IN THE CIRCUIT COURT
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, WHEATON, ILLINOIS

JOHN KRAFT and KIRK ALLEN,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
COLLEGE OF DUPAGE,	)	2015-CH-79
	)	
	)	
Defendant.	)	

CORRECTED RESPONSE TO COLLEGE'S COMBINED MOTION TO DISMISS VERIFIED COMPLAINT PURSUANT TO SECTION 2-619.1

INTRODUCTION

Having engaged in a pattern of delay and obstruction, Defendant College of DuPage now seeks to avoid the consequences of its actions by continuing to withhold clearly public documents and seeking to avoid the payment of penalties and Plaintiffs' attorneys' fees. Two sets of documents are at issue—the Broadcast Technologies invoices (Counts One and Two) and the W-2s for College of DuPage President Robert Breuder (Count Three)—both of which relate directly to expenditures of public funds. Defendant refused to produce the Broadcast Technologies invoices despite multiple requests from Plaintiffs (amazingly, Defendant now claims Plaintiffs should have filed yet another request) and provided wholly deficient responses to Plaintiffs' requests. Then, once Plaintiffs filed the instant lawsuit, Defendant produced the Broadcast Technologies invoices (misleadingly stating that it previously withheld them based on an irrelevant court order) and attempted to wash its hands of the situation by declaring Counts One and Two "moot." The harm, though, extends beyond denial of documents (and is not remedied simply by the production of documents) because it also includes delay and failure to provide proper responses to Freedom of Information Act requests. Plaintiffs are entitled to civil penalties for Defendant's willful and intentional failure to comply with FOIA, and Plaintiffs should also be entitled to attorneys' fees if they can prevail on the civil penalties.

W-2 forms for public employees reflect the expenditure of public funds. Even though such documents contain some private information, Plaintiff Kraft has never disputed that some limited portions of the W-2s contain exempt information and has consistently stated that he would accept redacted versions. FOIA specifically provides that when exempt and non-exempt information is intermingled in public records, the public records must nonetheless be produced, although the public body can redact the exempt information. Furthermore, Plaintiff Kraft is entitled to his attorneys' fees in connection with his FOIA request.

Plaintiff bears a heavy burden on its motion under 735 ILCS 5/2-615. "A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enters., Inc. v.*

Cnty. of Cook, 232 Ill. 2d 463, 473 (2009). Defendant has not met its burden with regard to Count Three, and its arguments with regard to Counts One and Two are unpersuasive. Accordingly, Plaintiffs respectfully request that this Court deny College's Combined Motion to Dismiss Verified Complaint Pursuant to Section 2-619.1.

ARGUMENT

I. FOIA should be liberally interpreted to encourage access to public records.

Defendant's intransigence in producing public records flies in the face of the explicitly stated goal of the Illinois FOIA. The purpose of FOIA "is to open governmental records to the light of public scrutiny." *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 128 Ill. 2d 373, 378 (1989). Accordingly, under FOIA, "public records are presumed to be open and accessible." *Lieber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill. 2d 401, 407 (1997). As the General Assembly states in section 1 of FOIA: "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." 5 ILCS 140/1.

II. Defendant has not "mooted" the invoice issue.

A. Counts One and Two should not be dismissed as moot under Section 2-619(a)(9) because Plaintiffs seek additional relief.

Plaintiffs seek not only documents but also an order imposing civil penalties and awarding costs and reasonable attorneys' fees as to Counts One and Two. (Ver. Compl. ¶¶ 30, 35.) "A claim is moot when no actual controversy exists or events occur which make it impossible for a court to grant effectual relief." *Duncan Publ'g v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1st Dist. 1999). "Actions will be dismissed as moot once plaintiffs have secured what was originally sought." *Id.*

Although Defendant has now produced the records requested in Counts One and Two after substantial delay, Plaintiffs request more than the production of documents in their Complaint; Plaintiffs also seek the imposition of civil penalties for Defendant's willful and intentional failure to comply with FOIA under 5 ILCS 140/11(j) and an award of costs and

reasonable attorneys' fees under 5 ILCS 140/11(i). (Ver. Compl. ¶¶ 30, 35.) Accordingly, this Court can still grant effectual relief under Counts One and Two. Defendant's blanket statement that "the injunctive relief sought in those counts is now moot" overstates the case. (Mot. to Dismiss at 3.) In particular, the validity of Defendant's claimed exemption remains at issue.

At least two Illinois appellate courts have recognized that once an agency produces the requested records in full, "a plaintiff's claim for production of records and information is moot," but "its motion for attorney's fees, 'which is ancillary to the underlying action,' is not." *Duncan*, 304 Ill. App. 3d at 782 (quoting *GMRI, Inc. v. EEOC*, 149 F.3d 449, 451 (6th Cir. 1998)). In *Duncan*, the court affirmed the entry of summary judgment on the production request but held that the circuit court erroneously denied plaintiff the right to be heard regarding the claim for fees and reversed and remanded on that issue. *Id.* at 787. Thus, while this Court may strike Plaintiffs' requests for production, it is clear Plaintiffs' additional requests for relief in Counts One and Two remain.

B. Counts One and Two should not be dismissed per 2-619(a)(9) because Defendant's acts warrant civil penalties and Plaintiffs are entitled to attorneys' fees.

1. Defendant's improper withholding of public records under the investigative records exemption merits the imposition of penalties under 5 ILCS 140/11(j).

Defendant's assertion of the 7(1)(d) exemption for investigative records was unjustified, improper, and surrounded by circumstances indicating bad faith. By amendment effective January 1, 2010, the Illinois FOIA provides that "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 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). Defendant's deficient response to Plaintiffs' records requests meets this bad faith threshold.

In initially responding to Plaintiffs' requests for the Broadcast Technologies invoices, Defendant stated only that the invoices "are exempt from disclosure under FOIA Section 7(1)(d) which exempts 'Records in the possession of any public body created in the course of administrative enforcement proceedings, or any law enforcement or correctional agency for law

enforcement purposes.'" (Ver. Compl. Exs. B & D.) This response fell well short of Defendant's statutory obligation. According to FOIA: "Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request, the reasons for the denial, including a *detailed factual basis for the application of any exemption claimed*, and the names and titles or positions of each person responsible for the denial." 5 ILCS 140/9 (emphasis added). Defendant did not provide *any* factual basis for its denial, let alone a "detailed factual basis."

In addition, Defendant did not properly assert the 7(1)(d) exemption. That exemption involves a two-part test, but Defendant cited only the first part. It is not sufficient to state that the records are part of an administrative enforcement proceeding or are being used by a law enforcement agency for law enforcement purposes. If the documents meet those criteria (and, as explained below, they do not) the public body may deny disclosure "only to the extent that disclosure would" interfere with law enforcement proceedings or administrative enforcement proceedings, deprive a person of a fair trial, disclose a confidential source or investigative techniques, endanger the life of law enforcement personnel, or obstruct an ongoing investigation. *See* 5 ILCS 140/7(1)(d). Defendant never claimed that it met any of those criteria.

An Illinois appellate court has warned against using the exemption for an ongoing criminal investigation as a "magic talisman" against disclosure. *Day v. City of Chicago*, 388 Ill. App. 3d 70, 76 (1st Dist. 2009). The court also noted that the public body must provide a "*detailed* justification" for withholding under the investigative records exemption. *Id*. at 74 (emphasis in original); s*ee also* 2013 PAC 25483 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 25483, issued Nov.12, 2013, at 5-6) (holding, in a binding opinion, that the defendant "has not sustained its burden of showing by clear and convincing evidence" that an exemption under section 7(1)(d) prohibits disclosure when it failed to "identify any investigation or specific proceedings or describe how release of the records would interfere with any proceedings"). Here, Defendant provided no justification at all, let alone a detailed justification supported by clear and convincing evidence. Defendant's attempt to stymie legitimate newsgathering efforts directed toward a politically sensitive investigation should not be countenanced.

In addition, by its terms, the 7(1)(d) exemption does not even apply to the public records at issue. The 7(1)(d) exemption relates only to "[r]ecords 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." 5 ILCS 140/7(1)(d). Defendant is not a law enforcement or correctional agency and did not claim to be one. The only possible application of 7(1)(d) then would be to records created in the course of an administrative enforcement proceeding. Defendant did not claim in its denial that there was an administrative enforcement proceeding or that the requested records were created in the course of such a proceeding. Instead, as Plaintiffs allege, the documents "were not created in the course of an administrative enforcement proceeding." (Ver. Compl. ¶¶ 28, 33.) The 7(1)(d) exemption is simply inapplicable. Perhaps that is why Defendant tried to change positions in February and claim its denials were based on a court order that did not even exist when Defendant denied Plaintiffs' requests.

In fact, in a letter Defendant's counsel wrote to Plaintiffs' counsel on February 23, 2015, Defendant's counsel states: "When your clients first sought these documents, they were the subject of a court seal and were not produced for this reason." (Mot. to Dismiss Ex. 1.) This is demonstrably false. As noted above, Defendant's denial letters do not mention the November 14, 2014 court order. That is because both were sent before November 14. The first denial was sent on October 13, 2014, and the second denial was sent on November 6, 2014. (See Ver. Compl. Exs. B & D.) In fact, since the FOIA denial was not based on any court order, Defendant's subsequent production of documents after the court order was vacated indicates that there was no proper basis for the initial denial. These shifting bases for denial are evidence of bad faith. *See Rock River Times v. Rockford Pub. Sch. Dist. 205*, 2012 IL App (2d) 110879, ¶ 22 (2d Dist. 2012). Defendant should have operated under the presumption that all records in its custody are open to inspection and copying. Instead it withheld records claiming an exemption that it could not later justify.

Only now in its motion to dismiss does Defendant offer any explanation for its actions. Defendant claims that it relied on representations made by "DuPage County Assistant State's Attorney Kenneth Tatarelis that disclosure of the Broadcast Technologies Invoices might interfere with a criminal investigation" when it denied Plaintiffs' FOIA requests. (Mot. to Dismiss at 3.) The purported Tatarelis statement comes out of nowhere. It is not in either of the denial letters. (*See* Ver. Compl. Exs. B & D.) It is not in the Verified Complaint. It is not supported by affidavit as it must be by statute. *See* 735 ILCS 5/2-619 (stating that grounds for attack that do not appear on face of pleading "shall be supported by affidavit"). And it is not the type of fact that can be judicially noticed.[1] As such, the purported Tatarelis statement is not cognizable and has no relevance to this motion, except as further evidence of Defendant's willful failure to comply with FOIA.

Defendant's actions—denying on one basis and then falsely stating the denial was based on another, attempting improperly to augment the record to bolster plainly deficient denial letters—are consistent with the type of activities the circuit court in *Rock River Times* deemed worthy of penalties for willful and intentional failure to comply with FOIA. As the circuit court noted in *Rock River Times*, the "entire course of events here strongly suggest[ed] that the [school] first decided that it would not release a document which it did not want to release, and only then did it begin looking for reasons to support a decision it had already made." 2012 IL App (2d) 110879, ¶ 22.

In sum, contrary to Defendant's assertions in its motion, the facts indicate that Defendant willfully and intentionally violated the requirements of FOIA by failing to provide justification for its claimed exemption and improperly withholding public records under 7(1)(d). Defendant then compounded the problem by claiming an ex post (and false) justification for denying the requests and seeking to use "evidence" that is plainly improper on a motion to dismiss. The

[1] "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. Evid. Rule 201(b).

Court would be justified in granting Plaintiffs' requested relief under Counts One and Two, and therefore Plaintiffs' civil penalties claim should not be dismissed insofar as it relates to these counts.

2. As the potentially prevailing party in this matter, Plaintiffs are entitled to an award of costs and reasonable attorneys' fees pursuant to 5 ILCS 140/11(i).

Defendant argues Plaintiffs are not entitled to attorneys' fees under Counts One and Two, relying solely on the attorney fee discussion in *Rock River Times*. (Mot. to Dismiss at 4-7.) That decision held that "nothing less than court-ordered relief" is required "in order for a party to be entitled to attorney fees under FOIA," rejecting the "catalyst-theory"—long-accepted in Illinois—which holds that "a party can recover attorney fees if the lawsuit prompts the other party to voluntarily change its conduct." *Rock River Times*, 2012 IL App (2d) 110879, ¶¶ 16, 40. In short, the *Rock River Times* court interpreted a minor amendment in the Illinois FOIA to find a drastic change in Illinois law.

Although the Second District came to this conclusion, the law is yet unsettled in Illinois. In the only other case to consider this issue, which Defendant acknowledges by footnote, the First District considered the *Rock River Times* decision and came to the exact opposite conclusion, finding that *Rock River Times* was "wrongly decided." *Uptown People's Law Ctr. v. Dep't of Corr.*, 2014 IL App (1st) 130161, ¶ 8 (1st Dist. 2014). After extensive analysis of the 2010 FOIA amendment, the court found "no indication that the legislature intended to abandon Illinois' policy of awarding fees under FOIA despite the absence of a court order." *Id.* at ¶ 21.

This makes sense in light of the civil penalties provision, 5 ILCS 140/11(j), that was also added in the very same 2010 Amendments. *Rock River Times* is also the first case to interpret the civil penalties provision, finding that defendant's acts warranted a civil penalty. *Id*. at ¶ 44. But in so finding, the court failed to explain why an order imposing a civil penalty for willful and intentional failure to comply with FOIA is not the very "court-ordered relief" that *Rock River Times* requires. Under the rule announced in *Rock River Times*, an order imposing civil penalties should amount to the "court-ordered relief" necessary to be deemed a prevailing party under

FOIA. Here, the grant of such relief would clearly make Plaintiffs the prevailing party in this matter, entitling them to an award of attorneys' fees. For this reason, the request for attorneys' fees in Counts One and Two should not be dismissed.

III. The Breuder W-2s contain information reflecting expenditures of public funds and should be disclosed.

Dr. Robert Breuder is the President of the College of DuPage, and information on his W-2s constitutes a public record. Defendant denied Mr. Kraft's request on the ground that the W-2s contain "private information" exempt from disclosure. (Ver. Compl. Ex. F.) Mr. Kraft does not deny that the W-2s contain some "private information," but the W-2s also contain records reflecting public expenditures (*i.e.*, payments to a public employee from a public body). The Illinois FOIA is definitive on this issue: "All records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public." 5 ILCS 140/2.5. In addition, "[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." 5 ILCS 140/3(a) (emphasis added). Furthermore, the exemptions to the Illinois FOIA must be read narrowly and in favor of disclosure. *See S. Illinoisian v. Ill. Dept. of Pub. Health*, 218 Ill. 2d 390, 416-17 (2006). Finally, Defendant must prove the applicability of any exemption by clear and convincing evidence. 5 ILCS 140/11(f). Notwithstanding these clear and specific directives, Defendant seeks to withhold the records of how its funds are spent.

The fact that some private information may be included in the public records is no bar to disclosure. Under FOIA, when a public record includes information that is exempt and 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). Again, the directive is clear. Even the Illinois Municipal League agrees that many categories of information in W-2 forms are public

information and must be disclosed. *See* Illinois Municipal League W-2 Form Guide, located at http://www.iml.org/file.cfm?key=3404 (attached as Ex. A).[2]

Defendant contends that, even if it should lose on the Breuder W-2s, it is "immunize[d]" from all liabilities and penalties under Section 9.5(f) of FOIA. (Mot. to Dismiss at 7.) Defendant misreads Section 9.5(f), which provides in pertinent part that "[a] public body that discloses records in accordance with an opinion of the Attorney General is immune from all liabilities by reason thereof and shall not be liable for penalties under this Act." 5 ILCS 140/9.5. This section, however, applies only when a public body "discloses" records—not when it conceals public records. Tellingly, Defendant does not cite a single case in support of its radical re-interpretation of the statute.

Defendant falsely states that "[n]ot surprisingly, Plaintiff makes no reference to the PAC rejection correspondence in his Verified Complaint." (Mot. to Dismiss at 7.) In fact, the Verified Complaint states: "Plaintiff Kraft sought review from the Illinois Public Access counselor, and the Public Access Counselor issued a non-binding decision in the Defendant's favor." (Ver. Compl. ¶ 21.) Regardless, Defendant cites several non-binding Public Access Counselor ("PAC") opinions as "clear and unambiguous precedent" in support of its argument that W-2s need not be disclosed (Mot. to Dismiss at 7). Defendant overstates the significance of the non-binding PAC opinions. As an Illinois appellate court has stated: "Thus, in this case, all parties agree the Attorney General chose to issue a nonreviewable, nonbinding, and nonfinal opinion, leaving Grosskopf with merely the Attorney General's advisory and unenforceable statement on the matter. The Assistant Public Access Counselor's letter has no legal effect." *Brown v. Grosskopf*, 2013 Ill. App. (4th) 120402, ¶ 11 (4th Dist. 2013). Moreover, notwithstanding the purportedly "clear and unambiguous precedent" the PAC has previously ordered the disclosure of W-2s. As is noted in the non-binding PAC opinion attached as part of Group Ex. 4 to the

[2] Plaintiffs respectfully request that this Court take judicial notice of the Illinois Municipal League guide.

Motion to Dismiss, the PAC in 2011 PAC 12652 "this office concluded that the library district was required to disclose the W-2 forms . . . ."

Finally, Defendant notes, in rank speculation, that "[f]or Kraft, it seems that his requests are not really about seeking information." (Mot. to Dismiss at 8.) Defendant's mudslinging, in addition to being unseemly, is also irrelevant. Under FOIA, a public body cannot "require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver." 5 ILCS 140/3(c). Defendant takes the position that it would turn over the salary information if requested in the context of other documents. (Mot. to Dismiss at 8.) Plaintiff Kraft, however, has a right to see President Breuder's information in the form in which Defendant reported it to the federal government. The pertinent question is not whether a requester makes a request with a pure heart but instead whether the records at issue are public records subject to disclosure under the principles of transparency and accountability that animate the Illinois Freedom of Information Act. Here, they unquestionably are.

Conclusion

For the reasons set forth herein, Plaintiffs' hereby respectfully request that this Court deny Defendant's Motion to Dismiss.

Dated: April 17, 2015

Respectfully submitted,

JOHN KRAFT & KIRK ALLEN

By: __/s/ Brendan J. Healey_____
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused to be served Plaintiffs' Corrected Response to College's Combined Motion to Dismiss Verified Complaint Pursuant to Section 2-619.1 on this 17th day of April, 2015, via email and e-filing, to Defendant's counsel of record as follows:

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