

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,

Plaintiff,

vs.

JOLIET POLICE DEPARTMENT,

Defendant.

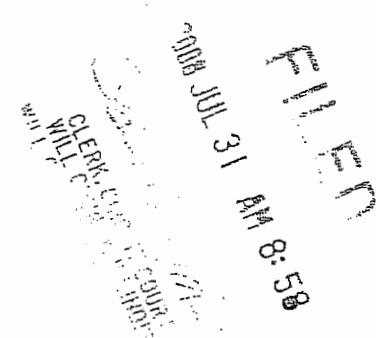
)
No.: 07 MR 530
)

ORDER

This matter coming before the Court on the Plaintiff's Motion for Summary Judgment, with due notice having been given and the Court having considered the briefs and arguments of counsel, as well as the applicable statutory and case law, it is ORDERED:

Background

Plaintiff filed an action to direct Defendant to produce for inspection and copying records pursuant to the Illinois Freedom of Information Act (hereinafter "FOIA"), 5 ILCS 140/1 *et seq.* Specifically, Plaintiff seeks documents relative to a legislatively mandated study, 725 ILCS 5/107A-10, conducted by the Illinois State Police, the Chicago Police Department, the Evanston Police Department and the Joliet Police Department. This study examined the use of eyewitness identification procedures traditionally employed by the police departments (i.e., lineup subjects and photo arrays displayed simultaneously to



witnesses by administrators who know the identity of the suspected perpetrator) in comparison to the sequential double-blind approach (where lineup subjects and photo arrays are displayed sequentially by administrators who do not know the identity of the suspected perpetrator). After the conclusion of the Pilot Program, these departments released a Report to the Legislature of the State of Illinois on Sequential Double-Blind Identification Procedures. The Report indicated that the new identification procedure, i.e., the sequential double-blind approach, produced more inaccurate identifications. This finding was in contrast to the findings of other studies.

Subsequently, the Plaintiff issued a FOIA request to the Joliet Police Department seeking:

- (1) all documents that describe or reflect the procedures followed by the investigating officers in the control group of cases, i.e., those identification procedures that did not employ the sequential double-blind method described in 725 ILCS 5/107A-10(c). In addition to all other relevant information, this request includes any records documenting whether each live line-up was a first viewing of a suspect by an eyewitness, or if the eyewitness had previously identified the suspect in a photo line-up;
- (2) all documents employed to train the police officers who participated in the Pilot Program, and any recordings or records of such training;
- (3) all documents that relate to the retention of Sheri H. Mecklenberg, Dr. Roy S. Malpass and Dr. Ebbe Ebbesen to perform services in connection with the Pilot Program, the analysis of data, and the preparation of the Report to the Legislature.
- (4) Documents sufficient to show the criminal court case numbers for each and every case included in the Pilot Program and the data analysis, all corresponding photographs and recordings of line-ups, and all photographs of suspects and fillers shown to an eyewitness during a photo spread or sequential photo array, as required by 725 ILCS 5/107A-5(a);
- (5) The complete database of information used to generate the data tables in the Report regarding the Pilot Program and the Appendix thereto, as well as any other information contained in the database that was not included in the Report and Appendix.

The Defendant failed to respond within seven working days as required under FOIA. Plaintiff subsequently appealed, assuming that the failure to respond constituted a denial, and the Defendant responded by producing records for paragraphs (1), (2), and (5). The Defendant claimed that no records existed relative to the request contained within paragraph (3). Finally, the Defendant objected to the request in paragraph 4, claiming that the requested information was exempt from production under 5 ILCS 140/7(1)(b), (c)(i) and (c)(viii).

After properly exhausting its administrative remedies, Plaintiff filed this action seeking production of the requested documents, as well as reasonable attorney's fees under 5 ILCS 140/11(i). Plaintiff filed this Motion for Summary Judgment contending that no genuine issue of material fact exists, that the exemptions claimed by the Defendant are not valid as a matter of law, and that the public interest in obtaining the information outweighs any burden imposed on the Defendant.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (2007). The purpose of summary judgment is not to try a question of fact, but simply to determine whether any genuine issue of material fact exists. Forsythe v. Clark USA, Inc., 224 Ill.2d 274, 864 N.E.2d 227 (2004). Summary judgment should not be allowed unless the moving party's right to judgment is clear and free from doubt. Jackson v. TLC Associates, Inc., 185 Ill.2d 418, 706 N.E.2d 460 (Ill. 1998).

The purpose of the Freedom of Information Act is to open governmental records to the light of public scrutiny. See Baudin v. City of Crystal Lake, 192 Ill. App. 3d 530,

534-35, 548 N.E.2d 1110, 1113 (2d Dist. 1989). Generally there is a presumption that public records are open and accessible. Lieber v. Bd. of Trustees of S. Illinois Univ., 176 Ill.2d 401, 408-09, 680 N.E.2d 374, 377-78 (Ill. 1997). Any exemptions under the Act are to be read narrowly and the body claiming said exemption bears the burden of proof to establish that the exemption is applicable. Reppert v. Southern Illinois Univ., 375 Ill. App. 3d 502, 505, 874 N.E.2d 905, 907-08 (4th Dist. 2007).

FOIA Exemptions

Section 7(1)(b)(v) states in relevant part:

(1) The following shall be exempt from inspection and copying:

* * *

(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of 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

* * *

(v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies; provided, however, that identification of witnesses to traffic accidents, traffic accident reports, and rescue reports may be provided by agencies of local government, except in a case for which a criminal investigation is ongoing, without constituting a clearly unwarranted per se invasion of personal privacy under this subsection;

5 ILCS 140/7(1)(b)(v).

Section 7(1)(c)(i) states in relevant part:

(c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:

(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;

5 ILCS 140/7(1)(c)(i).

Section 7(1)(c)(viii) states in relevant part:

(c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:

* * *

(viii) obstruct an ongoing criminal investigation

5 ILCS 140/7(1)(c)(viii). The Defendant also contends that the request is unduly burdensome and the burden on the public body outweighs the public interest in producing the information.

During argument, the Defendant argued that the Plaintiff requested the production of the documentation used to compile the study, in essence a two page form for each case and a potential third form to address circumstances surrounding any potential line-up. Plaintiff, however, contends that its FOIA request seeks the production of the entire investigatory file for each case. After reviewing paragraph 4, the court finds that the entire files are within the FOIA request.

Open Files

Law Enforcement Exemption

During argument, the parties discussed the differences between open and closed files. Plaintiff contends that closed files do not fall within the FOIA law enforcement exemptions, because the production of these documents would not interfere with on-

going criminal investigations or any reasonably contemplated law enforcement proceedings. Defendant argues that some files (cases with no statute of limitations, such as murder or rape cases) may be considered closed because there are no leads but may be reopened pending new information. Defendant argues that other files may be considered closed because they have been through trial, but an appeal is pending, and thus, if reversed, the case may be subject to trial again. In these cases, Defendant argues that the same exemptions would still apply under Section 7 of FOIA. The Court agrees that in those cases where there is no statute of limitations or in those cases which are on appeal, the cases are not considered closed and shall be treated as open files subject to the FOIA law enforcement exemptions.

The Defendant provided the Affidavit of Deputy Police Chief Patrick B. Kerr in support of its Response to establish its burden that the exemptions apply to the production of these files. Deputy Chief Kerr details in his Affidavit that even if the identification factors in police reports are redacted, suspects could become aware of the status of the investigation, as well as potential evidence that could incriminate them. Further, Deputy Chief Kerr noted that suspects would clearly know exactly what information the police have relative to their involvement. Deputy Chief Kerr further details the potential risk of disclosure of witness information to the safety and well being of witnesses and their families, as well as the additional problem that disclosure of the information could further hinder obtaining cooperation of witnesses in the future.

The Plaintiff contends that the Affidavit of Deputy Chief Kerr is conclusory, insufficient and does not contain specific detailed reasons as to why these files are exempt. Plaintiff contends that the Defendant has failed to meet its burden of showing

that the exemptions under Section 7 are applicable. See Illinois Educ. Ass'n v. Illinois State Bd. Of Educ., 204 Ill.2d 456, 791 N.E.2d 522 (Ill. 2003). However, after reviewing the Affidavit, the court finds that Defendant has met its burden of establishing that the open files, as well as those closed files which may be reopened or where charges may still be brought (i.e., when the statute of limitations has not expired) are exempt under Section 7(1)(c). The identity and information provided by persons to the police as contained in these files are per se exempt under Section 7(1)(c).

Privacy Exemption

Defendant further contends that the information contained in the police reports, as well as the photographs used as in the line-ups, are exempt from production under Section 7(1)(b) as the production would constitute a clearly unwarranted invasion of personal privacy rights of those individuals. The Plaintiff agrees that there is a privacy exemption, but contends that the redaction of names and identifiers from the reports and photographs would cure that problem. No evidence has been provided that the individuals in the photographs have consented to the dissemination of said photographs.

Because the requested information (identification of individuals who have provided information in an ongoing criminal investigation) clearly falls within the exemption under Section 7(1)(b)(v), the information is per se exempt from production. Plaintiff's request for the redaction of information does not assist in this instance as stated above. The Affidavit of Deputy Chief Kerr clearly provides sufficient basis to establish that the privacy rights of these individuals would be affected by the disclosure and the

Defendant has met its burden to establish that this information is exempt from production.

At argument, Plaintiff indicated that the photographs could be returned or destroyed once the study is complete. Plaintiff has indicated that it will not publicly disseminate the photographs or other information. However, the idea behind FOIA is to release documents to the public. There is no ability to restrict or condition the release of the information.

Alternatively, the argument may be made that the information contained in the files, i.e., photographs and other identifying information in the police reports, is not specifically contained within the enumerated exemptions under Section 7(1)(b)(v). Therefore, case law requires that “[w]here a public body asserts an exemption for information that is not specifically included on the list and therefore not exempt per se, the court must evaluate the particular information to see if it would constitute a clearly unwarranted invasion of personal privacy.” Lieber, 176 Ill.2d at 408-09, 680 N.E.2d at 377-78. Some factors that the court should consider include (1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information. The information must be evaluated on a case by case basis.

Thus, the Court examines those factors in this case. With regard to the first factor, the public and private interests are equal. However, the degree of invasion of privacy and the subsequent effect of said invasion of privacy factor falls on the Defendant's side. According to Deputy Chief Kerr, the consequences of breaching the trust of these individuals would be far-reaching if the individuals providing information,

whether as a filler in a police line-up or relative to an investigation, were not convinced that their anonymity would be preserved. The final factor weighs in favor of the Plaintiff, as the Defendant holds the files and is not obviously keen on releasing them to the public. However, when balancing all of these interests, the ability of the Defendant to assure persons that their assistance in acting as "fillers" in a photographic police line-up or in providing information in an investigation clearly outweighs the interests of the Plaintiff. Thus, the exemption in Section 7(1)(b) applies to protect the police reports and photographs in open cases from production as this would be a "clearly unwarranted invasion of privacy."

Closed Files

With regard to the closed files, Defendant has agreed to produce the documents used in the study with the suspect, eyewitness and victim information redacted from those documents. As of 2007, approximately one half of the cases in the study were considered closed. The Defendant argues that the photographs used as "fillers" in any line-up in the closed cases are exempt from disclosure under Section 7(1)(b). As stated above, there has been no evidence that these individuals consented to the dissemination of their photographs. Again, considering the factors as set forth above, these photographs are exempt from disclosure under Section 7(1)(b).

With regard to the remaining information in the closed files, the Defendant argues that the burden imposed on it to comply with the request outweighs the public interest. Under Section 3(f), a public body may deny access to materials "if compliance with the request would be unduly burdensome for the complying public body and there is no way

to narrow the request and the burden on the public body outweighs the public interest in the information." 5 ILCS 140/3(f).

The Defendant submitted the Affidavit of Officer Robert Puleo in support of its argument that the redaction of the underlying criminal files would be unduly burdensome. Officer Puleo noted that he had ten reports picked at random, and that he spent 461 minutes checking the status and redacting the ten files. His Affidavit notes that if the Defendant was required to review the approximately 257 cases involved in the Pilot Program, substantial man hours (197 hours) would be required for the Defendant to determine the status of the investigation, and redact witness, victim and juvenile information.

The Defendant has already agreed to provide the Report Data, in redacted format, in closed cases. There is no dispute that the Plaintiff will have the opportunity to review the same information relied upon by the authors of the Report. Thus, it is clear that the Plaintiff will have a chance to perform the study requested based upon the exact same data as used by the authors, placing the parties on the same playing field. The potential relevance of the additional information contained in the closed cases does not outweigh the very real man hours that will be required to redact the entire files.

CONCLUSION

For all the reasons set forth above, the Plaintiff's Motion for Summary Judgment is GRANTED in part and DENIED in part as follows:

- (1) As to open files, the Plaintiff's Motion for Summary Judgment is DENIED, as the information sought is exempt from disclosure pursuant to 5 ILCS 140/7(1)(b)(v), (c)(iii) and (viii) as stated above;
- (2) As to closed files, the Plaintiff's Motion for Summary Judgment is GRANTED in part, and the Defendant is ordered to produce to Plaintiff for inspection and copying the documents used in the Pilot Program, in the redacted format, with the suspect, eyewitness, victim information redacted from those documents;
- (3) As to the photographs in closed files, the Plaintiff's Motion for Summary Judgment is DENIED, as the information sought is exempt from disclosure pursuant to 5 ILCS 140/7(1)(b)(v).
- (4) As to the remaining information contained in the closed files, the Plaintiff's Motion for Summary Judgment is DENIED, as the redaction of the information contained in those materials would impose an undue burden on the Defendant.

As all matters in controversy have been resolved, there is no just reason to delay enforcement or appeal of this order. Clerk to notify all parties.

7/31/08
Date

Betty
Hon. Bobbi N. Petrungaro