.* § 10. Once a local governmental agency submits local public records for review, the Commission will decide whether the records should be maintained or destroyed after it determines "what public records have no administrative, legal, research or historical value and should be destroyed or otherwise disposed of and shall authorize destruction or other disposal thereof." *Id.*

¶ 34 In this case where the challenge to the arbitrator's award is substantiated on establishing a direct conflict between a provision of the CBA and statutory requirements, we need not look further than the plain language of the statute to determine the state's public policy. See, *e.g.*, *People v. Felella*, 131 Ill. 2d 525, 539, 137 Ill.Dec. 547, 546 N.E.2d 492 (1989) ("Declaring public policy is the domain of the legislature."); *Henderson v. Foster*, 59 Ill. 2d 343, 347-48, 319 N.E.2d 789 (1974) (citing various cases for the proposition that state statute is the strongest indicator of public policy and, where the legislature speaks on a subject upon which it has constitutional power to legislate, the public policy is what the statute passed indicates); *AFSCME II*, 173 Ill. 2d at 316-17, 219 Ill.Dec. 501, 671 N.E.2d 668 (relying on various statutes to find a well-defined and dominant public policy).

¶ 35 In light of the plain language of the Local Records Act, we agree with the City that the statutory framework the General Assembly constructed makes clear that Illinois recognizes a public policy favoring the proper retention of government records and that the destruction of public records may occur only after consideration by and with the approval from the Commission in a process established by the Commission. 50 ILCS 205/7, 10 (West 2016). As such, the procedures laid out in the Local Records Act are an express, legislative restriction on a local government to act in any other way than authorized by the statute.

¶ 36 We find further support that Illinois public policy demands the oversight of the destruction and maintenance of government records through creation of a State Records

Commission which, under the State Records Act, similarly requires state agencies to seek the approval of the State Records Commission prior to the destruction of state records. 5 ILCS 160/17 (West 2016). The legislature underscored its public policy purposes for enacting the State Records Act, specifically declaring:

> "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois (i) that government records are a form of property whose ownership lies with the citizens and with the State of Illinois; [and] (ii) that "those records are to be created, maintained, and administered in support of the rights of those citizens and the operation of the State * * *." *Id.* § 1.5.

The State Records Act further states, "those records are, with very few exemptions, to be available for the use, benefit, and information of the citizens; and * * * may not be disposed of without compliance to the regulations in this Act." *Id.*

¶ 37 In sum, we find there is a "well-defined and dominant" public policy rooted in state law concerning the procedures for the proper retention and destruction of government records, which is at issue in this case. We turn then to the question of whether the arbitrator's award violated the public policy established by the legislature by enforcing compliance with the contract provision. We conclude that it did.

*7 **[8]** ¶ 38 Here, the arbitrator determined in his initial arbitration order that the City violated section 8.4 by withholding the destruction of the disciplinary records covered under the agreement. Consequently, the arbitrator directed the parties "to negotiate between themselves a time line and method to implement the findings" and that the City should "destroy all records covered by Section 8.4." Addressing the City's argument that police disciplinary records cannot be destroyed without the Commission's written approval, the arbitrator interpreted the CBA to hold that there is no basis to suggest that the issuance of an award granting relief in favor of the FOP violates public policy, stating "in issuing an Award that enforces Section 8.4 [he] is doing so consistent with State law and not contrary to State public policy." In the arbitrator's subsequent awards, which incorporate the initial award, the arbitrator again found the document destruction requirement valid and enforceable once the DOJ concluded its investigation.

¶ 39 Before this court, the FOP contends the City's facial challenge is a "direct attack on the contract language, as opposed to the enforceability of the Award, clearly indicating that the City seeks to evade its bargaining obligations through this action." The FOP notes that, because "the City agreed to the provision, * * * presumably with full knowledge of its obligations under the Local Records Act," the provision must be contractually enforced. The FOP argues that the award can be validly enforced because the City can still request document destruction approval from the Commission.

¶ 40 Although the FOP is correct that the City could comply with the Local Records Act by submitting disciplinary records to the Commission, which we note is not required under the CBA, submission to the Commission is but a single element of the statutory procedures a local government must follow under the Local Records Act. The second, and arguably most crucial, aspect is compliance with the Commission's ultimate decision regarding the retention or destruction of the government records.

¶ 41 As written, section 8.4 only requires that disciplinary documents "will be destroyed" after a finite period of time. Section 8.4 does not take into consideration whether the records "do not have sufficient administrative, legal or fiscal value to warrant their further preservation" (see 50 ILCS 205/10 (West 2016)), nor does the provision require the parties to be bound by a decision from the Commission. In fact, section 8.4 makes no reference to any of the mandatory review procedures codified in the Local Records Act.

¶ 42 Moreover, the FOP's assertion that the City could comply with state law by submitting disciplinary records to the Commission begins to quickly unravel when considering the circumstance where, after submitting disciplinary records to the Commission for review, the Commission denies the City's request for destruction, thereby mandating the retention of the disciplinary records covered under section 8.4. In this situation, the City would find itself in a catch-22, where, on the one hand, the City would violate the CBA (as well as the arbitrator's award) if, in accordance with an order from the Commission, the City retained disciplinary records beyond section 8.4's five-year requirement for destruction. On the other hand, the City would violate the Commission's binding order if it were to destroy any public records per the CBA without the Commission's "written approval" or contrary to the Commission's mandate. *Id.* § 6. Thus, even if the City complies with the initial review procedures of the Local Records Act, the FOP's position cannot be reconciled with state law, as it makes no allowance for the Commission to decide whether local government records should be destroyed or retained. Any attempt by the City

to challenge the Commission's decision based on the CBA's document destruction requirement would be futile, given that the legislature has vested in the Commission the ultimate authority to determine what public records should destroyed. An opposite result would lead to a shift in the balance of power where document destruction procedures in a contract provision would supersede statutory procedures. Such an outcome runs counter to the Commission's oversight responsibility and is completely inconsistent with the plain language and the spirit of the Local Records Act. Hence, it is no surprise that, when asked at oral argument whether this apparent conflict could be reconciled, counsel for the FOP declined to provide a definitive answer but rather stated he would first need to consider the Commission's order requiring the retention of public records covered under section 8.4. As illustrated above, waiting for an order from the Commission denying the City's request for the destruction of records covered under section 8.4 is unnecessary as the provision, on its face, fails to require or provide for the City to act in accordance with the document destruction procedures expressly outlined in the Local Records Act. Without allowing the City to comply with state law, section 8.4 clearly contravenes a well-defined statutory declaration of public policy and is simply incompatible with the legislative procedures articulated in the Local Records Act.

*8 **[9]** ¶ 43 While parties are generally free to make their own contracts, this court has long held that when a conflict exists between a contract provision and state law, as it clearly does in this case, state law prevails. See, *e.g.*, *Green v. Hutsonville Township High School District No. 201*, 356 Ill. 216, 221, 190 N.E. 267 (1934) ("A contract expressly prohibited by law is void, and there is no exception to this rule for the reason that a law cannot at the same time prohibit a contract and enforce it." (citing *Duck Island Hunting & Fishing Club v. Edward Gillen Dock, Dredge & Construction Co.*, 330 Ill. 121, 161 N.E. 300 (1928), and *De Kam v. City of Streator*, 316 Ill. 123, 146 N.E. 550 (1925))); *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121, 129, 293 Ill.Dec. 677, 828 N.E.2d 1175 (2005) (where a provision in an insurance policy conflicts with the law, the statute will continue to control). This doctrine is based on the common-law notion that courts will not lend judicial power to the enforcement of private agreements that are immoral or illegal. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). That is the precise situation presented here where a provision in a CBA contravenes explicit state law.

¶ 44 Accordingly, based on the foregoing reasons, the arbitrator erred in finding that section 8.4 is "consistent with state law and not contrary to state public policy," thereby mandating the parties to comply with the destruction of "all discipline records" covered under that provision. Consequently, the award is void and not enforceable. See, *e.g.*, *AFSCME I,* 124 Ill. 2d at 260, 124 Ill.Dec. 553, 529 N.E.2d 534 ("An arbitration award in contravention of paramount considerations of public policy is not enforceable.").

[10] ¶ 45 Based on our holding above that section 8.4 of the CBA violates explicit state law, we reject the FOP's assertion that the arbitration award is enforceable per section 15 of the Illinois Public Labor Relations Act (Labor Act) (5 ILCS 315/15 (West 2016)). Section 15 provides, in relevant part, the following:

> "(a) In case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by Public Act 96-889 and other than as provided in Section 7.5), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control. * * *
>
> (b) Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents." *Id.*

¶ 46 The FOP argues that section 15 of the Labor Act establishes a public policy in favor of enforcing labor arbitration awards over any other laws. As such, the FOP argues that, if this court finds a conflict between section 8.4 of the CBA and the provisions in the Local Records Act, the CBA prevails. We disagree.

¶ 47 If section 15 of the Labor Act were read as the FOP advocates, the public-policy exception established and applied by this court in numerous decisions (see, *e.g.*, *AFSCME I*, 124 Ill. 2d 246, 124 Ill.Dec. 553, 529 N.E.2d 534) would cease to exist. That is so because no matter how offensive to public policy an arbitrator's decision is—even if

it violates state law—the arbitrator's decision would stand. By this logic, the public policy exception doctrine would never apply to CBA provisions affecting the terms and conditions of employment, which is contrary to our decision in *AFSCME II* striking down just such a CBA provision on the ground that, "[a]s with any contract, a court will not enforce a collective-bargaining agreement that is repugnant to established norms of public policy." *AFSCME II*, 173 Ill. 2d at 307, 316, 219 Ill.Dec. 501, 671 N.E.2d 668.

***9** **[11]** ¶ 48 Further, we reject the FOP suggestion that this court should consider legislative bills that were introduced but never signed into law as evidence of legislative intent. The FOP contends that, because the General Assembly failed to pass proposed bills that would have required retention of records of alleged police misconduct and employee discipline, "the Legislature has signaled that such a public policy mandating indefinite retention of these types of records should not be established."

[12] ¶ 49 The FOP's position totally disregards the basic framework of the Illinois Constitution where the only manner in which the General Assembly has the power to impose its will upon the state is through the passage of a bill in both chambers that is either signed by the governor or repassed by a supermajority after his veto. Ill. Const., art. IV, §§ 8, 9. Accordingly, the introduction of a bill that is never passed or signed into law has no legal effect whatsoever, as the legislature cannot express its will or intent by a *failure* to legislate. See *United States v. Estate of Romani*, 523 U.S. 517, 535, 118 S.Ct. 1478, 140 L.Ed.2d 710 (1998) (Scalia, J., concurring in part and concurring in the judgment) ("The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law."). The reasoning is simple: there are several equally tenable inferences that may be drawn from such inaction. See, *e.g.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 170, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (stating that failure to pass a bill outlawing an agency interpretation of the law does not imply Congress's "acquiescence" to that interpretation, in part because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others"). One could only envision the chaos that would ensue (especially for the judiciary) if any of the 177 members of the General Assembly could dictate public policy through the introduction of a legislative bill—regardless if the bill becomes law.

[13] ¶ 50 With all this being said, our decision does not disregard the right of the parties to negotiate their contracts, nor do we attempt to restrain them in any way from doing so in the future. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 55, 350 Ill.Dec. 847, 949 N.E.2d 639 (2011). We have reasoned:

> "The freedom of parties to make their own agreements, on the one hand, and their obligation to honor statutory requirements, on the other, may sometimes conflict. These values, however, are not antithetical. Both serve the interests of the public. Just as public policy demands adherence to statutory requirements, it is in the public's interest that persons not be unnecessarily restricted in their freedom to make their own contracts." *Progressive Universal Insurance Co.*, 215 Ill. 2d at 129, 293 Ill.Dec. 677, 828 N.E.2d 1175.

However, "[a]s with any contract, a court may not enforce a collective-bargaining agreement in a manner that is contrary to public policy." *AFSCME II*, 173 Ill. 2d at 318, 219 Ill.Dec. 501, 671 N.E.2d 668; *De Kam*, 316 Ill. at 129, 146 N.E. 550 ("A contract expressly prohibited by a valid statute is void. This proposition has no exception, for the law can not at the same time prohibit a contract and enforce it. The prohibition of the legislature cannot be disregarded by the courts.").

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, we find that the arbitration award violated an explicit, well-defined, and dominant public policy. The appellate court was therefore correct when it affirmed the judgment of the circuit court vacating that award. Accordingly, the judgment of the appellate court is affirmed.

***10** ¶ 53 Affirmed.

Chief Justice Anne M. Burke and Justices Garman, Theis, Neville, and Michael J. Burke concurred in the judgment and opinion.

Justice Kilbride dissented, with opinion.

¶ 54 JUSTICE KILBRIDE, dissenting:

¶ 55 I respectfully dissent from the majority. My disagreement with the majority has nothing to do with the records that are the subject of this appeal. I firmly believe that police misconduct must be rooted out, and I would vehemently

oppose the indiscriminate destruction of police misconduct records. That is not what the arbitrator ordered in this case.

¶ 56 Rather, the arbitrator's award merely directed the parties to meet and negotiate. The arbitrator *did not* order the destruction of any records. We do not know what agreement, if any, would have resulted from the parties meeting and negotiating. We do not know whether those negotiations would have resulted in an agreement for the future destruction of any records. We also do not know whether they would have resulted in an agreement that fully complied with the Local Records Act (50 ILCS 205/1 *et seq.* (West 2016)) and all other applicable laws. I believe the parties should be allowed to meet and negotiate in accordance with the arbitrator's directive. This court could retain jurisdiction and remand for negotiations. After proceeding with negotiations, it would be warranted for this court to review the status of any agreement.

¶ 57 To repeat, the issue of police misconduct is a serious issue that must be confronted by society. This court was asked, however, to consider a fundamental principle of labor law, namely, the validity and enforcement of arbitration awards. The majority acknowledges that "[i]t is well established that judicial review of an arbitrator's award is extremely limited and *the award must be construed, if possible, as valid*." (Emphasis added.) *Supra* ¶ 25 (citing *American Federation of State, County & Municipal Employees v. State of Illinois*, 124 Ill. 2d 246, 254, 124 Ill.Dec. 553, 529 N.E.2d 534 (1988) (*AFSCME I*)). I agree with the majority that there is a " 'well-defined and dominant' public policy rooted in state law concerning the procedures for the proper retention and destruction of government records" (*supra* ¶ 37) and that an arbitrator's award violating this public policy can be set aside (*supra* ¶ 25).

¶ 58 There is, however, a separate "well-defined and dominant" public policy in state law to enforce collective-bargaining agreements and labor arbitration awards. See 5 ILCS 315/15 (West 2016). I believe that these two important public policies can coexist harmoniously, and the arbitrator's decision may be construed so as not to create a conflict between these public policies. I disagree with the majority's conclusion that "the arbitrator's award [in this case] violated the public policy established by the legislature by enforcing compliance with the contract provision." *Supra* ¶ 37. Unfortunately, today's decision may well adversely impact the enforceability of other labor agreements.

¶ 59 As the majority recognizes, in January 2016, the arbitrator issued his initial opinion and interim award directing the parties to meet and attempt to establish a procedure for compliance with section 8.4 of the collective bargaining agreement and to negotiate a timeline and procedure to be followed in destroying eligible records and a method on how to destroy all records covered by that provision, except for records related to pending litigation or arbitration. *Supra* ¶ 13. On April 28, 2016, the arbitrator issued a second award altering his previous interim award " 'for the reasons of the public policy involved in the request of the U.S. Department of Justice.' " *Supra* ¶ 15. On June 21, 2016, the arbitrator issued a third award clarifying that public policy would not prevent enforcement of the initial January 2016 award once the Department of Justice completed its investigation. *Supra* ¶ 16.

***11** ¶ 60 The arbitrator's award simply directed the parties to negotiate the method and procedure for the possible future destruction of eligible records in compliance with section 8.4 of the collective bargaining agreement. The arbitrator *did not* mandate destruction of all records. Indeed, after negotiations, the parties may not reach any agreement on the destruction of any records. Accordingly, I would find that the arbitrator's award did not violate any "well-defined and dominant" public policy concerning the procedures for the proper retention and destruction of government records.

¶ 61 There is strong United States Supreme Court labor law precedent confirming a court's duty to uphold arbitration awards. Importantly, as the Supreme Court made clear in *United Paperworkers International v. Misco, Inc.*, 484 U.S. 29, 37, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987):

> "The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government * * *. The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute."

¶ 62 The Supreme Court in *Misco* emphasized:

> "[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds,

courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. * * * [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38, 108 S.Ct. 364.

¶ 63 *Misco* likewise recognized that "a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42, 108 S.Ct. 364 (citing *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum, & Plastic Workers of America*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), and *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 92 L.Ed. 1187 (1948)). The Supreme Court cautioned, however,

"that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests." ' " (Emphasis in original.) *Misco*, 484 U.S. at 43, 108 S.Ct. 364 (quoting *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. 2177, quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 89 L.Ed. 744 (1945)).

¶ 64 In examining its prior decision in *W.R. Grace*, the Supreme Court in *Misco* stated:

"Two points follow from our decision in *W. R. Grace.* First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public interests.' [*W.R. Grace*,] 461 U. S. at 766, 103 S.Ct. 2177. *At the very least, an alleged public policy must be properly framed under the approach set out in* W. R. Grace, *and the violation of such a policy must be clearly shown if an award is not to be enforced.*" (Emphasis added.) *Misco*, 484 U.S. at 43, 108 S.Ct. 364.

***12** ¶ 65 This court subsequently adopted in *AFSCME I*, 124 Ill. 2d 246, 124 Ill.Dec. 553, 529 N.E.2d 534, the analysis employed by the Supreme Court in *W.R. Grace* and *Misco*. In *AFSCME I*, a patient at a mental health facility died while two employees of the facility were away from their worksite without permission. The Department of Mental Health discharged the employees, but the arbitrator reduced the discipline to suspensions and reinstatement without back pay or other benefits. *AFSCME I*, 124 Ill. 2d at 250-51, 124 Ill.Dec. 553, 529 N.E.2d 534.

¶ 66 This court, while recognizing we are not bound to follow federal decisions because Illinois has a different arbitration act, looked to the Supreme Court's decisions in *W.R. Grace* and *Misco*, reaffirming that the public policy exception is extremely narrow. *AFSCME I*, 124 Ill. 2d at 260-61, 124 Ill.Dec. 553, 529 N.E.2d 534. *In AFSCME I*, this court acknowledged "the important public policy of this State's commitment to compassionate care for the mentally disabled," but we also recognized that the case involved "the public policy of promoting constructive relationships between public employers and public employees, and the public policy which requires finality in arbitration awards." *AFSCME I*, 124 Ill. 2d at 262, 124 Ill.Dec. 553, 529 N.E.2d 534. We determined that the collective-bargaining agreement, as interpreted by the arbitrator, did not violate any explicit public policy that was well defined and dominant. *AFSCME I*, 124 Ill. 2d at 262-63, 124 Ill.Dec. 553, 529 N.E.2d 534. Moreover, we noted that the arbitration award in *AFSCME I* did not sanction violations of the law. *AFSCME I*, 124 Ill. 2d at 263, 124 Ill.Dec. 553, 529 N.E.2d 534. Accordingly, we held that public policy did not mandate discharge of the employees. *AFSCME I*, 124 Ill. 2d at 265, 124 Ill.Dec. 553, 529 N.E.2d 534.

¶ 67 Subsequently, in *American Federation of State, County and Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 307, 219 Ill.Dec. 501, 671 N.E.2d 668 (1996) (*AFSCME II*), this court applied the principles articulated in *AFSCME I*, *W.R. Grace*, and *Misco*. In *AFSCME II*, we held that an arbitration award reinstating an employee who falsely stated she had seen three children in the Department of Children and Family Services' custody and that they were "doing fine," when in fact they had perished in an accidental fire, violated public policy in favor of truthful and accurate reporting by the Department of Children and

Family Services. *AFSCME II*, 173 Ill. 2d at 307-08, 219 Ill.Dec. 501, 671 N.E.2d 668.

¶ 68 *AFSCME II* specifically recognized that the public policy exception's ultimate applicability to vacate an arbitrator's award in any case is necessarily fact dependent. *AFSCME II*, 173 Ill. 2d at 311, 219 Ill.Dec. 501, 671 N.E.2d 668. This court emphasized that the public policy concerning "the welfare and protection of minors has always been considered one of the State's most fundamental interests." *AFSCME II*, 173 Ill. 2d at 311, 219 Ill.Dec. 501, 671 N.E.2d 668. Indeed, we also stated that "a mechanical application of [a collective-bargaining agreement] provision may * * * collide with public policy" and recognized "the possibility of other remedies, short of a blanket reinstatement." *AFSCME II*, 173 Ill. 2d at 334, 219 Ill.Dec. 501, 671 N.E.2d 668. Thus, this court determined that the arbitrator's award ran afoul of public policy promoting the welfare and protection of abused and neglected children. *AFSCME II*, 173 Ill. 2d at 318-20, 219 Ill.Dec. 501, 671 N.E.2d 668. A careful reading of *AFSCME II* shows it left the door open for the arbitrator to enter an award that would not violate public policy. See *AFSCME II*, 173 Ill. 2d at 332-33, 219 Ill.Dec. 501, 671 N.E.2d 668.

¶ 69 Here, no public harm results from the arbitrator's decision directing the parties to negotiate over the method and procedure for destroying eligible records. The arbitrator did not engage in a "mechanical application" of any collective bargaining agreement provision and specifically acknowledged public policy concerns when declining to impose a blanket direction to destroy records. Instead, the arbitrator simply directed the parties to negotiate the matter. How could continued negotiations violate any public policy?

***13** ¶ 70 The arbitration award is specifically enforceable under section 15 of the Illinois Public Labor Relations Act (5 ILCS 315/15 (West 2016)). There is a well-established dominant public policy supporting collective bargaining and the enforcement of labor arbitration awards. The Public Labor Relations Act sets forth this explicit public policy:

> "It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours and other conditions of employment or other mutual aid or protection." 5 ILCS 315/2 (West 2016).

¶ 71 The Public Labor Relations Act specifically provides that it and any agreements made under the Act "*shall prevail and control*" when there is "any conflict between the provisions of this Act and any other law." (Emphasis added.) 5 ILCS 315/15(a) (West 2016). The Public Labor Relations Act further states that "any collective bargaining contract between a public employer and a labor organization * * * *shall supersede* any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents." (Emphasis added.) 5 ILCS 315/15(b) (West 2016). Thus, section 15 of the Public Labor Relations Act clearly establishes a well-defined and dominant public policy favoring collective bargaining and the enforcement of labor arbitration awards.

¶ 72 This court emphasized in *AFSCME I* both "the public policy of promoting constructive relationships between public employers and public employees, and the public policy which requires finality in arbitration awards." *AFSCME I*, 124 Ill. 2d at 262, 124 Ill.Dec. 553, 529 N.E.2d 534. Likewise, in *City of Decatur v. American Federation of State, County, & Municipal Employees, Local 268*, 122 Ill. 2d 353, 363-64, 119 Ill.Dec. 360, 522 N.E.2d 1219 (1988), this court discussed the Public Labor Relations Act, noting that other "courts facing conflicts between public employee bargaining laws and local civil service systems have opted in favor of granting primacy to the bargaining laws. [Citations.]"

¶ 73 Even the majority recognizes that review of an arbitrator's award is very limited, and indeed, this court must construe an award as valid if at all possible. *Supra* ¶ 25 (citing *AFSCME I*, 124 Ill. 2d at 254, 124 Ill.Dec. 553, 529 N.E.2d 534). Such a deferential judicial review is necessary to promote the State's declared public policy that, "where the right of employees to strike is prohibited by law, it is necessary to afford an alternate, expeditious, equitable and effective procedure for the resolution of labor disputes." 5 ILCS 315/2 (West 2016). As noted, this court has previously followed the United States Supreme Court decisions limiting the public policy exception to enforcement of arbitration awards.

¶ 74 Collective bargaining and the enforcement of arbitration awards are the cornerstone of labor policy. The majority's opinion discounts the basic protections guaranteed to public employees by the Illinois Public Labor Relations Act (5 ILCS 315/1 *et seq.* (West 2016)). The General Assembly, in enacting the Public Labor Relations Act evinced a strong public policy favoring collective bargaining and enforcement of labor arbitration awards over other laws.

¶ 75 The parties in this case not only collectively bargained section 8.4 but also agreed to the arbitration process for resolving any contractual disputes over the interpretation or application of section 8.4. The majority decision strikes at the heart of the collective bargaining process protected by the Public Labor Relations Act and may, as a consequence, adversely affect public sector collective bargaining contracts that contain arbitration agreements.

***14** ¶ 76 Importantly, the Public Labor Relations Act also requires that collective bargaining agreements in the public sector include a grievance procedure and, as a *quid pro quo* for the guarantee of the statutorily required final and binding arbitration process, must contain a no-strike provision for the duration of the agreement. 5 ILCS 315/8 (West 2016). In other words, in furtherance of the General Assembly's stated public policy supporting collective bargaining and final and binding arbitration procedure, public sector employees give up their right to strike.

¶ 77 Here, we have two well-defined and dominant public policies. I believe the General Assembly's clear statement of public policy favoring collective bargaining agreements and enforcement of labor arbitration awards over other laws tips the scale in this case in favor of enforcing the arbitrator's award. Nevertheless, I believe these two public policies can coexist harmoniously and, in this case, the arbitrator's decision should be construed so as not to create a conflict between these public policies. I would hold that the arbitrator's decision requiring negotiation for the methodology and procedure for the possible future destruction of eligible records does not violate any public policy as defined by the majority.

¶ 78 Undeniably, as the majority notes, in 1991, a federal district judge entered an order in a civil rights case requiring the City of Chicago (City) to cease destroying complaint register files, and other federal district judges began entering similar orders. *Supra* ¶ 9. In January 2019, a consent decree was entered in the United States District Court for the Northern District of Illinois. The consent decree requires implementation of reforms to the Chicago Police Department and other City agencies to ensure the City and the Chicago Police Department engage in lawful, constitutional policing. The consent decree specifically states that it was not intended to alter, impair, or conflict with the collective bargaining agreements or rights of employees under the Public Labor Relations Act. The City has not argued, however, that the consent decree prohibits destruction of all disciplinary records. In any event, the arbitrator specifically excluded from negotiations the destruction of any records relating to pending litigation or arbitration.

¶ 79 Additionally, nothing in the Local Records Act requires the indefinite retention or permanent preservation of records. I would, therefore, find that the arbitrator's decision does not clearly show a violation of any public policy and should not be set aside. The arbitrator's award merely directs the parties to meet and negotiate. The award does not require the destruction of any police misconduct records or any other police disciplinary records, nor does it require the parties to violate any statute.

¶ 80 Finally, I wish to reiterate that I do not advocate the indiscriminate destruction of police misconduct records. Nor do I minimize the seriousness of police misconduct. Public safety and effective law enforcement are of utmost importance. In fact, the consent decree requires implementation of reforms to ensure the City and the Chicago Police Department engage in lawful, constitutional policing. Those reforms include identifying and analyzing trends within misconduct complaints. The parties could well negotiate the timeline and preservation of records necessary for the implementation of reforms.

¶ 81 Based on the parties' briefs and comments during oral argument, it is readily apparent that the parties are fully aware of the requirements of the Local Records Act, other applicable statutes, and the consent decree. Thus, we can safely assume that negotiations for the possible future destruction of any eligible discipline records would be done in full compliance with the consent decree and any other requirements under the law. I believe the parties should be allowed to meet and negotiate in accordance with the arbitrator's directive.

***15** ¶ 82 In sum, as I have explained, the arbitrator in this case did not mechanically apply the provisions of the collective bargaining agreement. Instead, the arbitrator thoughtfully included public policy considerations in the decision and merely directed the parties to meet and negotiate. The arbitrator *did not* order the destruction of any police misconduct records or any other police disciplinary records.

¶ 83 For those reasons, I would reverse the decision of the appellate court and enforce the arbitrator's award. Accordingly, I respectfully dissent.

All Citations

--- N.E.3d ----, 2020 IL 124831, 2020 WL 3273050, 2020 L.R.R.M. (BNA) 226,312, 170 Lab.Cas. P 62,053

Footnotes

1 Section 8 of the Personnel Record Review Act provides that an employer, before releasing personnel-related information to a third party, "shall * * *, except when the release is ordered to a party in a legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old." 820 ILCS 40/8 (West 2008).

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2020 IL App (1st) 180378-U

Appellate Court of Illinois, First District, SIXTH DIVISION.

Charles DONELSON, Plaintiff-Appellant,

v.

Wendi W. LISS, Charise Valente, Eddie T. Johnson, Rahm Emanuel, and Chicago Police Department, Defendants-Appellees.

Nos. 1-18-0378 & 1-18-0396 (Consol.)

Order filed May 29, 2020

Appeal from the Circuit Court of Cook County. No. 17 L 9528, Honorable Moira S. Johnson, Judge, presiding.

ORDER

JUSTICE HARRIS delivered the judgment of the court.

***1** ¶ 1 *Held*: Appeal dismissed for lack of jurisdiction where plaintiff appealed the order dismissing his complaint for want of prosecution before period to refile expired.

¶ 2 Plaintiff Charles Donelson appeals *pro se* from the trial court's order dismissing his complaint against defendants Wendi Liss, Charise Valente, Eddie Johnson, Rahm Emanuel, and the Chicago Police Department, for want of prosecution.[1] On appeal, plaintiff argues the trial court abused its discretion and committed clear error where it dismissed the case for want of prosecution after plaintiff filed a motion for summons to issue, and the court granted his petition for a writ of *habeas corpus ad testificandum* but did not order the summons to issue. For the following reasons, we dismiss for lack of jurisdiction.

¶ 3 The record shows that on September 20, 2017, plaintiff filed a *pro se* complaint against defendants, alleging they violated the Freedom of Information Act (FOIA) and seeking damages, fees, and costs.

¶ 4 In his complaint, plaintiff alleged that in October 2016, he sent a request to the Chicago Police Department (CPD) headquarters seeking certain records. According to plaintiff, defendants did not respond within the five days required by the FOIA statute but did eventually send plaintiff a response asking him to narrow his request. Plaintiff responded "several times" with narrowed requests, but defendants "willfully sen[t] the exact records unresponsive to plaintiff [*sic*] request." Plaintiff then "moved to" the Public Access Counselor of the Illinois Office of the Attorney General for review, who received a response from the CPD but never responded to plaintiff's request for review.[2] Plaintiff claimed CPD violated the FOIA statute, and requested relief in the amount of "$3,000, and $5,000 respective [*sic*] for willful conduct and intension [*sic*] misrepresentation and also * * * costs of $150,957.00 for pain and suffering."

¶ 5 On October 18, 2017, plaintiff filed a motion for "summons to issue to obtain jurisdiction over defendants." On October 19, 2017, the trial court granted plaintiff's motion and ordered the status hearing be reset from November 22, 2017, to December 19, 2017.

¶ 6 On November 2, 2017, plaintiff filed a petition for writ of *habeas corpus ad testificandum*, requesting that the court order the Illinois Department of Corrections to bring him before the court so he could testify on November 22, 2017. The court granted the petition in a written order, directing the Illinois Department of Corrections to produce plaintiff before "the Honorable Harmening" on December 19, 2017. On that date, the court dismissed plaintiff's complaint for want of prosecution.[3]

***2** ¶ 7 Plaintiff sought leave to file a late notice of appeal, No. 1-18-0378, which this court allowed on March 15, 2018. Plaintiff had also previously filed a notice of appeal in January 2018, appeal No. 1-18-0396, from the same December 19, 2017, dismissal order. Plaintiff filed a motion to consolidate the appeals or dismiss one of them, because the two appellate case numbers were assigned to one case. On May 16, 2018, this court consolidated the two appeals.

¶ 8 On appeal, plaintiff contests the trial court's December 19, 2017, dismissal of his complaint for want of prosecution. Plaintiff argues the trial court's dismissal was "clear error, an abuse of discretion or premature" because the trial court

"issued no order" for summons to issue after granting his petition for *habeas corpus ad testificandum.*

¶ 9 Defendants have not filed responsive appellees' briefs. This court, however, has elected to consider this appeal on plaintiff's brief alone under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 10 As a preliminary matter, we note plaintiff's brief fails to comply with many of the requirements of Illinois Supreme Court Rule 341(h) (eff. May 25, 2018), which governs the content of appellate briefs. For example, his brief contains no "Points and Authorities" statement outlining the points argued and authorities cited in the argument (see Rule 341(h)(1)), no statement of jurisdiction (see Rule 341(h)(4)), and no argument supported by citations to the record or legal authority (see Rule 341(h)(7)). We may strike a brief and dismiss the appeal for failure to comply with the rules. *Marzano v. Dept. of Emp't. Sec.*, 339 Ill. App. 3d 858, 861 (2003).

¶ 11 Further, before reaching the merits of plaintiff's argument, we have an independent duty to determine our jurisdiction, which is limited to final judgments. *LM Insurance Corp. v. B&R Insurance Partners, LLC*, 2016 IL App (1st) 151011, ¶ 14. Here, plaintiff appeals from the dismissal of his complaint for want of prosecution. Generally, the dismissal of a complaint for want of prosecution is not a final judgment, because a plaintiff may commence a new action within one year after dismissal or within the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217 (West 1994).[4] " '[U]ntil the time of the expiration of the period for refiling, [a dismissal for want of prosecution] remains a nonappealable interlocutory order.' " *Gassman v. Clerk of the Circuit Court of Cook County*, 2019 IL App (1st) 171543, ¶ 20 (quoting *S.C. Vaughn Oil Co. v. Caldwell, Troutt& Alexander*, 181 Ill. 2d 489, 506-507 (1998) ("[T]he date upon which an order for dismissal of prosecution becomes final is the date upon which plaintiffs' right to refile the cause of action under section 13-217 expires.")).

¶ 12 Here, plaintiff filed his notice of appeal and late notice of appeal in January and March 2018, respectively, well within the statutory one-year period available to him for refiling his complaint in the trial court after the December 19, 2017, dismissal for want of prosecution. As such, the dismissal for want of prosecution of plaintiff's complaint is not a final and appealable order. *S.C. Vaughn*, 181 Ill. 2d at 501-502; *Wold v. Bull Valley Management Co., Inc.*, 96 Ill. 2d 110, 114 (1983). Therefore, this court does not have jurisdiction over this matter, and must dismiss the appeal. *Wold*, 96 Ill. 2d at 114.

***3** ¶ 13 Accordingly, for the reasons cited above, we dismiss this appeal for lack of appellate jurisdiction.

¶ 14 Dismissed.

Presiding Justice Mikva and Justice Connors concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 180378-U, 2020 WL 2791977

Footnotes

1 According to information in the record, plaintiff is currently an inmate in custody at Pontiac Correctional Center.

2 According to the City of Chicago's response to the Public Access Counselor, CPD responded to plaintiff's October 4, 2016, request on October 12, 2016, which was the fifth day for the statutorily mandated five-day response time (**5 ILCS 140**/3(d) (West 2016)), given that October 10, 2016, was the Columbus Day holiday.

3 The basis for the court's ruling is not stated in the written order and there is no report of proceedings in the record on appeal.

4 The Illinois Supreme Court found Public Act 89-7 (Pub. Act 89–7, eff. March 9, 1995), which amended this section, unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Accordingly, the version of section 13-217 which is currently in effect is the version that preceded the amendments to Public Act 89-7. See *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n. 1 (2008).

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2020 IL App (2d) 190013
Appellate Court of Illinois, Second District.

John R. ZEMATER Jr., Plaintiff-Appellant,
v.
The VILLAGE OF WATERMAN, Defendant-Appellee.

Nos. 2-19-0013 and 2-19-0018 cons.
|
Opinion filed May 29, 2020
|
Rehearing denied September 29, 2020

Synopsis

Background: Pro se motorist brought actions in two separate counties against village for malicious prosecution and to punish village for its alleged failure to comply with Illinois Freedom of Information Act (FOIA) after he was issued speeding citation. After motorist sent communications via email to president of village while litigation was pending, the Circuit Court, DeKalb County, William P. Brady, J., entered an order requiring motorist to communicate only with defense counsel regarding issues in case. After motorist again sent emails directly to village president, the Circuit Court, Kendall County, Melissa S. Barnhart, J., found motorist in contempt for violating trial court order, and awarded village $2,031.16 in attorney fees and costs. Motorist appealed.

Holdings: The Appellate Court, McLaren, J., held that:

[1] rule of professional conduct prohibiting communication with parties represented by counsel applied to pro se motorist;

[2] trial court had reasonable basis for enforcing rule of professional conduct;

[3] order directing motorist to communicate only with defense counsel was not an injunction subject to interlocutory appeal;

[4] motorist's noncompliance with trial order was unreasonable, deliberate, and pronounced, and thus holding him in contempt was warranted; and

[5] trial court did not abuse its discretion by awarding village $2,031.16 in attorney fees and costs.

Affirmed.

West Headnotes (10)

[1] **Appeal and Error** ⇐ Trial

The appellate court reviews for an abuse of discretion trial court's orders pertaining to its inherent authority to control course of litigation. Ill. Const. art. 6, § 1.

[2] **Attorneys and Legal Services** ⇐ Standards of professional conduct

Rule of professional conduct, which governed communications between parties to litigation represented by counsel, applied to motorist even though he chose to represent himself in action against village for malicious prosecution and failure to comply with Illinois Freedom of Information Act (FOIA) after he was issued speeding citation, where pro se litigant was held to same standard as licensed attorney. Ill. Const. art. 6, § 1; 5 Ill. Comp. Stat. Ann. 140/1; 735 Ill. Comp. Stat. Ann. 5/1-104; Ill. R. Prof. Conduct 4.2.

[3] **Attorneys and Legal Services** ⇐ Compliance with Standards and Rules

Pro se litigants must comply with the same rules and are held to the same standards as licensed attorneys.

[4] **Attorneys and Legal Services** ⇐ Standards of professional conduct

Trial court had a reasonable basis for enforcing the protections of rule of professional conduct, which governed communications between parties to litigation represented by counsel, against pro se motorist, who brought action against village for malicious prosecution after receiving speeding citation and sent email

communications directly to village president rather than defense counsel; motorist was held to same standard as licensed attorney, emails sent to village president were hostile and harassing, fact that motorist chose to represent himself did not deprive village of protections of rule, and protecting the village from motorist's communications furthered the public policy pertaining to confidential and fiduciary nature of attorney-client relationship. Ill. Const. art. 6, § 1; Ill. Sup. Ct. R. 201(c)(1); Ill. R. Prof. Conduct 4.2.

[5] **Appeal and Error** ⇐ Injunction

Order directing pro se plaintiff to communicate only with municipal defendant's counsel and not defendant regarding lawsuit was not an injunction subject to interlocutory appeal in action alleging violation of Illinois Freedom of Information Act (FOIA); order was procedural, deprived plaintiff of no legal right, and was entered pursuant to trial court's inherent authority consistent with State Constitution, Supreme Court rules relating to noncommunication, and public policy. 5 Ill. Comp. Stat. Ann. 140/1 et seq.; Ill. Sup. Ct. R. 307(a)(1).

[6] **Appeal and Error** ⇐ Discretion of lower court; abuse of discretion

Reversal of a trial court's decision to impose a particular sanction is only justified when the record establishes a clear abuse of discretion.

1 Cases that cite this headnote

[7] **Pretrial Procedure** ⇐ Failure to Disclose; Sanctions

A party's noncompliance with a court order is unreasonable where there has been a deliberate and pronounced disregard for a discovery rule.

[8] **Appeal and Error** ⇐ Sanctions in general

Once a court has imposed a sanction, stemming from a party's violation of a court order, the sanctioned party has the burden of establishing that the noncompliance was reasonable or justified by extenuating circumstances.

[9] **Contempt** ⇐ Disobedience to Mandate, Order, or Judgment

Pro se motorist's noncompliance with trial court order, which required him to communicate with village's defense counsel rather than president of village regarding pending litigation, was deliberate, pronounced, and unreasonable, and thus holding motorist in contempt of court for his violation of that order was warranted; after order was issued, motorist communicated directly with village twice, which indicated he had no intent to comply with order, and purpose of contempt sanction was to ensure motorist's future compliance with order, not to punish him for past conduct. Ill. Const. art. 6, § 1; Ill. R. Prof. Conduct 4.2; Ill Sup. Ct. R. 219(c).

[10] **Costs** ⇐ Nature and Grounds of Right

Trial court did not abuse its discretion by awarding village $2,031.16 in attorney fees and costs that were accrued in malicious prosecution action brought by pro se motorist, who was held in contempt and sanctioned for violating court order pertaining to direct communications with party, where award was reasonable and customary, and motorist's only argument on appeal that award was excessive was single sentence asserting that village "did not need to spend more" than $753.08, with citations of several pages of his motion to reconsider.

***1071** Appeal from the Circuit Courts of De Kalb and Kendall Counties. Nos. 17-L-72 18-CH-139, Honorable William P. Brady and Melissa S. Barnhart, Judges, Presiding.

Attorneys and Law Firms

John R. Zemater Jr., of Aurora, appellant pro se.

Bill Porter and Rita Louise Lowery Gitchell, of Chilton Yambert Porter LLP, of Geneva, for appellee.

OPINION

JUSTICE McLAREN delivered the judgment of the court, with opinion.

****714** ¶ 1 Plaintiff, John R. Zemater Jr., filed separate appeals from orders entered in his *pro se* actions against defendant, the Village of Waterman (Village). In plaintiff's De Kalb County case (appeal No. 2-19-0013), the trial court barred plaintiff from communicating directly with defendant rather than defendant's counsel. In his Kendall County case (appeal No. 2-19-0018), the court found plaintiff to be in indirect civil contempt for his noncompliance with a nearly identical order. Plaintiff also appeals from the Kendall County circuit ***1072** ****715** court's order of a monetary sanction. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 After receiving a speeding ticket issued by defendant's police department, plaintiff filed, *inter alia*, an action for malicious prosecution (appeal No. 2-19-0018) and an action to "punish" defendant for "failure to comply with the Illinois Freedom of Information Act (FOIA) [(**5 ILCS 140**/1 (West 2018))] by not providing a timely response" to his request for material purportedly related to his defense of the speeding ticket (appeal No. 2-19-0013).

¶ 4 A. Appeal No. 2-19-0018

¶ 5 Plaintiff filed his action against defendant for malicious prosecution on October 16, 2017. After filing the action, plaintiff sent an e-mail to the Village's president and board members discussing recent settlement negotiations and threatening an appeal. Plaintiff also stated in the e-mail that he was a *pro se* plaintiff, "which means that I do not have an [a]ttorney and because of that I can talk to you directly." Counsel for the Village, Bill Porter, wrote plaintiff, advising that he should direct communications in the matter to him. Defendant also requested the court to enter an order requiring plaintiff to communicate only with defense counsel regarding issues in this case. The court entered the requested order on June 21, 2018.

¶ 6 The next day, plaintiff wrote directly to the Village's president regarding his FOIA request and stating that he would abide by defendant's "cease and desist" letter and the court's order. On June 24 plaintiff wrote to Porter, stating, *inter alia* that Porter was "not doing his job" as the Village's attorney.

¶ 7 On June 26, 2018, defendant filed a petition for rule to show cause why plaintiff should not be held in contempt for his failure to comply with the June 21, 2018, order. On June 30, plaintiff again wrote an e-mail directly to the Village's president in which he stated, "I can't be held in [c]ontempt of [c]ourt for a FOIA request!" He further instructed the president that if Porter did not withdraw the motion for rule to show cause, he would file a lawsuit against the Village for trying to "bully" and "intimidate" him into not filing a FOIA request.

¶ 8 On September 26, 2018, following a hearing on the rule to show cause, the trial court found plaintiff in contempt of the June 21, 2018, order, and on October 11, 2018, defendant petitioned for an adjudication of indirect civil contempt for attorney fees and costs. The court awarded defendant $2131.16. Pursuant to plaintiff's motion for reconsideration, the court reduced the award to $2031.16.

¶ 9 B. Appeal No. 2-19-0013

¶ 10 Preliminarily, we note that plaintiff's "statement of facts" is deficient. See Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018) (the appellant's statement of facts "shall contain the facts necessary to an understanding of the case"). Plaintiff's statement consists of one, nonconforming sentence. However, because his Rule 341(h)(6) violation does not hinder our review, we choose not to strike plaintiff's statement of facts nor dismiss the appeal. *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶ 8, 386 Ill.Dec. 723, 21 N.E.3d 486.

¶ 11 Plaintiff filed his action to "punish" defendant for its untimely response to his FOIA request on June 8, 2018. After filing the action, plaintiff sent e-mails to the Village's president and its trustees proposing and revoking a settlement offer and threatening litigation. Despite receiving a letter from defendant to cease and desist direct communications with defendant and to address all communications regarding ***1073** ****716** this matter to Porter, plaintiff persisted in communicating directly with defendant and its trustees

regarding the litigation, sending an e-mail criticizing and insulting the recipients, as well as Porter.

¶ 12 Defendant filed a motion asking the trial court to order plaintiff to contact only defendant's attorney when plaintiff wished to communicate with defendant about the litigation. Defendant asserted that the order should be entered pursuant to the circuit court's inherent authority to control its own docket and to promote fairness and a confidential relationship between defendant and its attorney. Plaintiff then sent another e-mail directly to the Village's president and trustees threatening further litigation if such an order were issued.

¶ 13 On December 3, 2018, the trial court entered an order prohibiting any communications between plaintiff and defendant's representatives and ordering plaintiff to direct communications "regarding this particular case" to defendant's counsel. In response to plaintiff's concern about his right to speak to defendant's representatives at open meetings, the court stated that plaintiff's right to participate in public meetings, including to make public comment, was controlled by defendant's rules for conducting its meetings.

¶ 14 In appeal No. 2-19-0018, the propriety of the June 21, 2018, order, requiring plaintiff to communicate only with defense counsel regarding issues in this case, is central to plaintiff's appeal of the order finding him in indirect civil contempt for failure to comply with the order. See *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 586, 102 Ill.Dec. 172, 499 N.E.2d 952 (1986) (an appeal from the trial court's imposition of contempt and a fine on attorney for disobeying its order presents for review the issue of the propriety of the court's order (citing *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 174, 57 Ill.Dec. 585, 429 N.E.2d 483 (1981)). In appeal No. 2-19-0013, the propriety of the December 3, 2018, order, which is essentially identical to the June 21, 2018, order, is the only issue plaintiff raises. Accordingly, we consolidated the two appeals for dispositional purposes.

¶ 15 II. ANALYSIS

¶ 16 A. Orders Requiring Plaintiff to Communicate with Defense Counsel

[1] ¶ 17 Pursuant to article VI, section 1, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 1), which vests judicial power in the judiciary, trial courts have the inherent authority to control the course of litigation (*J.S.A. v. M.H.*, 224 Ill. 2d 182, 196, 309 Ill.Dec. 6, 863 N.E.2d 236 (2007)), including making and enforcing rules governing procedural matters. 735 ILCS 5/1-104 (West 2016); 23rd Judicial Cir. Ct. Rs. 1.0, 1.05 (Jan. 31, 2017). We review for an abuse of discretion the trial court's orders in these consolidated appeals. See *Bush v. Catholic Diocese of Peoria*, 351 Ill. App. 3d 588, 590, 286 Ill.Dec. 485, 814 N.E.2d 135 (2004) (reviewing trial court's decision to issue a protective order). A trial court abuses its discretion only when its decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take its view. *BNSF Ry. Co. v. Grohne*, 2019 IL App (3d) 180063, ¶ 42, 2019 WL 3049733.

¶ 18 Plaintiff argues that the trial court's orders of June 21, 2018, and December 3, 2018, are invalid because Illinois Rule of Professional Conduct 4.2, which addresses communication during litigation, does not apply to a *pro se* litigant. Rule 4.2 states,

> "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the ***1074** ****717** lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Ill. R. Prof'l Conduct (2010) R. 4.2 (eff. Jan.1, 2010).

[2] **[3]** ¶ 19 Although Rule 4.2 references the conduct of a "lawyer," we note that the rule's title, "Communication with Person Represented by Counsel," suggests that the focus of the rule is less the status of the party doing the communicating than the status of the person with whom the party is trying to communicate. In any event, it is axiomatic that *pro se* litigants "must comply with the same rules and are held to the same standards as licensed attorneys." (Internal quotation marks omitted.) *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78, 369 Ill.Dec. 659, 987 N.E.2d 1 (the rules must be complied with by "parties choosing to represent themselves without a lawyer"). Plaintiff, a party who chooses to represent himself, is therefore subject to Rule 4.2.

¶ 20 To support his argument that—Rule 4.2 rule does not apply to a *pro se* litigant—plaintiff cites *In re Segall*, 117 Ill. 2d 1, 109 Ill.Dec. 149, 509 N.E.2d 988 (1987), a case that does not mention *pro se* representation but holds that a lawyer who chooses to represent himself in litigation must comply with the rule. *Id.* at 6, 109 Ill.Dec. 149, 509 N.E.2d 988 (Rule 4.2 "is designed to protect litigants represented by counsel

from direct contacts by opposing counsel"). The *Segall* court reasoned: "[a] party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation." *Id.* Similarly, a party represented by counsel does not lose this protection simply because the opposing party has chosen to represent himself.

[4] ¶ 21 Here, given the persistence and hostility of plaintiff's direct communication with defendant and plaintiff's misapprehension of the law, the trial court had a reasonable basis for enforcing the protection of Rule 4.2. See Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014) (providing for protective orders to prevent abuse during discovery). Protecting defendant under these circumstances also furthered public policy regarding the confidential and fiduciary nature of the attorney-client relationship. If the physician-patient relationship can be thwarted by circumventing he opposing party's attorney, it would appear the attorney-client relationship would be similarly circumvented by a party communicating with an opposing party directly, over that party's objection—especially when the opposing party requests and procures an order proscribing such activity. *Cf. Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 587-88, 102 Ill.Dec. 172, 499 N.E.2d 952 (1986) (prohibiting defendants and their attorneys from engaging in *ex parte* discussions with the injured plaintiff's treating physicians where "public policy strongly favors the confidential and fiduciary relationship existing between a patient and his physician").

[5] ¶ 22 Finally, in appeal No. 2-19-0013, plaintiff appeals the trial court's order under Illinois Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017), contending that the order is an injunction or "gag order" and, therefore, subject to interlocutory appeal as of right. Even if the court's order were considered an injunction, the court had a reasonable basis for enjoining plaintiff's harassing contacts with defendant. However, the order is not an injunction. In requiring plaintiff to contact only defendant's attorney and not defendant regarding this lawsuit, the court exercised its inherent authority consistent with Illinois's constitution, supreme court rules relating ***1075** ****718** to noncommunication, and public policy. The order is procedural and deprives plaintiff of no legal right, such as the rights to make a FOIA request or participate in the Village's public meetings. Our jurisdiction over this appeal derives solely from the final judgment entered by the trial court on May 29, 2019, which dismissed the case with prejudice, and its subsequent denial of plaintiff's motions to reconsider and for leave to file a second-amended complaint.

¶ 23 B. Contempt and Monetary Sanction

¶ 24 Plaintiff first contends that the order directing him to communicate only with defendant's counsel was improperly entered. As explained above, we reject this argument. Plaintiff's second and third contentions are that the court improperly found him in indirect civil contempt for failing to follow the court's order and improperly entered a monetary sanction of $2031.16.

¶ 25 Article II, part E, of the Illinois Supreme Court rules addresses pretrial procedure in civil cases in the trial court. Illinois Supreme Court Rule 201(c)(1) (eff. July 1, 2014), provides:

> "(c) Prevention of Abuse.
>
> (1) Protective Orders. The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression."

Illinois Supreme Court Rule 219(c) (eff. July 2, 2001) provides, *inter alia*:

> "[T]he court, upon motion or upon its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is willful, a monetary penalty. When appropriate, the court may, by contempt proceedings, compel obedience by any party * * * to any * * * order entered under these rules."

[6] **[7]** **[8]** ¶ 26 "Reversal of a trial court's decision to impose a particular sanction is only justified when the record establishes a clear abuse of discretion." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 67, 209 Ill.Dec. 623, 651 N.E.2d 1071 (1995). "A party's noncompliance is 'unreasonable' where there has been a deliberate and pronounced disregard for a discovery rule." *H & H Sand & Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 242, 198 Ill.Dec. 367, 632 N.E.2d 697 (1994). Once a court has imposed a sanction, "the sanctioned party has the burden

of establishing that the noncompliance was reasonable or justified by extenuating circumstances." *In re Estate of Andernovics*, 311 Ill. App. 3d 741, 746, 244 Ill.Dec. 271, 725 N.E.2d 382 (2000).

[9] ¶ 27 Here, plaintiff's noncompliance was unreasonable due to his deliberate and pronounced disregard for the pretrial rule. The trial court entered the order requiring plaintiff to communicate only with defense counsel regarding this matter on June 21, 2018. The next day, June 22, plaintiff wrote directly to defendant stating he would abide with defendant's "cease and desist" letter and the court's order but would still pursue his FOIA request. On June 30, after defendant filed a motion for a rule to show cause why he should not be held in contempt, plaintiff again wrote directly to defendant stating, "I can't be held in [c]ontempt of [c]ourt for a FOIA request!" He threatened defendant that, if defendant's counsel did not withdraw the ***1076** ****719** motion for a rule to show cause, he would file a lawsuit against defendant for trying to "bully" and "intimidate" him into not filing a FOIA request. Thus, plaintiff improperly communicated directly with defendant twice within nine days of the court's order barring him from doing so.

¶ 28 Plaintiff contends that the June 22 communication "purged" him of any contempt because he stated he would abide by the court's order; therefore, the court's contempt sanction was entered not to coerce his compliance with the order but solely to punish him for past misconduct. See *First Midwest Bank/Danville v. Hoagland*, 244 Ill. App. 3d 596, 611-12, 184 Ill.Dec. 250, 613 N.E.2d 277 (1993) (distinguishing civil contempt sanctions, such as plaintiff's, from criminal contempt sanctions). We disagree.

¶ 29 If plaintiff intended to abide by the court's order, he would have directed his communication on June 22 to defendant's counsel, not defendant. His June 30 direct communication with defendant in response to the motion for rule to show cause further indicates no intent to abide by the order. In that e-mail, plaintiff warned that he would sue defendant if the motion for a rule to show cause was not withdrawn. The trial court characterized the June 30 communication as "threatening." The purpose of the contempt sanction was clearly to ensure plaintiff's present and future compliance with the order, not to punish him for past conduct. The contempt finding was not an abuse of discretion.

[10] ¶ 30 Nor was the monetary sanction an abuse of the court's discretion. Following a hearing on defendant's affidavit of the costs and fees incurred adjudicating the indirect civil contempt hearing, the court found an award of $2031.16 to be reasonable and customary. Plaintiff's only argument on appeal that the award is excessive is a single sentence asserting that defendant "did not need to spend more than $753.08," with citations of several pages of his motion to reconsider. See *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855, 311 Ill.Dec. 951, 869 N.E.2d 964 (2007) ("A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.)).

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgments of the circuit courts of De Kalb and Kendall Counties.

¶ 33 Affirmed.

Justices Jorgensen and Brennan concurred in the judgment and opinion.

All Citations

2020 IL App (2d) 190013, 157 N.E.3d 1069, 441 Ill.Dec. 712

2020 IL App (4th) 190192-U

Appellate Court of Illinois, Fourth District.

Nolan WATSON, Plaintiff-Appellant,

v.

Lisa WEITEKAMP, in Her Official Capacity as Freedom of Information Officer for the Department of Corrections, Defendant-Appellee.

NO. 4-19-0192

FILED May 6, 2020

Appeal from the Circuit Court of Sangamon County, No. 18MR689, Honorable Jack D. Davis II, Judge Presiding.

ORDER

JUSTICE DeARMOND delivered the judgment of the court.

***1** ¶ 1 *Held*: The appellate court affirmed, holding the trial court properly granted defendant's motion to dismiss because plaintiff failed to state a cause of action under Illinois's Freedom of Information Act.

¶ 2 In September 2018, plaintiff filed *pro se* a motion for preliminary injunctive relief, naming as individual defendants: Lisa Weitekamp, Freedom of Information Act (FOIA) Officer for the Illinois Department of Corrections (DOC); Melinda Graves, Medical Records Director for Western Illinois Correctional Center; and Mark Stephenson, an employee of Western Illinois Correctional Center's records office. In later court filings, plaintiff named only one defendant: Lisa Weitekamp. Plaintiff alleged four claims: (1) Weitekamp improperly denied his FOIA requests; (2) by denying his FOIA requests Weitekamp violated his due process and equal protection rights under the federal and state constitutions; (3) by improperly denying his FOIA requests Weitekamp converted his personal property, *i.e.*, the public records he rightly requested; and (4) by denying his FOIA requests Weitekamp inflicted upon him cruel and unusual punishment and intentional emotional distress. In November 2018, defendant filed a motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2018)), arguing plaintiff failed to state a claim for relief under FOIA and sovereign immunity barred plaintiff's remaining three claims. Plaintiff responded to defendant's section 2-619.1 motion by filing three motions of his own: Motion for leave to File an Amended Complaint for Injunctive Relief, Motion to Issue a Specific Order, and Motion for Costs and Civil Penalties. Following a telephonic hearing on March 5, 2019, the trial court granted defendant's motion, dismissing plaintiff's complaint with prejudice. The court also denied plaintiff's other pending motions.

¶ 3 On appeal, plaintiff argues the trial court erroneously granted defendant's motion to dismiss. Interestingly, plaintiff limits his argument on appeal to his FOIA claim only, conceding in his reply brief: "Plaintiff's non-FOIA claims are no longer relevant in this cause and all arguments may be deemed moot in Defendant's brief pages 20-27." In accordance with plaintiff's concession, we limit our review to only his FOIA argument—*i.e.*, the trial court mistakenly granted defendant's motion to dismiss because defendant errantly denied his FOIA requests thereby entitling plaintiff to relief. We disagree and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In July 2018, though he designated his requests by letter we designate them by number, plaintiff submitted this verbatim FOIA request to DOC:

> 1. Books: Black's Law Dictionary, ILCS statutory citations books, and books on how to draft all legal forms.
>
> 2 Statutory and procedural rules for job assignments restrictions, based of specific sex offenses charged with. And all persons or number of persons that presently work and have worked at any IDOC institution with a sex offense case, distinguish between the two.
>
> ***2** 3. The names of each ILL. Prison that allows people charged with sex offense cases to work jobs.
>
> 4 Number of times a person convicted of a sex offense violated law while working at Western IL. C.C.

5. Policy of clothing distribution annually or semi annually to inmates, based off legislative intent and fiscal obligations, including how much money is allocated per year for each inmate, for the following items: T-shirts, underwear, socks, coats, state blues, shoes, bedding, hygiene, sanitary cleaning supplies. And an itemized list of all items allocated to be distributed annually, semi annually, monthly, weekly, or daily for Western Illinois Correctional Center.

6. Guidelines on denials of law library access to necessary books, notarizations, attendance copies.

7. Guidelines on denial of access to hot water, for cleaning, washing, sanitizing, bathing, and drinking.

8. Legislative intent and guidelines for state pay.

9. The amount of cleaning and sanitation supplies allotted to inmates each week, or day for cell cleaning only.

10. The names of supervising Authority of the records office and Business office at Western ILL. Correctional Center.

¶ 6 In her official capacity as DOC's Freedom of Information officer, defendant labeled plaintiff's request as Freedom of Information Request #180723266 and issued a response denying the request on July 24, 2018. Defendant provided responses to plaintiff's individual requests. For request 1, defendant responded: "IDOC does not maintain or possess records responsive to your request." For requests 2-4 and 6-10, defendant responded: "You have not submitted a request for records. A reasonable description requires the requested records to be reasonably identified as a record, not as a general request for data, information, and statistics. (*Krohn v. Department of Justice*, 628 F.2d 195 (D.D. Cir. 1980)." For request 5, defendant responded:

"Clothing policies are maintained in your facility's library and are denied pursuant to Section 7(1)(e-5) of the FOIA, which exempts the release of "records requested by persons committed to the Department of Corrections if those materials are available in the library of the correctional facility where the inmate is confined. The remainder of your request is not a request for records. A reasonable description requires the requested records to be reasonably identified as a record, not as a general request for data, information, and statistics. (*Krohn v. Department of Justice*, 628 F.2d 195 (D.D. Cir. 1980)."

¶ 7 On August 10, 2018, plaintiff appealed the denial of his FOIA requests to Illinois's Public Access Counselor. The same day, plaintiff submitted additional FOIA requests to defendant, asking for the following: his medical records; records explaining why it is free to get materials from the law library at Pontiac Correctional Center; an itemized list of all legal books available at the Pontiac Correctional Center library; and procedures for obtaining shepardizations, case law, and notarizations and any restrictions for all DOC institutions. After plaintiff narrowed this latter request, defendant responded by granting it in part and denying it in part. Defendant granted plaintiff's request for records explaining why Pontiac Correctional Center provides shepardizations and case law for free, but denied the remaining requests for one of two reasons; either DOC did not possess or maintain responsive records or plaintiff requested information and failed to reasonably describe a record.

***3** ¶ 8 Plaintiff filed a complaint he styled a "Motion for Preliminary Injunction Relief," in September 2018. Plaintiff initially named several defendants, but in later court filings plaintiff identified one defendant, Lisa Weitekamp, in her official capacity as DOC's Freedom of Information officer. As is relevant to this appeal, plaintiff alleged defendant cited improper exemptions and reasons for denying his FOIA requests. In November 2018, defendant moved to dismiss plaintiff's complaint pursuant to Illinois's Code of Civil Procedure section 2-619.1, arguing, in relevant part here, plaintiff's complaint failed to state a claim for relief. And in a subsequent objection to plaintiff's motion to file an amended complaint, defendant argued for dismissal because FOIA does not provide a cause of action against individuals, but only against a "public body." Following a telephonic hearing in March 2019, the trial court granted defendant's motion to dismiss with prejudice, finding: "Plaintiff's complaint fails as a matter of law."

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Plaintiff contends the trial court erred in granting defendant's motion to dismiss. Specifically, plaintiff argues "the allegations of plaintiff's amended complaint, and his reply to defendant's motion to dismiss, when construed in the light most favorable to plaintiff was sufficient to establish

a cause of action upon which relief could be granted." We disagree and affirm the trial court's judgment.

¶ 12 Section 2-619.1 of the Code permits combining into one motion those motions regarding the pleadings under section 2-615 of the Code and motions for involuntary dismissal or other relief under section 2-619. 735 ILCS 5/2-619.1 (West 2018). Here, defendant's section 2-619.1 motion to dismiss included an argument that "plaintiff's FOIA claim should be dismissed pursuant to [section] 2-615 because he cannot state a claim for relief." Since plaintiff deemed his non-FOIA claims "no longer relevant in this cause," we will consider defendant's section 2-615 argument for dismissal only.

¶ 13 "A section 2-615(a) motion to dismiss tests the legal sufficiency of the complaint based on defects apparent on its face." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. In plainest terms, a defendant filing a section 2-615 motion to dismiss a plaintiff's complaint asks, "So what? The facts the plaintiff has pleaded do not state a cause of action against me." *Winters v. Wangler*, 386 Ill. App. 3d 788, 792, 989 N.E.2d 776, 779 (2008). When presented with a section 2-615 motion, a court must consider "whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, are sufficient to entitle the plaintiff to relief as a matter of law." *Winters*, 386 Ill. App. 3d at 793. If the alleged facts prove insufficient to warrant relief for the plaintiff, the trial court should dismiss the action. Put differently, dismissal under section 2-615 is proper if a complaint does not establish a cause of action upon which relief may be granted. *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 13, 79 N.E.3d 184. We review *de novo* a trial court's order granting a motion to dismiss under section 2-615. *Grant v. State*, 2018 IL App (4th) 170920, ¶ 12, 110 N.E.3d 1089.

¶ 14 On appeal, defendant reinforces her section 2-615 argument against plaintiff's complaint, essentially saying —"So What? The facts the plaintiff has pleaded do not state a cause of action *against me.*" (Emphasis added) *Winters*, 386 Ill. App. 3d at 792. Specifically, defendant argues that she, even in her official capacity as DOC's FOIA officer, is not a proper defendant to plaintiff's action because she is not a "public body" under Illinois' Freedom of Information Act (**5 ILCS 140**/1.1 *et seq.* (West 2018)) (FOIA or the Act). We agree with defendant and affirm the trial court's dismissal under section 2-615.

¶ 15 We have recognized "the purpose of FOIA 'is to open governmental records to the light of public scrutiny.' " *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 29, 992 N.E.2d 629 (quoting *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 405, 910 N.E.2d 85, 91 (2009)). In furthering that purpose, FOIA "mandates that 'each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in [the Act].' " (Emphasis omitted.) *Stern*, 233 Ill. 2d at 405 (quoting **5 ILCS 140**/3(a) (West 2006)). As mandated providers of public records requested pursuant to FOIA, "public bodies" play the central role in effectuating the Act. For example, requests must be submitted and directed to a "public body," (**5 ILCS 140**/3(c) (West 2018)); a "public body" must "designate [a] *** Freedom of Information officer or officers *** [to] receive requests submitted to the public body under this Act, ensure that the public body responds to the request in a timely fashion, and issue responses," (**5 ILCS 140**/3.5(a) (West 2018)); and a "public body" must promptly respond to requests for public records. **5 ILCS 140**/3(b), (d) (responding to requests generally), 3.1 (responding to requests for commercial purposes), 3.2 (responding to recurrent requester), 3.6 (responding to voluminous requests) (West 2018).

*4 ¶ 16 Since the burden of responding to public records requests under FOIA falls upon the public body, when it fails to produce the requested records, the requester may seek to enforce the Act against the public body. Indeed, FOIA provides that "any person denied access to inspect or copy any public record by a public body may file suit for injunctive relief or declaratory relief," (**5 ILCS 140**/11(a) (West 2018)); and "[t]he circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access." **5 ILCS 140**/11(d) (West 2018); see also **5 ILCS 140**/11(b), (c) (West 2018). Moreover, the trial court may enforce its order against the public body by imposing civil penalties on the public body. **5 ILCS 140**/11(j) (West 2018). Taken together, these FOIA sections provide two reasons why petitioners, like plaintiff here, may only prosecute a legal action to enforce the Act against a public body. First, as we have said, it is the public body—not the individual—who is tasked with receiving and responding to FOIA requests. Second, FOIA gives the circuit court jurisdiction over the *public body.*

¶ 17 FOIA defines a "public body" as follows:

> "[A]ll legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School code." **5 ILCS 140**/2(a) (West 2018).

We previously observed that "section 2(a) does not include individual members of those bodies in its definition of 'public body.' " (Emphasis omitted.) *City of Champaign*, 2013 IL 120662, ¶ 33. It is neither a logical nor jurisprudential leap, then, to observe now that section 2(a)'s definition of "public body" does not include employees in those bodies, like Freedom of Information officers or other individuals acting in their official capacities. Indeed, the First District twice reached the same conclusion in *Korner v. Madigan*, 2016 IL App (1st) 153366, 69 N.E.3d 892 and *Quinn v. Stone*, 211 Ill. App. 3d 809, 570 N.E.2d 676 (1991). We find *Korner* particularly instructive.

¶ 18 There, the plaintiff filed a complaint naming as defendants several public officers acting in their official capacities and alleging those defendants "violated [her] rights under the Illinois FOIA by withholding the documents she sought." *Korner*, 2016 IL 153366, ¶ 6. The defendants filed a motion to dismiss, arguing "the Illinois FOIA applies only to public bodies, and not to individual public officers," but the trial court denied their motion. *Korner*, 2016 IL 153366, ¶ 6. On appeal, the First District explained our "General Assembly patterned the Illinois FOIA after the federal FOIA," (*Korner*, 2016 IL 153366, ¶ 10), and "[f]ederal courts have consistently held that 'the Freedom of Information Act authorizes suit against federal agencies, not against individuals.' " *Korner*, 2016 IL 153366, ¶ 1 (quoting *Morpurgo v. Board of Higher Education*, 423 F. Supp. 704, 714 n.26 (S.D.N.Y. 1976)). Consequently, the First District concluded: "Because Korner named as defendants only individuals, and not any public body, the trial court should have dismissed the complaint on the basis of the failure to name a proper defendant." *Korner*, 2016 IL 153366, ¶ 11 (citing *Quinn v. Stone*, 211 Ill. App. 3d 809, 811, 570 N.E.2d 676 (1991) (holding "[t]he trial court properly dismissed plaintiff's complaint *** on the basis that defendant is not a 'public body' as defined under the FOIA")).

¶ 19 In light of FOIA's provisions and the *Korner* opinion, we conclude that in order to state a FOIA cause of action that would entitle the plaintiff to relief, the plaintiff must name a public body as a defendant, not an individual as a defendant—even if that individual is a public officer acting in her official capacity. And this is where the rubber meets the road in this case. Plaintiff failed to name a public body in his complaint. He named several individuals—including defendant Lisa Weitekamp—in their official capacities. Later, he limited his action to one defendant, Lisa Weitekamp, and averred the following in his motion for leave to file an amended complaint: "This complaint for injunctive relief, does not seek to control or enjoin the actions of, or impose sanctions on the I.D.O.C, only the actions of Lisa Weitekamp, the FOIA officer for the I.D.O.C. No other defendants are named in this action, nor were any served any summons." Not only did plaintiff fail to name a "public body" as defendant, but he eschewed any implication that he sought to enjoin a "public body" through Weitekamp. This is not a mere oversight that we can now overlook or excuse because FOIA and *Korner* make clear that plaintiffs can only sue a public body to enforce FOIA claims. Since plaintiff failed to name a "public body" as a defendant to his FOIA claim, he failed to plead a cause of action that would entitle him to relief from a court and the trial court properly dismissed his complaint under section 2-615.

¶ 20 III. CONCLUSION

*5 ¶ 21 For the reasons stated, we affirm the trial court's judgment.

¶ 22 Affirmed.

Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (4th) 190192-U, 2020 WL 2790475

End of Document

2020 IL App (3d) 170158-U

Jamal SHEHADEH, Plaintiff-Appellant,

v.

Sheriff Michael DOWNEY, Defendant-Appellee.

Appeal No. 3-17-0158

Order filed February 5, 2020

Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois, Appeal No. 3-17-0158, Honorable Adrienne W. Albrecht, Judge, Presiding.

ORDER

JUSTICE HOLDRIDGE delivered the judgment of the court.

***1** ¶ 1 *Held*: (1) The trial court properly dismissed the plaintiff's complaint under the Illinois Freedom of Information Act (FOIA) pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure because the information sought by the claimant was either not a "public record" kept by the public body or was exempt from disclosure under section 7 of the Act; (2) the trial court properly dismissed the plaintiff's claims for sanctions and for civil penalties under FOIA; (3) the plaintiff's claim for costs under FOIA was forfeited; and (4) plaintiff's motions on appeal for costs, sanctions, and a protective order were denied.

¶ 2 Plaintiff Jamal Shehadeh (Shehadeh), acting *pro se*, filed a complaint against the Sheriff of Kankakee County, Illinois (the Sheriff) pursuant to the Illinois Freedom of Information Act (FOIA, or the Act) (**5 ILCS 140**/1 *et seq.* (West 2016)).[1] Shehadeh had submitted several requests for documents and other materials under FOIA while he was detained at the Jerome Combs Detention Center (JCDC) in Kankakee County. In his complaint, Shehadeh alleged that he did not receive the documents he requested in a timely manner under the Act and that the Sheriff continued to withhold such documents unlawfully. Shehadeh later filed a motion for civil penalties under the Act to redress what he characterized as the Sheriff's willful and intentional violations of the Act. He also filed a motion for sanctions against the Sheriff's counsel for allegedly disclosing Shehadeh's private and confidential medical information in a public filing. After Shehadeh filed his complaint, the Sheriff provided Shehadeh with some of the documents he requested without being compelled to do so by a court order.

¶ 3 The Sheriff filed a combined 2-615 and 2-619 motion to dismiss Shehadeh's FOIA claims under section 2.619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). The Sheriff argued that Shehadeh's complaint failed to state a claim under section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) because it did not identify the dates his alleged FOIA requests were made, the substance of any of such requests, or the records sought. In addition, the Sheriff argued that Shehadeh's FOIA claims should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(9) (West 2016)) because disclosure of the documents sought by Shehadeh would threaten the safety and security of inmates and staff at JCDC, and such documents were therefore exempt from disclosure under section 7 of the Act. The Sheriff supported his 2-619(9) motion to dismiss with an affidavit of Chad Kolitwenzew, the Chief of Corrections for Kankakee County, who testified as to various safety and security concerns he claimed were raised by Shehadeh's FOIA requests. The Sheriff also opposed Shehadeh's motions for civil penalties and sanctions. In opposition to the Sheriff's dismissal motions, Shehadeh argued, *inter alia*, that Chief Kolitwenzew's affidavit was conclusory and failed as a matter of law to satisfy the Sheriff's burden to establish by clear and convincing evidence that certain materials sought by Shehadeh were exempt from disclosure under section 7 of the Act.

***2** ¶ 4 The trial court dismissed Shehadeh's complaint under both sections 2-615 and 2-619, but it dismissed Shehadeh's complaint *with prejudice* based upon its finding that the documents sought by Shehadeh were exempt from disclosure under the Act (*i.e.*, based entirely upon the arguments raised in the Sheriff's section 2-619 motion). The trial court also dismissed Shehadeh's claims for civil penalties and sanctions. The court directed the Sheriff's counsel to submit a written Order to that effect for the court to sign and enter. Twelve days after the trial court issued its oral ruling, and one day

before the trial court issued its final written judgment order, Shehadeh filed a verified motion for costs arguing that he was entitled to recover the out-of-pocket costs he incurred while pursuing his FOIA claims, including copying and postage costs. On March 6, 2017, Shehadeh filed his notice of appeal. The final judgment order that Shehadeh appealed did not address Shehadeh's motion for costs.

¶ 5 Shehadeh has appealed the trial court's judgment. While his appeal was pending, Shehadeh filed several motions with this court, including a motion for sanctions against the Sheriff's counsel, a motion for protective order under Illinois Supreme Court Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014), and, on July 26, 2019, a motion for leave to supplement the record on appeal with the transcript of the February 15, 2017, hearing on the Sheriff's combined motion to dismiss. We took the first two motions with the case and granted Shehadeh 30 days to file the February 15, 2017, hearing transcript as a supplemental record. Thereafter, Shehadeh sought two additional extensions of time in which to file the supplemental record, which we granted. The supplemental record was filed with this court on November 19, 2019.

¶ 6 FACTS

¶ 7 Shehadeh is a federal inmate who was detained at JCDC from August 17, 2016, through September 12, 2016, pursuant to an Intergovernmental Agreement (IGA) between the U.S. Marshalls Service and the Kankakee County Sheriff's Office (KCSO). During the 27 days that he was detained at JCDC, Shehadeh filed 66 grievances and other requests utilizing the JCDC inmate kiosk system.

¶ 8 Some of Shehadeh's requests were styled as FOIA requests. Specifically, Shehadeh requested the following documents and other materials under FOIA: (1) a complete paper copy of his inmate file; (2) all e-mails and other correspondence to or from any KCSO employee relating to Shehadeh; (3) the IGA between the U.S. Marshals Service and the KCSO regarding the housing of federal detainees at JCDC; (4) The U.S. Marshalls Service Form 129 (an "Individual Custody/Detention Report") created and used by the U.S. Marshals Service in preparation for the entry of one of their detainees into another facility); (5) any text messages sent or received from the Sheriff's personal and work cell phones from August 15, 2016, through August 19, 2016; (6) an electronic copy of Shehadeh's booking photo; (7) paper copies of all emails concerning Shehadeh sent to or from the Chief of Corrections, the Assistant Chief of Corrections, the Classification officer, and any other KSCO employee from August 18, 2016, until the request is fulfilled; (8) video footage taken on August 29, 2016, between noon and 1:00 p.m., which Shehadeh alleged recorded an incident of excessive force that Shehadeh witnessed a sergeant commit upon another inmate in JCDC's "E-pod"; (9) copies of all reports and communications regarding the alleged August 29, 2016, incident and any records indicating the identities of all KCSO employees present at the incident, including their personnel files and any "disciplinary and misconduct info" contained therein; (10) paper copies of any records indicating what "Google" or other internet search engine queries were made by any KCSO employee during the September 11, 2016, jail shift between 3:00 p.m. and 11:00 p.m. (including records identifying which employees made the searches and from which location, the duration of time that KCSO employees spent on the internet, and any other related information); (11) the amount of hourly wages paid to KCSO employee's during the aforementioned shift, and the number of aggregate man hours worked by employees during that shift; (12) records showing KCSO "individual staff and work station response times to cell and pod call buttons and any records that can show what if any internet searches were being performed during the times call buttons went unanswered for longer than thirty seconds or were reactivated immediately after staff acknowledgement"; and (13) a copy of the electronic record of a phone call that "was placed from Flex A" in JCDC and "spanned the period of approximately 2100-2105 hours."

*3 ¶ 9 On September 14, 2016, Shehadeh filed a verified complaint against the Sheriff and other KCSO employees pursuant to FOIA. In his complaint, Shehadeh alleged that he had submitted "a number of" unspecified FOIA requests through the JCDC's inmate kiosk system and that the Sheriff had refused one of his requests without explanation, failed to timely respond to the others, and continued to unlawfully withhold public information that Shehadeh had requested. The complaint did not attach copies of any of Shehadeh's FOIA requests or otherwise identify the contents of any such request. Shehadeh sought an order compelling the release of the records he requested plus civil penalties in the amount of $5,000 for each FOIA violation committed by the defendants. He later moved for sanctions under Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. June 14, 2013) to redress what he characterized as the Sheriff's willful and intentional violations of the Act.

¶ 10 After Shehadeh filed his complaint, the Sheriff voluntarily provided Shehadeh with some of the documents he requested without being compelled to do so by a court order. On October 14, 2016, the Sheriff provided Shehadeh with his booking photograph, copies of the grievances he had filed and his grievance history report, his inmate management card, and his inmate booking card. However, the Sheriff refused to provide the other documents and materials requested by Shehadeh.

¶ 11 On October 18, 2016, the Sheriff filed a combined 2-615 and 2-619 motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016). The Sheriff argued that Shehadeh's claims should be dismissed pursuant to section 2-615 because his complaint failed to state a cause of action under FOIA. The Sheriff further maintained that Shehadeh's claims should be dismissed under section 2-619(a)(9) for various reasons. Specifically, the Sheriff contended that: (1) Shehadeh's claims for any records already released by the Sheriff were moot; and (2) the remaining documents and other materials sought by Shehadeh were properly withheld because such documents were either unidentifiable, did not constitute "public records" kept or maintained by the Sheriff's Department, or were exempt from disclosure under section 7 of FOIA (**5 ILCS 140**/7 (West 2016)). The Sheriff supported his 2-619(a)(9) motion to dismiss with the affidavit of Chad Kolitwenzew, the Chief of Corrections for Kankakee County, who testified as to various safety and security concerns he claimed were raised by Shehadeh's FOIA requests.

¶ 12 On December 29, 2016, Shehadeh filed a response to the Sheriff's motion to dismiss and a motion for leave to file a proposed amended complaint that attached the FOIA requests at issue. Shehadeh argued that his initial complaint had alleged facts sufficient to state a cause of action under FOIA and, to the extent the trial court concluded otherwise, his proposed amended complaint cured any pleading deficiencies in his initial complaint. Thus, he contended that his complaint was not subject to dismissal under section 2-615. Shehadeh further maintained that his FOIA complaint was not subject to dismissal under section 2-619 because Chief Kolitwenzew's affidavit was conclusory and was insufficient as a matter of law to establish that any of the requested materials were exempt from disclosure under the Act.

¶ 13 Shehadeh also argued that he was entitled to civil penalties under section 11(j) of the Act (**5 ILCS 140**/11(j) (West 2016)) because the Sheriff had "willfully and intentionally" failed to respond to Shehadeh's FOIA requests and notify him of his review rights within 5 days, as prescribed by the Act. He sought a declaratory judgment that the Sheriff's failure to respond to his FOIA requests was willful and intentional plus penalties of "no less than $2,5000" for each of the Sheriff's allegedly willful and intentional violations of the Act.

***4** ¶ 14 Among other motions, Shehadeh also filed a motion for sanctions against the Sheriff's counsel. In that motion, Shehadeh stated that, when the Sheriff's counsel filed the affidavit of Chief Kolitwenzew in support of the Sheriff's motion to dismiss on October 17, 2016, counsel attached to the affidavit descriptions and copies of communications between Shehadeh and various KCSO employees that were sent or received via the KCSO's jail kiosk system, some of which contained Shehadeh's private and confidential medical information that was prohibited from public disclosure under FOIA and "HIPAA." Shehadeh claimed, immediately after this information was publicly filed, Shehadeh e-mailed the Sheriff's counsel and asked him to redact or otherwise remove such confidential information but that, as of December 29, 2016, counsel had not done so. Shehadeh asked the court to order the Sheriff's counsel to "immediately remove [Shehadeh's] private data from public view, to "refer[ ] the matter to the ARDC," and to "impose a monetary sanction" against counsel.

¶ 15 The Sheriff filed a reply in support of its motion to dismiss and a response to the new motions raised by Shehadeh. The Sheriff argued that Chief Kolitwenzew's affidavit established that several of the documents and other materials sought by Shehadeh were exempt from disclosure because disclosure of such materials would threaten safety or security at JCDC, and that other documents requested by Shehadeh were either not public records maintained by the public body or were otherwise not subject to FOIA. The Sheriff further argued that Shehadeh's proposed amended complaint did not cure the deficiencies contained in his initial complaint. Moreover, the Sheriff maintained that, because the records sought by Shehadeh had either been provided to Shehadeh, were not public records, or were exempt from disclosure under FOIA, Shehadeh had failed to carry his burden of proving that the Sheriff had violated FOIA willfully or in bad faith, and was therefore not entitled to civil penalties under section 11(j) of the Act. In addition, the Sheriff argued that the trial court should dismiss Shehadeh's complaint as a sanction under its inherent authority to dismiss harassing and vexatious litigation.

¶ 16 On February 15, 2017, the trial court held a hearing on the Sheriff's motion to dismiss and on Shehadeh's outstanding motions. Shehadeh did not appear at the hearing.[2] After outlining several examples of what he characterized as Shehadeh's "profligate" litigiousness, the Sheriff urged the trial court to dismiss Shehadeh's complaint pursuant to its inherent authority to control its docket and to prevent frivolous filings. On the merits, the Sheriff argued that, notwithstanding his proposed amended complaint, Shehadeh had failed to state a cause of action under FOIA and that Shehadeh's failure to file a counter-affidavit in opposition to Chief Kolitwenzew's affidavit required that all of the facts asserted in Kolitwenzew's affidavit be deemed admitted. The Sheriff further argued that: (1) Chief Kolitwenzew's affidavit established that several of the materials requested by Shehadeh were exempt from disclosure for safety and security reasons; and (2) other materials sought by Shehadeh were not public records kept or maintained by the Sheriff's Department; and (3) the trial court should dismiss Shehadeh's motion for civil penalties and his "frivolous" motion for sanctions.

¶ 17 At the conclusion of the February 15, 2007, hearing, the trial court orally granted the Sheriff's motion to dismiss from the bench, stating that, "[t]he motion to dismiss with prejudice is allowed based on the unresponded to-affidavits, based on the lack of * * * a statement of a cause of action. But * * * it's the 2-619 aspect of your motion that causes the Court to decide to dismiss * * * the complaint with prejudice." The trial court asked the Sheriff's counsel to provide the court with a written order consistent with its oral ruling. Clarifying its ruling for counsel, the trial court stated, "I'd like you to give me an order so that on review, it is apparent that the reasoning is that * * * [Shehadeh's] requests fit within the [FOIA} exceptions and that * * * therefore, it's substantive, rather than just you didn't state a cause of action." The trial court also denied Shehadeh's motions for civil penalties and sanctions. The transcript of the February 15, 2017, hearing does not reflect that Shehadeh's December 29, 2016, motion for leave to file an amended complaint was expressly ruled upon by the trial court.

*5 ¶ 18 On February 17, 2017, the Sheriff's counsel submitted a proposed written order pursuant to the trial court's request. Ten days later, Shehadeh filed objections to the proposed order together with a proposed counteraffidavit purporting to refute Chief Kolitwenzew's claims that the materials requested by Shehadeh would threaten jail safety or security, particularly if the Sheriff redacted any protected information. Shehadeh's proposed counteraffidavit also stated that Shehadeh had received the IGA agreement between the U.S. Marshals Service and the KCSO from the Department of Justice and that it contained no data that is exempt from disclosure under FOIA except for the number of security staff needed for a prisoner escort, which the Sheriff could have easily redacted.

¶ 19 Also on February 27, 2017, Shehadeh filed a "Verified Motion for Costs" under section 11(i) of FOIA (**5 ILCS 140**/11(i) (West 2016). In that motion, Shehadeh contended that he was entitled to recover all out-of-pocket costs he had incurred in litigating his FOIA requests, which Shehadeh claimed amounted to $102.25 spent on copying, envelopes, and postage. Shehadeh argued that he had "substantially prevailed" within the meaning of the Act, thereby entitling him to recover reasonable costs, because: (1) "records were released by [the Sheriff] following commencement and service of the suit"; and (2) "[u]nder the catalyst theory there is a presumption of a causal nexus between service of a FOIA suit and release of records immediately ahead of a public body's Motion to Dismiss for mootness."

¶ 20 On February 28, 2017, the trial court signed and entered the written order presented by the Sheriff's counsel. The written order provided that the Sheriff's motion to dismiss was granted with prejudice "based upon the affirmative matters raised pursuant to section 2-619(a)(9) regarding mootness, [Shehadeh]'s failure to identify public records to be produced, the [Sheriff]'s lack of possession of certain records, and the exemptions claimed under **5 ILCS 140**/.7 *et seq.*" Specifically, the trial court's written order stated that: (1) Shehadeh had received copies of his booking photo, grievances, and other non-exempt records, and "[t]o the extent [Shehadeh]'s complaint is related to the production of these documents, this claim is dismissed as moot"; (2) "[t]o the extent that [Shehadeh]'s complaint related to [his] request for an undated phone call recording, this claim is dismissed because the request submitted by [Shehadeh] did not identify a record that could have been produced by the public body"; (3) "[t]o the extent that [Shehadeh]'s complaint relates to paper copies of internet search engine queries ("Google searches") related to Sheriff's Department employees, this claim is dismissed as the record[s] requested are not public records, as these records are data not ordinarily kept by the public body"; (4) "[a]s to the remainder of [Shehadeh]'s requested records, the evidence supplied by the [Sheriff], including the affidavit of Chief * * * Kolitwenzew established by clear and convincing evidence entitlement to exceptions

available to the Sheriff's Office (a public body) under section 7 of FOIA."[3] The written order then discussed several specific exceptions under section 7 that it found applied to prevent disclosure of each of the remaining categories of documents and other materials sought by Shehadeh.

¶ 21 The trial court's written order further noted that, "based upon the Sheriff's entitlement to the exemptions claimed in his motion to dismiss, coupled with the mootness of [Shehadeh]'s claims regarding non-exempt documents, [Shehadeh]'s motion for leave to file an amended complaint which attempts to cure the *facial* deficiencies articulated in [the Sheriff]'s 2-619.1 motion, will be denied."

***6** ¶ 22 Moreover, the trial court's written order denied several of Shehadeh's other pending motions, including his motion for civil penalties under the Act. In support of the latter ruling, the trial court's written order stated that Shehadeh had failed to meet his burden to prove that the Sheriff had violated the Act willfully or in bad faith in responding (or in failing to timely respond) to his FOIA requests. Thus, the court held that Shehadeh was not entitled to civil penalties under section 11(j) of the Act. The trial court's final written order did not address Shehadeh's verified motion for costs, which Shehadeh had filed twelve days after the trial court's oral ruling and one day before the court entered its final written order.

¶ 23 On March 3, 2017, Shehadeh filed a "supplement" to his objections to the trial court's order attaching a redacted copy of the IGA between the U.S. Marshals service and the Kankakee County Detention Center that Shehadeh claimed to have received from the United States Department of Justice. Shehadeh argued that the redacted IGA agreement "clearly contains some non-exempt data."

¶ 24 Three days later, Shehadeh filed his notice of appeal of the trial court's February 28, 2017, final judgment order.

¶ 25 While this appeal was pending, Shehadeh filed several motions in our appellate court. We denied some of his motions, but we took the following two motions with the case: (1) Shehadeh's June 16, 2016, renewed motion for sanctions against the Sheriff's counsel based upon allegedly false statements contained in certain of counsels' sworn certificates of service; and (2) Shehadeh's July 26, 2019, motion for a protective order barring the public disclosure of certain communications regarding his confidential medical information that the Sheriff had attached to Chief Koliwenzew's affidavit and filed with the court. We also granted Shehadeh's motion for leave to supplement the record on appeal with the transcript of the trial court's February 15, 2017, hearing on the Sheriff's combined 2-615/2-619 motion to dismiss Shehadeh's complaint, and Shehadeh's request for additional time to do so. We granted Shehadeh 30 days (*i.e.*, until September 27, 2019) to file the hearing transcript as a supplemental record. Shehadeh subsequently sought, and we granted, two additional extensions of time to file the supplemental record, which was filed with our court on November 19, 2019.

¶ 26 ANALYSIS

¶ 27 I. The dismissal of Shehadeh's complaint under section 2-619

¶ 28 In this appeal, Shehadeh argues that the trial court erred in dismissing his FOIA complaint. The trial court dismissed Shehadeh's FOIA complaint with prejudice under section 2-619(a)(9) of the Code. That section allows involuntary dismissal of a claim that is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2–619(a)(9) (West 2016)). An "affirmative matter" is "something in the nature of a defense that negates the cause of action completely." (Internal quotation marks omitted.) *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 10. If the "affirmative matter" asserted is not apparent on the face of the complaint, the motion must be supported by affidavit. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). By presenting adequate affidavits supporting the asserted defense (*i.e.*, affidavits that satisfy the requirements of Illinois Supreme Court Rule 191), the defendant satisfies the initial burden of going forward on the motion. *Id.* The burden then shifts to the plaintiff.

¶ 29 To defeat a properly-supported motion to dismiss under section 2-619(a)(9), the plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Id.* The plaintiff may do so by "affidavit[ ] or other proof." *Id.* "A counteraffidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion else the facts are deemed admitted." *Id.* If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed. *Id.* We review a trial court's dismissal of a complaint under

section 2-619(a)(9) *de novo*. *Watkins*, 2012 IL App (1st) 100632, ¶ 10.

***7** ¶ 30 In this case, the trial court ruled that Shehadeh's FOIA claims were defeated by various affirmative matters established by Chief Kolitwenzew's affidavit. We address the trial court's rulings as to each of the categories of documents and other materials requested by Shehadeh, and Shehadeh's challenges to each of those rulings, in turn below.

¶ 31 A. Materials already produced to Shehadeh

¶ 32 Prior to the trial court's ruling on the Sheriff's motion to dismiss, Shehadeh had already received copies of his booking photo, grievances he sent via the JCDC's kiosk system, and other non-exempt records. It is undisputed that these documents were produced in full without redactions. The trial court ruled that, to the extent Shehadeh's FOIA complaint raised any claim for the production of those documents, such claim was "dismissed as moot." That ruling was correct. A claim is moot when no actual controversy exists or events occur which make it impossible for a court to grant effectual relief. *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 116 (1992); *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1999). Where the claimant has received what he sought in the litigation, his action should be dismissed as moot. *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, ¶ 12; *Duncan*, 304 Ill. App. 3d at 782. "[O]nce a public body provides the information requested under FOIA, even after a lengthy delay, the controversy over the public body's production of [those] documents ceases to exist," and a plaintiff's continued claim for the production of that information is moot. *Roxana Community Unit School District No. 1 v. Environmental Protection Agency*, 2013 IL App (4th) 120825, ¶ 41; see also *Turner*, 2019 IL App (3d) 170819, ¶ 12; *Duncan*, 304 Ill. App. 3d at 782. Thus, any continued claim by Shehadeh to the production of the documents already provided to him by the Sheriff would be moot and would have been properly dismissed under section 2-619(a)(9). *Turner*, 2019 IL App (3d) 170819, ¶ 13 (affirming dismissal of FOIA claim as moot under section 2-619(a)(9) where plaintiff had received the information he had requested from the Joliet Police Department). In any event, Shehadeh does not appear to challenge the trial court's ruling as to documents already produced to him.

¶ 33 B. Internet search queries

¶ 34 Shehadeh requested "paper copies of any records indicating for the 1500 – 2300 hrs 11 September 2016 KCSO jail shift what internet 'Google' or other search engine queries were conducted, by which employee and location in the jail, duration of time spent on the internet and any other related info." He also requested aggregate man hours paid to KCSO staff members during the shift in question, and information related to staff response times during that shift. The trial court dismissed Shehadeh's FOIA claim for these documents because it held that were not "public records" ordinarily kept by a public body and were therefore outside of FOIA's purview.

¶ 35 FOIA provides that members of the public should have access to "public records." **5 ILCS 140**/1 (West 2016). The Act defines "public records" to mean:

> "all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body." **5 ILCS 140**/2(c) (West 2016).

***8** Under this definition, documents that already exist and that are in the possession of a public body are subject to disclosure under FOIA. *Hites v. Waubonsee Community College*, 2016 IL App (2d) 15083656, ¶ 75.

¶ 36 However, "FOIA was not designed to compel the compilation of data not ordinarily kept by the public body." *Hites*, 2016 IL App (2d) 150836, ¶ 75; see also *Chicago Tribune Co. v. Department of Financial and Professional Regulation*, 2014 IL App (4th) 130427, ¶ 34; *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (1989). If responding to the plaintiff's FOIA request would require the public body to create a new document, rather than produce an existing document kept or maintained by the public body, the public body need not respond. *Hites*, 2016 IL App (2d) 150836, ¶¶ 75-79; see also *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶¶ 32, 36 (defendant in a FOIA action was not required to compile the number of initial claims and complaints received against licensed physicians where the

defendant did not maintain a record of the requested number of claims). FOIA does not require a public body to answer "general inquiry questions" posed by the plaintiff that are "more akin to an interrogatory in a civil action than a request for records under FOIA." *Hites*, 2016 IL App (2d) 150836, ¶ 75; see also *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶¶ 32, 36.

¶ 37 Here, Chief Kolitwenzew swore in his affidavit that that "[n]either JCDC nor the Sheriff's Department keeps or stores search engine histories or information related to search engine searches by staff." Moreover, Shehadeh's request did not specify which staff members performed the internet search queries at issue, or upon which computers or other electronic devices such searches were performed. Thus, Shehadeh's request would have required the Sheriff's Department to examine unspecified electronic devices in order to compile data regarding unspecified employees' internet searches that was not kept by the JCDC or by the Kankakee County Sheriff's Department. This would have required the Sheriff's department to create new documents responsive to Shehadeh's request. Accordingly, the trial court did not err when it dismissed Shehadeh's claims for these documents based on its finding that they were not public records kept by the Sheriff. *Hites*, 2016 IL App (2d) 15083656, ¶¶ 75-79; *Chicago Tribune Co.*, 2014 IL App (4th) 1304278, ¶¶ 32, 36; *Kenyon*, 184 Ill. App.3d at 32.

¶ 38 Shehadeh argues that he established with his counteraffidavit (at ¶ 10) that the KCSO did have possession and control of its employees' internet search records. We disagree. Shehadeh did not file his counteraffidavit until twelve days after the trial court issued its oral ruling dismissing his complaint, and one day before the trial court entered its final written judgment order presented by the Sheriff. The trial court disregarded Shehadeh's counteraffidavit and ruled in its final order that that Shehadeh had "failed to file a counteraffidavit in his response" to the Sheriff's motion to dismiss "and therefore the evidentiary facts contained within [Chief Kolitwenzew's] affidavit shall be deemed admitted." However, even assuming *arguendo* that Shehadeh's proposed counteraffidavit was timely filed and should have been considered by the trial court (an issue we do not decide), the counteraffidavit fails to rebut Chief Kolitwenzew's sworn statement that neither JCDC nor the Sheriff's Department keeps or stores search engine queries or information related to search engine searches performed by staff. In Paragraph 10 of his counteraffidavit, Shehadeh avers that "[t]he Kankakee County Sheriff's Office does have records of its employees' internet use, including what search engine queries were conducted." Shehadeh asserts that he knows this because he "studied computer engineering in college" and is "aware that the individual computer terminals upon which these activities were conducted store this data by default." However, Shehadeh does not claim to have personal knowledge of the particular computers used at the JCDC or of KCSO's policies regarding the storage of internet search data on such computers. Thus, Shehadeh's proposed counteraffidavit fails to meet the mandatory requirements of Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)), which provides that "affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants," and it does not competently allege any evidentiary facts rebutting Chief Kolitwenzew's statements (which were based on Chief Kolitwenzew's personal knowledge).[4]

¶ 39 C. Phone Call

***9** ¶ 40 On September 11, 2016, Shehadeh sent a FOIA request via the JCDC's kiosk system requesting an electronic recording of a phone call that he claimed was placed from a phone in "Flex A" "from 2100 to 2105 hours." Shehadeh did not identify the date on which this phone call was allegedly made. The trial court ruled that any FOIA claim based on such an alleged phone call was "dismissed because the request submitted by [Shehadeh] did not identify a record that could have been produced by the public body." A FOIA request must reasonably identify a public record and may not merely ask to inspect or copy general data or vaguely identified information. *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶ 33. Here, Shehadeh's initial request for a copy of an undated phone call did not sufficiently identify a record capable of production, and the trial court properly dismissed the request on that basis under section 2-619(a)(9). In any event, Shehadeh does not challenge the trial court's dismissal of this particular FOIA request on appeal and has apparently abandoned the request.

¶ 41 D. Whether certain materials were exempt from disclosure under section 7 of the Act

¶ 42 Based upon sworn statements in Chief Kolitwenzew's affidavit, the Sheriff argued that the remaining categories of materials that Shehadeh requested were exempted from

disclosure under section 7 of the Act because disclosure of the materials would jeopardize jail safety and security and for various other reasons. The trial court agreed and dismissed all of Shehadeh's remaining FOIA claims under section 2-619(a)(9) based upon various exemptions asserted by the Sheriff. Shehadeh appeals each of the trial court's rulings, arguing that Chief Kolitwenzew's affidavit is conclusory and insufficient as a matter of law to prove by clear and convincing evidence that any of the claimed exemptions applied. We address each of the trial court's rulings below.

¶ 43 As an initial matter, the Sheriff contends that Shehadeh has forfeited review of the trial court's dismissal of several of his FOIA requests because he failed to raise arguments as to those requests, either before the trial court or in this appeal. However, we decline to find that forfeiture bars review of any of these issues, for two reasons. First, forfeiture is a limitation on the parties, not the on the jurisdiction of the appellate court. *In re Marriage of Heindl*, 2014 IL App (2d) 130198, ¶ 21. Accordingly, we may consider an issue not raised in the trial court or on appeal, particularly where, as here, the issue is one of law. *Id.*; see *In re Marriage of Piegari*, 2016 IL App (2d) 160594, ¶ 10; see also *Turner*, 2019 IL App (3d) 179819, ¶ 20 (whether an exemption applies to a FOIA request under section 7 of the Act is an issue of statutory construction)). Second, the Sheriff based each of its claims to a section 7 exemption on Chief Kolitwenzew's affidavit, and Shehadeh has argued (both before the trial court and on appeal) that: (1) Kolitwenzew's affidavit is conclusory and insufficiently specific to establish that the Sheriff is entitled to claim any exemptions under section 7; and (2) the Sheriff has not explained why the KCSO cannot segregate exempt from non-exempt data and release the requested records with redactions, as required by section 7. Thus, we will address Shehadeh's challenges to each of the exemptions claimed by the Sheriff and applied by the trial court.

¶ 44 All records possessed by a public body are presumed open to inspection or copying under FOIA, and a public body asserting exemption of a record must prove it is exempt from disclosure by clear and convincing evidence. **5 ILCS 140**/1.2 (West 2016); *Turner*, 2019 IL App (3d) 179819, ¶ 18. To sustain its burden to prove that an exemption applies, a public body must provide a detailed explanation justifying its exemption claim, specifically addressing the requested documents in a manner allowing for adequate adversarial testing. *Id.* ¶ 20; *Williams v. Klincar*, 237 Ill. App. 3d 569, 572 (1992). Whether an exemption applies is a matter of statutory construction that this court reviews *de novo*. *Turner*, 2019 IL App (3d) 179819, ¶ 20.

***10** ¶ 45 The trial court "shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of th[e] Act." **5 ILCS 140**/11(f) (West 2016). However, the court need not conduct an *in camera* review where the public body meets its burden of showing that the statutory exemption applies by means of affidavits. *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 469 (2003); *Williams*, 237 Ill. App. 3d at 572–73. Affidavits "will not suffice if the public body's claims are conclusory, merely recite statutory standards, or are too vague or sweeping." *Illinois Education Ass'n*, 204 Ill. 2d at 469; *Williams*, 237 Ill. App. 3d at 573.

¶ 46 1. The USMS-129 Form

¶ 47 The trial court ruled that the U.S. Marshalls Service Form 129 (USMS-129 form) requested by Shehadeh was exempt from disclosure under section 7(1)(e) of the Act, which exempts "records that relate to or affect the security of correctional institutions and detention facilities" (**5 ILCS 140**/7(1)(e) (West 2016)). In his affidavit, Chief Kolitwenzew swore that he was familiar with the USMS-129 form, which was "utilized and created by the U.S. marshals service in preparation for one of their detainees' entry into another facility." Chief Kolitwenzew further swore that: (1) each federal inmate housed at JCDC has a USMS-129 form assigned to him, which is shared with JCDC; (2) each USMS-129 form "lists specific offenses and particularized information regarding an inmate's history of criminal offenses, threats to jail staff, escape threats and attempts," and each form "contain[s] particularized information that is utilized in the classification of inmates by JCDC"; (3) "these forms are uses in threat assessment" and "handling of specific inmates." Chief Kolitwenzew swore that [p]roviding inmates with this form would: (1) "endanger KCSO staff, heighten the threat of escape, and potentially endanger other inmates; and (2) provide inmates with the information that is utilized when assessing the transportation, detention, detection, observation, and investigation of incidents regarding inmates in Federal and State facilities." He further averred that, "[i]f inmates knew the contents contained on the form, inmates could potentially circumvent the observations made that determine threat and escape assessments or intentionally interfere with effective threat assessment levels."

¶ 48 These detailed sworn statements by KCSO's Chief of Corrections provide ample justification for the trial court's ruling that the USMS-129 form is exempt from disclosure in its entirety under section 7(1)(e) of the Act. Chief Kolitwenzew provided a thorough account of the specific contents of the form and, based upon those specific contents, opined that disclosure of the form would threaten security at JCDC in several specific requests (*e.g.,* by endangering KCSO staff and other innates, heightening escape risks, and enabling inmates to circumvent or interfere with threat assessments). This is not at all like the unsupported, vague, and conclusory statements that our appellate court has held insufficient to support an exemption under section 7 in other cases. See, *e.g.*, *Williams*, 237 Ill. App. 3d at 573 (defendant's affidavit was "completely inadequate" to sustain the defendant's burden of proving that requested documents were exempt from disclosure under section 7(1)(a) where the affiant merely stated in conclusory fashion that the material at issue was exempt under certain Board rules and regulations). Chief Kolitwenzew did not merely recite the statutory standards or baldly assert that an exemption applied. He provided a detailed explanation of why the documents at issue was exempt. We therefore uphold the trial court's judgment that the USMS-129 form was exempt under section 7(1)(e).[5]

***11** ¶ 49 The trial court also found the USMS-129 form exempt from disclosure under section 7(1)(b)(5) of the Act (**5 ILCS 140**/7(1)(b-5), which exempts "[f]iles, documents, and other data or databases maintained by one or more law enforcement agencies and specifically designed to provide information to one or more law enforcement agencies regarding the physical or mental status of one or more individual subjects." In his affidavit, Chief Kolitwenzew avers that "the USMS 129 form contains specific medical information and treatment history of inmates." This unrebutted, sworn statement established that any portion of the form relating to the physical or mental status of an inmate was exempt and properly withheld under section 7(1)(b-5).[6]

¶ 50 2. Correspondence among KCSO staff

¶ 51 The trial court dismissed Shehadeh's FOIA request for text messages sent or received from the Sheriff's personal and work cell phones because it held that such information is exempt from disclosure under sections 7(1)(e) (which exempts "records that relate to or affect the security of correctional institutions and detention facilities") and section 7(1)(b) (which exempts "[p]rivate information," unless disclosure is required by some other provision of FOIA or some other law) (**5 ILCS 140**/7(1)(b) (West 2016)). The trial court also dismissed Shehadeh's FOIA requests for all e-mails and other correspondence among KCSO personnel and jail administrators regarding Shehadeh because it found such information exempt under sections 7(1)(e) (which exempts "records that relate to or affect the security of correctional institutions and detention facilities"), section 7(1)(d)(v) (**5 ILCS 140**/7(1)(d)(v) (West 2016)) (which exempts "[r]ecords in the possession of any * * * law enforcement or correctional agency for law enforcement purposes * * * to the extent that disclosure would * * * disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request"), and 7(1)(d)(vi) (**5 ILCS 140**/7(1)(d)(vi) (West 2016)) (which exempts "[r]ecords in the possession of any * * * law enforcement or correctional agency for law enforcement purposes * * * to the extent that disclosure would * * * endanger the life or physical safety of law enforcement personnel or any other person").

¶ 52 Chief Kolitwenzew's affidavit provides sufficient evidence to support these rulings. In his affidavit, Chief Kolitwenzew swore that:

> "Providing correspondence such as emails or text messages related to a particular inmate jeopardizes facility security by perpetuating the risk of retaliation by inmates, enabling the inmate to anticipate response times, and discloses knowledge of identification, investigation, and observation procedures related to particular inmates.
>
> Additionally, the correspondence related to classification involves the determination of said classification, including threat assessment, risk levels, mental health observations, and other screening information that is directly related to security of the facility. This correspondence may also contain JCDC security codes, facility security bulletins, classification information, and criteria used in handling, transfer, and operational procedures."

These detailed and specific security concerns that Chief Kolitwenzew raised in connection with Shehadeh's requests for correspondence among the KCSO staff were sufficient to establish exemptions under sections 7(1)(e), 7(1)(d)(v),

and 7(1)(d)(6). Moreover, Chief Kolitwenzew's statements regarding these security issues were unrebutted. Shehadeh's counteraffidavit, which was filed 12 days after the trial court issued its oral ruling dismissing Shehadeh's FOIA complaint and one day before it entered its final written order, states in conclusory fashion that: (1) none of Shehadeh's requests jeopardizes the safety or security of the jail; (2) "[e]-mails sought by [Shehadeh] that pertain to [Shehadeh] do not contain data that jeopardizes facility security, enables anticipation of response times, or discloses identification, investigation, and observation procedures"; and (3) [n]one of the public records requested by [Shehadeh] contain [*sic*] security codes, facility security bulletins, classification information, and criteria used in handling, transfer, and operational procedures." However, Shehadeh made these statements without having reviewed the correspondence at issue, so the statements could not possibly have been made based upon his personal knowledge. Nor could Shehadeh's conclusory assertions that none of the documents sought would jeopardize jail security have been based on his personal knowledge. Accordingly, even if the trial court had considered Shehadeh's counteraffidavit, it would not have affected its ruling because the counteraffidavit does not competently allege any evidentiary facts that could rebut Chief Kolitwenzew's sworn statements regarding the concrete threats to JCDC security posed by the disclosure of the internal KCSO correspondence requested by Shehadeh.

***12** ¶ 53 The trial court also correctly determined that text messages and e-mails sent or received from the Sheriff's personal and work cell phones was exempt both for security reasons under section 7(1)(e) and because such correspondence constitutes "private information" exempt from disclosure under section 7(1)(b). Shehadeh cites *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, 40-44, for the proposition that work-related communications on a public employee's personal electronic device are public records subject to disclosure under the Act. However, *City of Champaign* merely held that electronic communications that city officials sent to each other on their personal devices while conducting public business during a business meeting were subject to FOAI disclosure because such communications were prepared and sent by or for a public body (*i.e.*, while the meeting was in session and while the city officials were "functioning collectively as the 'public body.' ") *Id.*, ¶¶ 40-44. *City of Champaign* does *not* hold or imply that *any* electronic communication sent or received from a public employee's personal or work-issued electronic device is subject to disclosure under FOIA, even where such communications are sent while the employee is working or where the communications relate to the employee's job functions. To the contrary, our appellate court expressly declined to reach that holding in *City of Champaign*, noting that it was the legislature's responsibility to make any such determination. *Id.* ¶ 44 ("If the General Assembly intends for communications pertaining to city business to and from an individual city council member's personal electronic device to be subject to FOIA in every case, it should expressly so state."). In any event, Shehadeh's requests were not even limited to the Sheriff's work-related e-mails, much less to e-mails the Sheriff sent or received while functioning collectively with others as a "public body." Accordingly, the trial court correctly found the correspondence at issue exempt from disclosure under FOIA, and *City of Champaign* does not require a contrary result.

¶ 54 3. Video footage of August 29, 2016 incident

¶ 55 The trial court further held that the video footage of an alleged August 29, 2016, incident at JCDC involving a sergeant and another inmate that Shehadeh requested, along with his requests for staff schedules and staff response times, were exempt for security reasons under sections 7(1)(e) ("security of correctional and detention facilities), 7(1)(d)(v) ("disclosure of investigatory techniques, detection, and observation of crime and misconduct"), and 7(1)(d)(vi) ("physical safety of law enforcement personnel or any other person"). These rulings were supported by Chief Kolitwenzew's affidavit, in which Kolitwenzew swore that "[a]llowing access to intra-facility security camera footage would allow inmates to view coverage angles, blind spots, response times, and security patterns of KCSO staff," and that "[a]llowing this information would increase escape risks" and "endanger KCSO staff and other inmates." These specific and particularized security concerns justify the withholding of the video footage under section 7. See generally *Zander v. Department of Justice*, 885 F. Supp. 2d 1, 7 (D.D.C. 2012) (holding that the withholding of a video recording of prison inmates being extracted from their cells under section 7(F) of the federal Freedom of Information Act, which "protect[s] law enforcement officials from disclosure of information that could prove threatening to them," was "abundantly reasonable" because disclosure of the recording "presents the possibility that other prisoners will learn the methods and procedures utilized by [Board of Prisons] officials, and that this information might be used to thwart the safe application of these techniques in the future").

¶ 56 In his counteraffidavit, Shehadeh asserts that "[p]roviding [him] with the video footage he seeks will not allow disclosure of blind spots, response times, and security patterns." However, like other statements in his counteraffidavit dismissing any security concerns raised by Chief Kolitwenzew, these statements are wholly conclusory, were made without viewing the materials at issue, and were not based on personal knowledge. Moreover, Shehadeh also sought other particularly sensitive information, such as "records showing individual staff and workstation response times to cell and call buttons." The disclosure of this information carries obvious security risks and increases escape risks. Thus, the trial court did not err in dismissing Shehadeh's claims for these records under FOIA pursuant to section 2-619(a)(9) of the Code.

¶ 57 4. Personnel records of KCSO employees

¶ 58 As noted above, Shehadeh also sought the personnel files of KCSO employees, including information regarding staff schedules, aggregate work hours, and hourly wages. The trial court found this information exempt from disclosure under section 7(1)(e-6), which exempts "[r]ecords requested by persons committed to the Department of Corrections * * * or a county jail if those materials include records from staff members' personnel files, staff rosters, or other staffing assignment information." (Emphasis added). **5 ILCS 140**/7(1)(e-6) (West 2018). However, it appears that this exemption did not apply to the personnel files of KSCO employees at the time that Shehadeh filed his FOIA requests in September 2016. At that time, section 7(1)(e-6) exempted records from staff members' personnel files only if such records were sought by "persons committed to the Department of Corrections." It did not exempt such records from disclosure if the FOIA request were made by a person committed to a county jail, like JCDC. As the parties note, the legislature added the phrase "or a county jail" to section 7(1)(e-6) in the August 4, 2017, amendments to that section in order to afford staff members of county jails the same protections as staff members of the Department of Corrections. However, the amended provision would not appear to apply retroactively to FOIA claims filed before its enactment, because the statute does not clearly prescribe the temporal reach of the amended provision and because the amendment is substantive, rather than procedural. See *Perry v. Department of Financial & Professional Regulation*, 2018 IL 122349, ¶¶ 66-71; *NBC Subsidiary (WMAQ-TV) LLC v. Chicago Police Department*, 2019 IL App (1st) 181426, ¶ 29. Thus, the trial court's ruling that section 7(1)(e-6) exempted the FOIA requests at issue appears to have been error.

***13** ¶ 59 We do not need to decide that issue, however, because we may affirm the trial court's judgment on other grounds. We review the trial court's judgment, not its rationale, and we may affirm on any basis that the record supports, even if the trial court did not rely on that basis. *Kubicheck v. Traina*, 2013 IL App (3d) 110157, ¶ 28, n.3; *Estate of Sperry*, 2017 IL App (3d) 150703, ¶ 19, n.4. Here, the unrebutted evidence established that the personnel files sought by Shehadeh are exempt under section 7(1)(e), because disclosure of the information would threaten JCDC security, and also under section 7(1)(d)(vi), because disclosure of the information would risk the safety of KCSO law enforcement personnel and JCDC inmates. It would also be exempt from disclosure under section 7(b), which protects the private information of KCSO staff. In his affidavit, Chief Kolitwenzew swore that "[a]llowing access to personnel files of KCSO staff to inmates increases the risk of retaliation by inmates, jeopardizes the personal privacy of KCSO staff, and further affects the security and safety of JCDC occupants and staff." Shehadeh's conclusory assertions to the contrary in his counteraffidavit are not based on personal knowledge and do not rebut the reasonable security concerns articulated by Chief Kolitwenzew. Chief Kolitwenzew also averred that KCSO staff personnel files "contain sensitive personal information of KCSO staff, including identifying information such as addresses and phone numbers, protected health information, and personnel records." Such information would obviously be protected from disclosure under sections 7(1)(b), which exempts "private information," and 7(1)(c), which exempts "personal" information.

¶ 60 In sum, allowing inmates unfettered access to the personnel files of correctional staff supervising their detention poses obvious risks to the safety and privacy of the correctional staff. In his Reply brief, Shehadeh asserts (without citation to authority) that he is "absolutely entitled to records concerning disciplinary matters where an adjudication of guilt on the employee's part was found and a sanction was imposed." However, Shehadeh has not claimed that any such records exist, and his FOIA request was not nearly so limited. Rather, he sought the entire personnel files of KCSO staff members. We find that the trial court did not err in dismissing Shehadeh's broad request for these files.

¶ 61 5. IGA between the U.S. Marshals Service and KCSO

¶ 62 The trial court's final order does not address Shehadeh's FOIA request for a copy of the IGA between the U.S. Marshals Service and the KCSO, presumably because Shehadeh did not

raise the issue in his Response to the Sheriff's motion to dismiss his complaint.[7] Nevertheless, putting aside all questions of forfeiture, we hold that the record in this case establishes that the IGA was exempt from disclosure. In his affidavit, Chief Kolitwenzew swore that he was familiar with the IGA and noted that the IGA contains information that, if disclosed, would jeopardize facility security and threaten the safety of KCSO personnel and other federal inmates. For example, Kolitwenzew stated that the IGA contains information regarding "security transportation procedures, intake and exit procedures, custody handoff procedures, and chain-of-command structures for the handling of federal inmates." Kolitwenzew averred that the disclosing this information to inmates could "deteriorate the safety and security procedures by allowing inmates access to procedures developed in conjunction with federal authorities about the handling and care of federal inmates, which would 'irreparably harm" JCDC security,' jeopardize the safety of JCDC personnel and other inmates, and "may reveal observation and investigation techniques shared between the two agencies." These detailed and specific security risks, which were not rebutted by Shehadeh's conclusory counteraffidavit, establish that the IGA was exempt from disclosure under sections 7(1)(d)(v), 7(1)(d)(vi), and 7(1)(e) of the Act.[8]

¶ 63 E. Costs

***14** ¶ 64 Twelve days after the trial court issued its final written judgment dismissing Shehadeh's FOIA complaint, and one day before the court issued its final written judgement order, Shehadeh filed a verified motion for costs arguing that he was entitled to recover the out-of-pocket costs he incurred while pursuing his FOIA claims, including copying and postage costs, pursuant to section 11(i) of the Act (**5 ILCS 140**/11(i) (West 2016)). That section provides that "[i]f a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorney's fees and costs." *Id.* Because Shehadeh failed to obtain a ruling on his motion for costs before the trial court entered its final judgment and before Shehadeh filed his notice of appeal of that judgment, he may not raise the issue on appeal. *Rodriguez v. Illinois Prisoner Review Bd.*, 376 Ill. App. 3d 429, 432-33 (2007) (ruling that "it is the responsibility of the party filing a motion to request the trial judge to rule on it, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise," and holding that the plaintiff's failure to obtain a ruling on his motion for default judgment before filing his notice of appeal "resulted in his abandonment of the motion and created a procedural default of any issue related to that motion for the purpose of appeal"); *Jackson v. Alverez*, 358 Ill. App. 3d 555, 563–64 (2005) (holding that a party was deemed to have abandoned a motion for leave to amend her complaint by filing a notice of appeal without first ensuring that the trial court had ruled on the motion for leave to amend).

¶ 65 F. Civil Penalties

¶ 66 Shehadeh also argues that the trial court erred in denying his claim for civil penalties under section 11(j) of the Act (**5 ILCS 140**/11(j) (West 2016). That section provides that "[i]f the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence. In assessing the civil penalty, the court shall consider in aggravation or mitigation * * * whether the public body has previously been assessed penalties for violations of this Act " *Id.* Shehadeh argued before the trial court that he was entitled to penalties under this provision because the Sheriff had not responded to his FOIA requests within the 5-day time frame as required by sections 3(d), 9(a), and 9(b) of the Act.[9] However, Shehadeh did not plead facts suggesting that the Sheriff willfully violated the Act or otherwise acted in bad faith. Accordingly, the trial court denied his request for penalties.

¶ 67 Because the trial court made factual determinations in considering whether to impose civil penalties, we will affirm the trial court's decision unless it was against the manifest weight of the evidence. *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 48. In this case, the Sheriff produced all responsive, non-exempted documents without having been ordered to do so by the trial court. The trial court's refusal to impose civil penalties based

entirely upon the Sheriff's alleged violation of section 3(d)'s 5-day deadline, absent additional evidence of willful law breaking or bad faith, was not against the manifest weight of the evidence.

***15** ¶ 68 In an effort to bolster his claim for civil penalties on appeal, Shehadeh has submitted documents on appeal purporting to show that the Sheriff has failed to properly train a FOIA compliance officer and has repeatedly violated the Act in responding to records requests brought by inmates. Shehadeh did not present any of this evidence before the trial court, and we will not consider it.

¶ 69 G. Sanctions

¶ 70 Shehadeh argues that the trial court abused its discretion in denying his motion for sanctions against the Sheriff under Illinois Supreme Court Rules 137 and 219. In response to Shehadeh's FOIA request, the Sheriff disclosed all of Shehadeh's grievances, FOIA requests, and other written correspondence with KCSO during his incarceration at JCDC. Some of this correspondence included references to Shehadeh's medical conditions and requests for treatment. The Sheriff attached all of the correspondence as an exhibit to Chief Kolitwenzew's affidavit, which it filed with the trial court without obtaining an order sealing the filing or otherwise acting to prevent non-disclosure of Shehadeh's private medical information. Shehadeh sought sanctions against the Sheriff, arguing the Sheriff's disclosure of his private medical information in a public filing violated state and federal laws, including "HIPAA" and FOIA. The trial court denied Shehadeh's motion.

¶ 71 We will uphold a trial court's denial of a motion for sanctions unless the denial constitutes an abuse of discretion. *Amadeo v. Gaynor*, 299 Ill. App. 3d 696, 701 (1998). A trial court abuses his discretion only where no reasonable person would take the view adopted by the trial court. *Id.* We find no abuse of discretion here. The parties dispute whether the Sheriff's public disclosure of the correspondence at issue violated state or federal law. Nevertheless, in response to Shehadeh's request for redaction of his private medical information from the public record, the Sheriff's counsel sent Shehadeh a letter informing him that the Sheriff was "potentially willing to agree to a joint confidentiality order" if proposed by Shehadeh. Shehadeh declined this offer of accommodation and instead filed a motion for sanctions. Shehadeh cites no authority suggesting that sanctions would be appropriate under the circumstances presented in this case. Accordingly, the trial court's denial of Shehadeh's motion for sanctions was not an abuse of discretion.

¶ 72 H. Other arguments raised by the parties

¶ 73 Because we affirm the trial court's dismissal of all of Shehadeh's claims under section 2-619(a)(9), we need not address the Sheriff's alternative arguments that dismissal was appropriate under section 2-615 or as a sanction for Shehadeh's history of "harassing and vexatious" conduct. Nor need we address Shehadeh's argument that the trial court erred by denying his motion for leave to file an amended complaint that would have cured the facial deficiencies in his initial complaint, as this argument responds to the Sheriff's contention that dismissal would have been appropriate under section 2-615 (not section 2-619).

¶ 74 II. Shehadeh's Motions on Appeal

¶ 75 Shehadeh filed several motions on appeal, three of which were taken with the appeal. Shehadeh filed a verified application for the reimbursement of expenses on appeal under section 11(i) of the Act. We deny this motion because the claimant has not prevailed on appeal.

***16** ¶ 76 Shehadeh has also filed renewed motion for sanctions against the Sheriff's counsel. (The motion is styled as a "renewed" motion because we denied his initial motion for sanctions on appeal). Shehadeh argued that. when the Sheriff's counsel served Shehadeh with a copy of his appearance in this court, counsel misrepresented the date of service in the sworn certificate of service by indicating that the document was served before it was actually placed in the mail (as proven by the metered postage stamp and by mail tracking information later obtained by Shehadeh). The Sheriff's counsel states that this was merely a clerical error. In a letter the Sheriff's counsel previously submitted to the ARRC in response to Shehadeh's request for an ARDC investigation against him, the Sheriff's counsel stated that, when serving documents that have been electronically filed, it is his firm's customary practice to serve documents by mail after the firm has received file-stamped copies from the court. Shehadeh contends that this proves that the Sheriff's counsel has a regular practice of falsifying certificates of service and that the Sheriff's argument that the erroneous date was merely

a "clerical error" was false. He asks us to sanction the Sheriff's counsel on that basis.

¶ 77 We decline to do so. Contrary to Shehadeh's assertion, the Sheriff's counsel's letter to the ARDC does not establish that the Sheriff routinely and deliberately issues false certificates of service. To the contrary, the Sheriff told the ARDC that the error in the certificate of service at issue was a clerical error committed by his secretary, who had counsel sign the certificate of service on the date the appearance was e-filed and then forgot to change the date of service when a file-stamped copy of the appearance (together with the previously-dated certificate of service) was placed in the mail for service. Counsel did nothing worthy of sanctions. Shehadeh's motion for sanctions is denied.

¶ 78 Finally, as part of a "combined pleading" seeking various relief, Shehadeh filed a one-sentence motion asking us to have the aforementioned correspondence containing his private medical information "deemed non-disclosable, confidential, and protected from disclosure" pursuant to Illinois Supreme Court Rule 201(c) (Ill. S. Ct. R. 201(c) (eff. July 1, 2014)). Shehadeh cites no authority in support of this motion other than a citation to Rule 201(c), which addresses a trial court's authority to issue certain types of discovery orders. We are not a trial court, and the public filing of documents disclosed pursuant to a FOIA request during subsequent litigation of FOIA claims is not a discovery matter. Thus, Shehadeh has not submitted any relevant authority supporting his motion to this court. His motion is therefore denied. As noted above, the Sheriff's counsel has informed Shehadeh that he is "potentially willing to agree to a joint confidentiality order" if proposed by Shehadeh. Thus, to obtain the relief he desires, Shehadeh could either enter into an agreed protective order with the Sheriff counsel or file a motion to seal the trial court record.

¶ 79 CONCLUSION

¶ 80 For the reasons set forth above, the judgment of the circuit court of Kankakee County is affirmed. Shehadeh's motions on appeal for costs, sanctions, and a protective order are denied.

¶ 81 Affirmed. Motions on appeal for costs, sanctions, and a protective order denied.

Justice McDade and Justice Wright concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (3d) 170158-U, 2020 WL 589284

Footnotes

1 Shehadeh initially named additional defendants and raised other claims in addition to his FOIA claims, but he voluntary dismissed all such claims and defendants after the defendants filed their motion to dismiss. All such claims were dismissed with prejudice. Shehadeh appeals only the dismissal of his FOIA claims against the Sheriff. Thus, throughout this Order, we identify the Sheriff as the sole defendant and we address only the dismissal of Shehadeh's FOIA claims against the Sheriff.

2 Shehadeh was serving his federal sentence in a federal penitentiary at the time.

3 The trial court's written order further noted that Shehadeh had "failed to file a counteraffidavit in his response" to the Sheriff's motion to dismiss "and therefore the evidentiary facts contained within [Chief Kolitwenzew's] affidavit shall be deemed admitted."

4 In his appellate briefs, Shehadeh also argues that the Sheriff could have satisfied his FOIA request by "furnish[ing] him with a data dump from the browser histories for the time requested," which would contain the search engine queries Shehadeh sought. However, Shehadeh's initial FOIA request did not simply seek the histories on browsers installed on JCDV computers; rather, he sought search queries that were entered into third-party internet search engines. As noted, he failed to present any competent evidence rebutting Chief Kolitwenzew's sworn statement that such information is not kept or maintained by the KCSO.

5 Shehadeh argues that the fact that he obtained a redacted copy of his USMS-129 from the Macon County Sheriff via a FOIA request defeats the Sheriff's claim that the document was exempt in its entirety. We disagree. Macon County's failure to assert any particular exemption under FOIA (which may have been the result of an oversight or some other error) is not at issue in this case. The only relevant issue is whether the Sheriff supported his claims to exemption in this case by clear and convincing evidence. As noted above, Chief Kolitwenzew's detailed affidavit met that standard.

6 Because we affirm the trial court's rulings that the form was exempt under sections 7(1)(e) and 7(1)(b-5), we do not need to address the court's additional finding that the form was also exempt under section 7(1)(b)(1)(a).

7 Shehadeh raised the issue for the first time in his "supplemental" objections to the trial court's dismissal order, which he filed after the entry of the final written judgment order dismissing his complaint.

8 Contrary to Shehadeh's argument, the fact that he was able to obtain a redacted version of the IGA from the U.S. Marshals Service does not rebut Chief Kolitwenzew's affidavit or undermine Kolitwenzew's credibility. Whether the federal government releases the IGA under the federal Freedom of Information Act is irrelevant to whether disclosing the IGA's contents to inmates at JCDC would be detrimental to that facility's security and therefore exempt from disclosure under section 7 of the Illinois FOIA.

9 Section 9(a) provides that a public body denying a request for public records under FOIA shall notify the requester in writing of the decision to deny the request and the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, the names and titles or positions of each person responsible for the denial, the requestor's right to review by the Public Access Counselor and his right to judicial review under the Act. See **5 ILCS 140**/9(a) (2016). Section 9(b) provides that, when a request for public records is denied on the grounds that the records are exempt under Section 7 of the Act, the public body's notice of denial shall specify the exemption claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority. **5 ILCS 140**/9(b) (West 2016). Section 3(d) of the Act requires a public body to either comply with or deny a request for public records in writing (in the matter prescribed by section 9) "within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section." **5 ILCS 140**/3(d) (West 2016).

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