

Consolidated Case No. 1-08-2073

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**APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

STEVEN H. DAVID
CLERK OF COURT

NATIONAL ASSOCIATION OF CRIMINAL)
DEFENSE LAWYERS,)

Plaintiff-Appellant,)

v.)

CHICAGO POLICE DEPARTMENT,)

Defendant-Appellee.)

) Appeal from the Circuit
) Court of Cook County
) Chancery Division
) No. 07 CH 3622
) The Hon. Mary Anne Mason
) Judge Presiding

) *consolidated with*

NATIONAL ASSOCIATION OF CRIMINAL)
DEFENSE LAWYERS,)

Plaintiff-Appellant,)

v.)

CHIEF OF THE JOLIET POLICE)
DEPARTMENT,)

Defendant-Appellee.)

) Appeal from the Circuit
) Court of the Twelfth Judicial
) Circuit, Will County
) No. 07 MR 530
) The Hon. Bobbi N. Petrunaro
) Judge Presiding

**REPLY BRIEF OF PLAINTIFF-APPELLANT NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

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ARGUMENT

This Court's February 9, 2009 decision in *Day v. City of Chicago*, 388 Ill. App. 3d 70 (1st Dist. 2009)—handed down just six days after the filing of NACDL's opening brief—establishes the inadequacy of the boilerplate affidavits that the Chicago Police Department and the Joliet Police Department submitted below in support of their claim that FOIA's law enforcement exemption (5 ILCS 140/7(1)(c)) and privacy exemption (5 ILCS 140/7(1)(b)) apply to the police reports sought in NACDL's FOIA request.

Shifting focus in light of the *Day* decision, the Chicago Police argue principally that redaction of the police files in issue in this case would impose an undue burden on the agency, thereby avoiding the obligation to produce the records despite the unavailability of any exemption. *See* 5 ILCS 140/3(f). If the burden of redacting the documents is not "undue," the Chicago Brief concedes that the affidavits of Chicago Police Lt. James Gibson (Chicago R. C300-02 and C354-58) are insufficient to establish the applicability of the law enforcement and personal privacy exemptions. *See* Chicago Brief at 37.¹ Chicago contends that, rather than reversal under the *Day* holding, remand for "*in camera* review is the appropriate course." *Id.* The Chicago Police devote a final section of their Brief to arguing that the Circuit Court properly authorized redaction of the faces in lineup and photo array pictures pursuant to FOIA's personal privacy exemption.

This Reply Brief, in Section I, addresses the *Day* decision and shows (a) that this Court should simply reverse the Circuit Court in light of *Day* and order the Chicago Police to produce the records in issue, subject to redactions to which NACDL has already agreed, and (b) that, if there

¹ Joliet did not file a brief in this appeal. On July 21, 2009, this Court entered an order permitting Joliet to join the Chicago Brief. The affidavit of Joliet Deputy Police Chief Patrick B. Kerr, which the Joliet Police submitted in the Joliet case below, essentially parroted Chicago Police Lt. Gibson's boilerplate regarding the law enforcement and privacy exemptions. *Compare* Joliet R. C160-62 *with* Chicago R. C300-02. Thus, the concession in the Chicago Brief binds Joliet as well.

were to be *in camera* review of any documents in the court below, such review should be limited to those documents in which the Chicago Police have a *specific* reason to fear that disclosure of the document after redaction could violate privacy or interfere with an ongoing police investigation. Section II addresses the claimed “burden” of redacting the police records in issue, demonstrating that Chicago’s arguments fail to apprehend the public benefit to be gained from production of the records and are irreconcilable with the core purpose of FOIA. Finally, Section III shows that the privacy exemption does not apply to redacted images of faces from lineup and photo array pictures.

I. THIS COURT’S DECISION IN *DAY V. CITY OF CHICAGO* MAKES CLEAR THAT THE LOWER COURTS ERRED IN UNCRITICALLY ACCEPTING THE POLICE AGENCIES’ VAGUE AND NON-SPECIFIC JUSTIFICATIONS FOR INVOKING FOIA’S LAW ENFORCEMENT AND PRIVACY EXEMPTIONS.

Day v. City of Chicago, 388 Ill. App. 3d 70 (1st Dist. 2009) decided the same question that is at the core of the present appeal: whether a police department may shield police reports from production under FOIA with boilerplate, conclusory affidavits alleging that production of the records might interfere with an ongoing police investigation or reveal the identity of persons providing information to the police. *See* 5 ILCS 140/7(1)(c) and 140/7(1)(b). *Day* emphatically answered that question in the negative.

In *Day*, the plaintiff filed a FOIA request seeking all of the Chicago Police reports prepared in the course of the 1991 investigation that led to his arrest and conviction in a murder case. 388 Ill. App. 3d at 71. The Police objected to the request, invoking (among others) FOIA’s law enforcement and privacy exemptions—the two exemptions that are in issue here. *Id.* In the trial court, the Police relied principally upon an affidavit signed by Chicago Police Lieutenant James Gibson (who also signed the affidavits that the Police rely upon in this case). Gibson’s affidavit asserted, without explanation, that the murder investigation that led to the plaintiff’s arrest was

“ongoing”—an assertion that, if accurate, could bring the requested police reports within the ambit of the law enforcement exemption, which exempts production where disclosure would “obstruct an *ongoing* criminal investigation.” 5 ILCS 140/7(1)(c)(vii) (emphasis added).

To satisfy the Police burden to show that disclosure of the records would actually obstruct the claimed continuing investigation, Lt. Gibson averred: “Suspects in this crime could become aware of the status of the investigation, the degree of knowledge that police have as to their involvement, and the type of evidence that exists which could incriminate them.” *Day*, 388 Ill. App. 3d at 76. The language is noteworthy because it is *virtually identical* to the boilerplate that Lt. Gibson signed to support the Police assertion of the law enforcement exemption in this case. *See* Chicago R. C302.

Moving to the privacy exemption, Lt. Gibson in the *Day* case asserted that release of the police reports would “constitute an invasion of privacy of the witnesses involved,” going on to elaborate upon the importance of witness cooperation in police investigations. 388 Ill. App. 3d at 77. The *Day* opinion quotes Gibson’s affidavit on this point at length—and, once again, the language is remarkable because it is the same boilerplate that Gibson used in this case. *Compare* 388 Ill. App. 3d at 77 *with* Chicago R. C302.

Gibson’s affidavit in *Day* went on to contend that it would be impossible to protect the privacy of witnesses by redacting the identifying information from the police reports. The *Day* opinion quotes Gibson as follows in support of his claim that the reports could not be adequately redacted:

There is no way to completely ensure that any disseminated information would not be harmful, because seemingly innocuous information may prove valuable to an at-large perpetrator in discerning the nature of the ongoing police investigation.

388 Ill. App. 3d at 77. Here as well, Gibson's *Day* affidavit is word-for-word identical with the affidavit he submitted in this case. See Chicago R. C356.

Day held that the Gibson affidavit was woefully inadequate. Quoting *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 537 (2d Dist. 1989) (as quoted in *Ill. Educ. Ass'n v. Ill. State Bd. of Educ.*, 204 Ill. 2d 456, 468-69 (2003)), this Court reiterated the settled principle that, to sustain its burden to prove the applicability of a FOIA exemption, "the agency must provide a *detailed* justification for its claimed exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." 388 Ill. App. 3d at 74 (emphasis in original). This Court found that Gibson's affidavit contained "sweeping generalities." *Id.* at 77. Gibson's affidavit, this Court found, did "not elicit a single fact that would support an exemption under [FOIA];" it was, according to this Court, "one-size-fits-all, generic and conclusory." *Id.* at 80.

Chicago does not dispute that *Day* is on all fours with this case. Here, NACDL is seeking the exact same categories of police of police reports that were in issue in *Day*. For the same reason that Lt. Gibson's affidavit failed to sustain the burden to show the applicability of FOIA's law enforcement and privacy exemptions in *Day*, his materially indistinguishable affidavits in the record of this case do not support the applicability of those exemptions here.

A. Following *Day*, this Court Should Reverse the Decisions Below and Direct the Police Agencies to Produce the Police Records NACDL Has Requested.

The Chicago Police contend that, in the wake of *Day*, this case should be remanded to the Circuit Court for *in camera* review of the police reports in issue. That procedure is unnecessary and would serve only to further delay NACDL's access to records that it first requested *three years ago*—in July and September 2006. This Court should simply reverse the decisions below and direct the police agencies to produce the requested police reports.

Chicago does not proffer any reason why it would be “appropriate” to saddle the Circuit Court with an *in camera* review of the hundreds of police records that NACDL has requested. Chicago merely argues that it “did not have the benefit of *Day*’s guidance on the level of specificity required” for the law enforcement and privacy exemptions at the time Lt. Gibson submitted his boilerplate affidavits in the record of this case. *See* Chicago Brief at 37.

It is, of course, true that *Day* had not been decided when this case was litigated below. But *Day* did no more than apply established law. The central principle on which *Day* turns—that an agency must provide detailed and specific reasons for its claim that a particular document is exempt from FOIA—was already firmly established by the Supreme Court’s decision in *Ill. Educ. Ass’n*, 204 Ill. 2d at 470 and in the Second District decision in *Baudin*, 192 Ill. App. 3d at 536 on which *Day* principally relied. Thus, the police agencies in this litigation were on notice before the *Day* decision that the boilerplate they proffered below in support of their claimed exemptions would not be sufficient to sustain their burden of proof.

It was the police agencies’ responsibility in the trial court to establish—if they could—that the law enforcement and privacy exemptions applied. It is obvious that the police agencies not only *failed* to discharge their burden but that they *could not* have done so. As NACDL explained extensively in its opening Brief (at pp. 25-32), it is speculative and improbable that—after redaction of all names, addresses and other identifying information—production of the police reports at issue would interfere with any police investigation or reveal the identity of any person who has provided information to law enforcement. Having therefore failed to discharge their burden to establish any exemption for the records in issue, the police agencies must now comply with FOIA and produce the records. They are not entitled to a second bite at the apple (under the guise of *in camera* review).

FOIA provides for *in camera* review of requested records when such review is “appropriate” to determine if the records should be withheld for any reason. *See* 5 ILCS 140/11(f). But that does not mean, as the Chicago Brief seems to suggest (at p. 37), that *in camera* review should be required as a failsafe for a public agency in every case in which the agency’s affidavits are inadequate. Such a rule would convert the Circuit Court into the guardian of public agencies’ interest in withholding documents after the agency itself has failed to discharge its burden to prove the applicability of a claimed exemption. Not only would that rule place the court in the inappropriate role of acting as a quasi advocate for governmental agencies, but it would also unnecessarily increase the workload of busy trial judges who must manage FOIA litigation.

In *Day*, this Court did remand for an *in camera* review of the police records. But that review—confined to a single investigative file—was for a specific purpose: to determine if the file revealed any basis in fact for Chicago’s unlikely claim that there was an “ongoing” investigation, despite the fact that the murder in question was committed in 1991. *See* 388 Ill. App. 3d at 80. Thus, this Court directed an *in camera* review in order to determine the veracity of the claim in the Chicago Police affidavit regarding the status of the police investigation; as this Court put it, *in camera* review was the appropriate alternative to “rubber stamp judicature,” in which Chicago’s facially implausible claim of an ongoing investigation would be uncritically accepted on its face. *Id.*

In this case, in contrast, the Chicago Police have proffered no reason at all for *in camera* review of the many records NACDL has requested. The procedure is unnecessary and would only serve to further delay NACDL’s receipt of records to which it is clearly entitled.

B. Any *In Camera* Review of the Requested Police Reports Should be for a Limited Purpose, Consistent with the Letter and Spirit of FOIA.

If this Court were to order an *in camera* review of the documents in issue, that review should not be the sort of unguided, random “sampling” that Chicago proposes in its Brief (at p. 38). Instead, this Court should provide clear guidance to the Circuit Court as to the purpose for which *in camera* review of *some* documents might be appropriate under the circumstances of this litigation.

This Court should make clear that, prior to any *in camera* review of requested documents, the police agencies should perform the redactions that NACDL has agreed are appropriate, *i.e.*, coded redaction of all addresses, vehicle information, witness, victim and suspect names and other identifying information. If, after the redactions have been performed, a police agency believes there is a *specific* reason to believe that disclosure of a *particular* document (or case file) would obstruct an ongoing investigation or reveal the identity of a person who has provided information to law enforcement, the agency should present the particular document or file to the court for *in camera* review, along with a specific statement as to why the redacted document is exempt from disclosure. The agency’s statement should be filed in the public record. The document or file under review should be sealed and also included in the record. *Cf. Day*, 388 Ill. App. 3d at 80 (instructing the Circuit Court to seal any documents reviewed *in camera* and to include them in the record).

Any document or file that the police agencies do not present for *in camera* review in this manner should be forthwith produced to NACDL. This Court should also make clear that the Circuit Court need not review any document or file *in camera* where the police agency’s statement in support of such review is merely generic and not specific to the particular document. Absent such a threshold showing by the police agency, there would be no basis for the Circuit Court to even examine the document *in camera*, since, as *Day* makes clear, a detailed, document-specific

justification is the *sine qua non* for claiming the exemption. *See* 388 Ill. App. 3d at 74, *citing Ill. Educ. Ass'n*, 204 Ill. 2d at 464.

This guidance as to the appropriate procedure and scope of any *in camera* review is necessary in order to ensure that the review is minimally intrusive on the time of the Circuit Court and that *in camera* review does not result in further lengthy delay in the production of records to which NACDL is clearly entitled.

II. REDACTION OF THE POLICE REPORTS THAT NACDL HAS REQUESTED WOULD NOT IMPOSE AN UNDUE BURDEN ON THE POLICE AGENCIES.

In the face of *Day*, Chicago's principal argument is that it would pose an undue burden on the Police to redact the police reports in issue and that production of the reports is therefore not required. *See* 5 ILCS 140/3(f). This argument fails because it both understates the public interest in disclosure of the requested police reports and overstates the burden of performing the necessary redactions.

A. The Chicago Brief Understates the Public Importance of Disclosure of the Police Reports Underlying the Findings in the Pilot Study Report.

Chicago's argument regarding the burdensomeness of redacting the police reports in issue completely overlooks the evidence in this record regarding why these reports are essential to advance public discourse on reform of police eyewitness identification procedures.

Chicago does not dispute NACDL's extensive showing below regarding the public importance of maximizing the effectiveness and accuracy of eyewitness identification procedures in Illinois. There is no doubt that faulty eyewitness identifications have led to a large number of wrongful convictions in Illinois since 1900 and no dispute that these wrongful convictions have come at great social cost. *See* Chicago R. C453-56. Nor is there any dispute that the Illinois General Assembly commissioned the Pilot study in order to assess the reliability of current

eyewitness identification procedures. *See* 725 ILCS 5/107A-10. And, finally, it is uncontested that Pilot study Report—claiming that the current procedures are superior to proposed reforms—has been widely influential, including effectively thwarting the possibility of reform of police eyewitness identification procedures in Illinois in the near term. Chicago R. C455

Thus, Chicago does not and cannot dispute that the Pilot study Report findings are an important subject for public discussion and debate. Instead, Chicago argues that—since the Pilot study Report has already been debunked by, among others, a blue ribbon panel of distinguished scientists—production of the police reports from cases used in the Pilot study “will not further” the “public interest in disclosure of information that underlies the results of the [study].” Chicago Brief at 33.

This argument completely ignores NACDL’s undisputed demonstration of exactly why disclosure of the requested police reports *is* necessary to advance the public debate regarding the validity of the Pilot study Report and, thereby, to further wider public discussion regarding reform of police eyewitness identification procedures. Dr. Nancy Steblay, NACDL’s retained expert, explained in an affidavit filed below (Chicago R. C544-47) that, for researchers to engage in an informed discussion of the accuracy of the findings in the Pilot study Report, access to what Dr. Steblay termed the “identification histories” of eyewitnesses who were included in the study Report is essential. *Id.* at C544-45.

If an eyewitness included in the study was exposed to a showup or photo array prior to identifying the suspected individual in a live lineup, the validity of the lineup identification is questionable. For a variety of possible reasons, the eyewitness with such prior exposure could be identifying the suspected person not because she recognizes him from the scene of the crime, but

because of the effect on her psyche of having seen that person in the showup or photo array. *See id.* at C545-46.

The Pilot study Report described a very high rate of suspect identifications by eyewitnesses exposed to traditional, simultaneous lineups in Chicago and Evanston (two of the three jurisdictions in the study) and an extraordinarily low rate of filler identifications by such witnesses. *Id.* at C546-47. Indeed, this particular finding is a principal reason why the study Report's authors claim that traditional eyewitness identification procedures are more accurate and reliable than reform procedures.

Researchers have criticized the Pilot study Report as methodologically flawed. One central such criticism is that eyewitness identification history information *may well* have been excluded from the data analyzed by the Pilot study researchers—leading to the very robust findings regarding the accuracy of traditional eyewitness identification procedures described above. *Id.*

With researchers lacking access to the police reports showing the eyewitnesses' identification histories—*i.e.*, all past contacts between the suspect and the eyewitness—public debate regarding this key finding in the Pilot study Report remains at a standoff. Disclosure of these records is essential in order to further debate about the validity of the Pilot study Report findings. As Dr. Steblay explained in her affidavit below:

Reasonable people will argue about the role of multiple identification attempts in the Illinois Pilot Project results, just as the merits of the overall study are debated. Without full eyewitness identification history information, each side in the debate is left to advance their respective speculative hunches.

The only way that the debate can be advanced and the questions resolved is by examining the identification history data in the underlying police records and tracing the precise impact of the witnesses' identification histories on the Pilot Project findings. I therefore strongly believe that researchers seeking to assess the validity of the Illinois Pilot Project findings must be afforded access to all eyewitness identification history information for the eyewitnesses included in the Project.

Chicago R. C547 (emphasis added).

Simply put, the non-disclosure of the redacted police reports that NACDL seeks in this litigation has stifled public discussion concerning eyewitness identification procedures and stalled the public debate regarding the validity of the findings in the Pilot study Report. The public has a strong interest in evaluating those findings. Since the requested police reports are essential to such an evaluation, Chicago is flatly mistaken to contend that disclosing those reports will not further the public interest.

Chicago contends that there is a public interest in *nondisclosure* of the redacted police records in issue and that the value of secrecy should be weighed in assessing whether production of these records would be an undue burden on the police agencies. *See* Chicago Brief at 34. This is not part of the equation. FOIA instructs the courts to weigh the public interest in *having* the requested information against the burden to the agency from compliance with the request. *See* 5 ILCS 140/3(f). A governmental agency's preference for nondisclosure is not relevant consideration in this context.

If the redacted police reports that NACDL has requested are not exempt from disclosure (and this Court's decision in the *Day* case teaches that they are not) then they must be produced unless the burden of redacting them outweighs the public interest in disclosure—without regard to the Chicago Police belief that they should remain confidential.

As demonstrated above, it is very clear that there is a great public interest in disclosure of the redacted police records in this case.

B. The Chicago Brief Overstates the Burden of Redacting the Police Records for Production.

The Chicago Brief argues at considerable length that the Police would be greatly burdened by the task of redacting the requested documents. Chicago overstates the magnitude of that burden.

Chicago asserts that it would take at least approximately 200 person hours (a full month of work for a single person) to redact the requested police reports for production (*see* Chicago Brief at 27-28) and that this allocation of resources would be “extraordinarily burdensome” to the Police (*id.* at 31). It is less than clear how Chicago arrives at this estimate, but it is very clear that the estimate is excessive.

First, Chicago contends that its burden would include redacting identifying information, addresses, vehicle information and the like from criminal history reports, inventory reports, evidence reports, laboratory reports, background checks, social security name searches, vehicle tow reports, name check reports, CAPS information notices and drawings of the human body, among other things. Chicago Brief at 26. Chicago asserts that documents of this nature “seem unlikely even to relate to identification procedures” (*id.*)—and that is certainly true.

NACDL’s FOIA request in this case would be fully satisfied by production of those police reports with information pertinent to the assessment of the Pilot study. As NACDL explained in a supplemental memorandum submitted below (*see* Chicago R. C534-41), NACDL (and its expert) are interested in assessing the quality of the eyewitness identification procedures that were included in the Pilot study. To perform this assessment, NACDL must review all police records that directly describe the lineups and photo arrays included in the study. In addition, NACDL must review any police reports that show prior contact between the eyewitness and the suspect. This includes reports describing the circumstances of the eyewitnesses’ observations of the perpetrator at the scene of the crime; reports describing any relationship between the offender and the eyewitness prior to the crime; and reports describing the so-called “identification history” of the eyewitness—*i.e.*, identification procedures in which the eyewitness participated *prior* to the procedure that is included

in the Pilot study database. This information will likely (though not necessarily) be found in two locations: lineup reports and supplementary reports.

It is probable therefore that, with dialogue between the parties, agreements could be reached that would narrow the range of documents to be redacted and substantially reduce the time Chicago would need to make redactions.²

Second, Chicago claims that its burden would include “cull[ing] the entire collection of documents . . . searching for . . . relevant bits of information.” Chicago Brief at 32. This argument completely misstates the redaction task. NACDL has consistently maintained that redaction of *identifying information* (including addresses, vehicle information and the like) would be appropriate prior to the production of police reports. NACDL has never suggested—and would strongly oppose—massive redactions of the relevant Police reports, leaving only what the Police deem to be “relevant bits of information.”

As NACDL has shown elsewhere, the needs of law enforcement and of witness privacy would be fully protected by relatively modest redactions of identifying information. There is no authority under FOIA for the Police to make wholesale—and time consuming—redactions of all but the portions of police reports that the Police deem relevant to NACDL’s stated purposes.

Redactions are appropriate only to eliminate exempt information—in this case, identifiers of

² Before refusing a FOIA request on the grounds of “undue burden,” the government agency is required to open a dialogue with the requesting party in an effort to make the request manageable. “Before invoking [the undue burden] exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions.” 5 ILCS 140/3(f). Because the police agencies in this case have always adamantly refused to produce any reports from investigations they claim remain open, they never conferred with NACDL regarding their claim that compliance would be unduly burdensome and whether NACDL’s request could be satisfied by production of portions of the investigative files involved in the Pilot study. The absence of dialogue has apparently led to Chicago’s incorrect (and unsupported) assertion (Chicago Brief at 31) that NACDL categorically insists upon production of the full investigative file in every police case.

persons have provided information to law enforcement and identifiers that would disclose the status of an ongoing police investigation. FOIA does not authorize a public body to redact portions of its records merely because the public body may think the requestor doesn't need to see them.

In sum, while it is undeniable that redaction of the police reports in issue will require some allocation of police resources, the arguments in the Chicago Brief reveal that the Police significantly overstate the extent of the burden.

C. When the True Benefit of Disclosure is Weighed against the Actual Burden of Redaction, it is Apparent that the Burden of Producing the Requested Records is Not "Undue."

Considering the true benefit of the public disclosure of the police records in issue here and weighing that benefit against the actual burden to the police agencies of redacting those records for production leads to only one possible conclusion: the public interest would be gravely disserved if the police arguments were to be accepted and the small imposition on police time and resources required to redact the records in issue here were found to trump the interest in advancing a very important, high stakes public discussion.

Three points—all of them very clear on the record in this case—require this Court to find that the interest in disclosure outweighs the burden of redaction.

First, as NACDL demonstrated above, the police reports it seeks are in fact necessary to advance public debate on a matter that literally affects the integrity of the criminal justice system. The furtherance of public discussions like the one NACDL seeks to advance through production of these police reports is *the* core purpose for which the Illinois General Assembly enacted FOIA.

Section I of FOIA is very clear:

[I]t 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 Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely

5 ILCS 140/1. Obviously, public agencies must bear some burden in order to advance the public duty of full and free discussion of important issues like the ones involved here.

Chicago cites several cases in which the burden was held to outweigh the interest in disclosure, but those decisions were driven by the fact that there would be little or no value to the public from disclosure of the requested information. *See, e.g., ACLU Found. of N. Cal. v. Deukmejian*, 651 P.2d 822, 824(Cal. 1982) (public body was not required to make redactions, primarily because of the low utility that the disclosed documents would have after extensive redaction). Cases like *Deukmejian* are not instructive here.

In evaluating the “burden” of redacting the police reports in issue here, this Court must weigh the undeniable fact that, unlike *Deukmejian* and similar cases, the redaction task will yield disclosable documents of undeniable and significant value to public discourse in the State of Illinois about an important criminal justice issue.

Second, NACDL’s FOIA request is narrowly framed and the redaction procedure for the police reports in issue here is straightforward. After specific, identified police files are assembled, the police need only eliminate from the records any addresses; vehicle information; and identifiers of witnesses, victims, uncharged suspects, juveniles and lineup fillers. Codes must be inserted to indicate the nature of the redacted information. The redaction will leave intact most of the narrative in the police reports, which will then be useable for a defined research purpose.

Courts require public bodies to expend the time necessary to assemble records and segregate exempt from nonexempt material in cases like this one where the process of doing so is relatively clear-cut. “If a large proportion of the information in a document is non-exempt, and it is distributed in logically related groupings, the courts should require a high standard of proof for an agency claim

that the burden of separation justifies nondisclosure or that disclosure of the non-exempt material would indirectly reveal the exempt information.” *Mead Data Cent., Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Chicago cites cases that present very different scenarios from this one. A public body should not be required to produce records in response to a FOIA request that is vastly overbroad. *See, e.g., Am. Fed’n of Gov’t Employees, Local 2782 v. U.S. Dep’t of Commerce*, 907 F.2d 203, 208-209 (D.C. Cir. 1990) (request for “every chronological office file and correspondence file, internal and external, for every branch office [and] staff office [of the Census Bureau]” is “so broad as to impose an unreasonable burden upon the agency”). A public body should not be required to painstakingly review largely exempt documents for snippets of nonexempt material. *See, e.g., Doherty v. U.S. Dep’t of Justice*, 775 F.2d 49, 53 (2d Cir. 1985) (“The fact that there may be some nonexempt matter in documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line.”). Nor should a public body be required to undertake gargantuan tasks. *See, e.g., Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1039 (7th Cir. 1998) (nonexempt material in the requested documents not reasonably segregable since it would take the agency eight work *years* to segregate the exempt material).

This case is very different. NACDL’s FOIA request is narrowly confined to a specific set of relevant police files. Most of the information in the requested files is nonexempt. A reasonably straightforward redaction protocol will create disclosable records of great value to researchers and, ultimately, to public discussion about an important issue.

Third, the burden of redacting the police reports in this case is not extreme.

Courts have protected public bodies from requests that require massive undertakings like the ones in issue in *Solar Sources, Inc.* and the cases collected in NACDL's Brief (at pp. 44-45). But they have not balked at requiring public bodies to perform time consuming work, comparable to that necessary in this case, in order to respond to an appropriate FOIA request. For example, in *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2d Cir. 1995), *cert. denied*, 534 U.S. 1057 (2001) the court held that it was not "unreasonably burdensome" to require the public body to manually search 803 files to determine if any of them contained information relevant to the FOIA request. The court required the search. That undertaking may well have been *more* time consuming than performing redactions to materials in the 170 investigative files in issue here.

There is no case among those cited to the Court (or of which NACDL knows) in which any court excused a public body from undertaking so small an effort to produce documents that have as much public importance as the police reports in issue here. It would be contrary to the principles embodied in the Illinois FOIA if further public discussion regarding the Pilot study report and its policy implications were to be stymied solely because of the need to invest a modest amount of public agency resources to redact the key documents.

III. THE LOWER COURTS ERRED IN PERMITTING THE POLICE AGENCIES TO REDACT FACIAL IMAGES FROM LINEUP AND PHOTO ARRAY PHOTOS PRIOR TO PRODUCTION.

Chicago advances no argument that refutes NACDL's demonstration that lineup photos and photo array photos should be disclosed intact, without redaction of the participants' facial features.

Chicago does not dispute that this Court must apply the balancing test set forth in the Supreme Court's decision in *Leiber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill. 2d 401 (1997) to determine whether the public and private interest in disclosure of the unredacted photographs outweighs the privacy interests of those whose images are depicted in lineup photographs and in photo arrays. But

Chicago mistakenly exaggerates the privacy interest involved and understates the interest in disclosure.

First, the privacy interest in these photographs is not great, as NACDL explained in its opening Brief (at pp. 39-42). After all personal identifying information is removed from the photographs, the police officers and jailed persons who typically act as fillers in lineups will have only a minimal “privacy” interest in the photographs in which they are pictured. Moreover, lineup fillers have *consented* to serve as distracters in an identification procedure, knowing full well that photographs of the lineup in which they participated could be used at a public criminal trial and further diminishing any claimed privacy interest.

Chicago’s principal argument in response is that there is a stigma associated with “mug shots”—suggesting that the photographs in issue would be clearly identifiable as arrest photographs. *See* Chicago Brief at 41, 42 and 43. This argument is misplaced. The photographs in issue here are lineup photographs—typically picturing five or more individuals in a line—and photographs used in photo arrays—typically Polaroid pictures with no identifying marks that the Police maintain on file for this purpose. These are *not* “mug shots.” No person viewing any of these photographs would conclude that a particular person pictured had been arrested.³ To the extent that Chicago’s argument rests upon the claimed stigmatizing effect of having one’s mug shot disclosed to the public (*see Times Picayune Pub. Corp. v. U.S. Dep’t of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999)), the argument is simply inapt.

Chicago also overstates the privacy interest of the lineup participants by presuming that these individuals would be recognized if the public were to see their pictures. To the contrary, there

³ To the extent any photograph used in a photo array did convey the impression that the person was in police custody, that fact would present obvious concerns about the reliability of the identification procedure. *See, e.g., U.S. v. Saunders*, 501 F.3d 384, 390 (4th Cir. 2007).

is every reason to believe that persons shown in these photographs are completely unknown to the public and their facial features would likely never be connected to a name by anyone viewing the photos. This is not a case like *U.S. Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749 (1989), in which disclosure of a rap sheet would necessarily reveal the subject's name and show him in an unfavorable light, or like *ACLU v. Dep't of Defense*, 543 F.3d 59 (2d Cir. 2008), in which the photographs (of torture of Abu Ghraib prisoners) were highly stigmatizing and certain to capture instant, worldwide attention. Rather, all that is at stake here is the revelation of anonymous photographs with no stigmatizing effect. In this case, any privacy interest in the photographs (with identifying information redacted) is marginal at best.

Second, there is a public and private interest in disclosure of these photographs, which Chicago understates but does not attempt to deny. The importance of the unredacted photographs lies in the fact that they are the only means available to researchers to examine the integrity of the identification procedures that were included in the Pilot study. No other source of information exists that would reveal whether the lineups and photo arrays in the study were fairly constructed.

It is no answer to say that the Pilot study has been “probed and studied in other ways.” Chicago Brief at 44. Other studies that did not make use of the photographs did not and could not assess the integrity of lineup and photo array composition. That undertaking—undeniably one that bears critically on the validity of the Pilot study Report findings—can *only* be undertaken after researchers are provided access to unredacted lineup and photo array photographs.

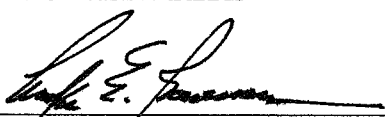
Therefore, there is no question that the important public interest in a full examination of the Pilot study Report findings outweighs the relatively small privacy interest of lineup and photo array participants. The unredacted photographs must be disclosed.

CONCLUSION

For the foregoing reasons and for the reasons stated in NACDL's opening Brief, this Court should enter an order reversing the decisions in both cases below and directing the Chicago Police and the Joliet Police to comply in full with NACDL's FOIA requests, subject only to those redactions that NACDL has agreed to accept.

Respectfully submitted,

**NATIONAL ASSOCIATION OF CRIMINAL
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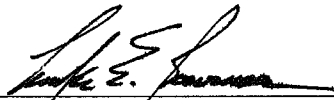
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 20 pages.



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CERTIFICATE OF SERVICE

I certify that I served three copies of the Reply of Brief of Plaintiff-Appellant National Association of Criminal Defense Lawyers upon:

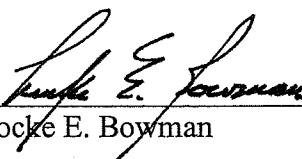
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