

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
MACOUPIN COUNTY, ILLINOIS

John Kraft,)
Plaintiff)
)
v.) 17 MR 25
)
City of Carlinville,)
Defendant)

**CITY OF CARLINVILLE'S
RESPONSE TO PLAINTIFF'S SECOND MOTION
FOR SUMMARY JUDGMENT**

NOW COMES the City of Carlinville, by and through one of its attorneys, Daniel P Schuering, and for its response to the Plaintiff's Second Motion for Partial Summary Judgment ("Second Motion") states as follows:

The Second Motion focuses on the compliance by the City of Carlinville with the Court's order of July 10, 2018. Contrary to the assertions of the Plaintiff, the response of the City is a complete response which provided all documents in the possession of the City which are responsive to the for requests contained in the January 16, 2017 Freedom of Information Act request of the Plaintiff. Attached hereto as Appendix A are letters dated July 13, 2018 and July 14, 2018 which constitute the transmittal of the records order to be disclosed.

The Plaintiff now focuses on two items from that original request alleging a failure on the part of the City to fully comply with his request. First, despite the transmittal of a stenographic transcript of meetings of the Carlinville Municipal Officers Electoral Board ("CMOEB"), the Plaintiff complains that the City did not provide a copy of a "recording" of those meetings. Second, the Plaintiff alleges that the City failed to provide copies of "all agendas, minutes, and public notices (IE: [sic] newspaper ads) of all Electoral Board meetings, including the meeting at Mr. Bertinetti's 's private office and the Executive Session

meeting held on December 28, 2016 prior to the open meeting on the same evening”, Kraft FOIA Request, January 16, 2017 (Exhibit A attached to the Complaint herein).

The plaintiff then launches into an argument with respect to the adequacy of the search performed by a single individual who is the City Clerk and Freedom of Information Act Officer for the City.¹ The Plaintiff then, following their misdirection of the court to an incorrect collateral argument, seeks summary judgment arguing that the City has failed to comply with the order of the Court of July 10, 2018.

I. Meeting Recordings

The assertion by the Plaintiff of a failure to produce “recordings” of the meetings of the CMOEB contains within it a misstatement of the law pertaining to the recording of meetings. No provision of the Illinois Municipal Code, 65 ILCS 5/1-1-1 et seq., requires meetings of an electoral board to be “recorded” as described by the Plaintiff. In addition, no provision of the Open Meetings Act, 5 ILCS 120/1 et seq., requires such a “recording”.

A. Illinois Municipal Code

In addition to a myriad of other duties, the City Clerk is the local election official in Illinois municipalities, 10 ILCS 5/1-3(10.). Included within those duties is the receipt and acceptance of nominating petitions, the receipt and acceptance of petitions objecting to nominations and service as a member of any electoral board constituted to hearing objections, 10 ILCS 5/10-9 (3).² At the December 13, 2016 meeting of the CMOEB, the members unanimously adopted a resolution appointing the City Clerk as the “ex-officio Clerk” of the municipal electoral board, CMOEB Transcript of Proceedings, December 13, 2016, p 19 L 7 through p 20 L 17. This designation, along with the duties prescribed in the Election Code places the City Clerk in possession of all records designated to be retained by the local election official, including all records of the electoral board.

Generally, the City Clerk is the keeper and custodian of all municipal records, “[t]he municipal clerk shall keep the corporate seal, to be provided by the corporate authorities, and all papers belonging to the municipality the custody and control of which are not given to other officers”, 65 ILCS 5/3.1-35-90.

¹ Coincidentally, that same officer also served as the clerk of the Carlinville Municipal Officers’ Electoral Board, discussed below.

² See, generally, Article 10 of the Election Code for various duties of the “local election official”, 10 ILCS 5/10-1 et. seq.

As a result, the City Clerk of the City of Carlinville is the sole custodian of all municipal records which encompass those records sought by the Plaintiff.

B. Carlinville Municipal Officers Electoral Board

The relevant provisions of the Election Code governing municipal electoral boards does not dictate specific rules of proceeding for electoral boards but does require that an electoral board “on the first day of its meeting adopt rules of procedure for the introduction of evidence and the presentation of arguments and may, in its discretion, provide for the filing of briefs by the parties to the objection or by other interested persons”, 5 ILCS 5/10-10. Such an objection petition was filed by Sherry Brianza, an elector of the City. At its initial meeting on December 13, 2016, the CMOEB adopted its procedural rules, CMOEB Transcript of Proceedings, December 13, 2016, p 6 L 9 through p 7 L 16. A copy of the procedural rules (the “Rules”) is attached hereto as Appendix B.

Contained within the Rules is Section 13, General Procedures, which specifies certain necessary matters and details to comply with the Election Code requirement for “rules of proceeding”. The second textual paragraph of that Section provides,

The Board shall provide a certified court reporter for all hearings, but not for record checks. The Board may waive this requirement at any time without notice. The Board will not cause a transcript to be prepared unless it needs a transcript for a particular purpose. If a petition for judicial review of the Board's decision is filed, the Board will provide a record to the court as provided by the Administrative Review Law. Any party may purchase a transcript from the court reporter at his or her own expense, Rules, Section 13, p. 4.

No provision of the relevant statutory language or the Rules suggests or, more importantly, requires recording of meetings of the Electoral Board. As a result, CMOEB prepared transcripts of all of its meetings, both of which were including in the City’s production of records on July 13-14.

Notwithstanding the lack of a requirement to record its meetings, the CMOEB is subject to the strictures of the Open Meetings Act, 5 ILCS 120/1 et seq., (“OMA”). Section 2.06 of OMA addresses minutes and recording of meetings by the unit of government OMA

2.06. Subsection (a) requires the keeping of minutes of all meetings, open or closed but does not require a “verbatim record” except in the case of closed sessions of the unit of government. That provision requires “a verbatim record of all their closed meetings in the form of an audio or video recording”, *Id.* at 2.06(a).

Immediately following the conclusion of the CMOEB proceedings, the objector in that proceeding filed an administrative review action in the Macoupin County Circuit Court, *Brianza v. Carlinville Municipal Officers Electoral Board and Demuzio*, 2017-MR-1. In that action, Brianza sought judicial review of the findings of the CMOEB. In response to the petition of Brianza, the ex-officio clerk of CMOEB, City Clerk and Freedom of Information of Act Officer, Carla Brockmeier, prepared and filed the record of all proceedings of the CMOEB with the circuit court as required by Section 10-10.1. (a) of the Election Code, 10 ILCS 5/10-10.1(a).

That record of proceedings was accompanied by the Certification of Ms. Brockmeier, copy attached as Appendix C (“Clerk’s Certification”). In the Clerk’s Certification, a complete listing of all materials pertaining to the CMOEB was enumerated and followed by the certification of Ms. Brockmeier which provided, in relevant part, “an original counterpart of the complete record of the proceedings of the Carlinville Municipal Electoral Board In the Matter of the Objection of Sherry L. Brianza to the Nominating Petition of Deanna Demuzio is attached hereto and is a true, correct and complete record of the proceedings therein”, *Brianza v. CMOEB, Certification of Record*, p. 2.³ The Clerk’s Certification bears the signature of Ms. Brockmeier and the seal of the City of Carlinville. The original of that administrative record is still on file in the records of the Macoupin County Circuit Clerk.

The certification made by Ms. Brockmeier was made to the Circuit Court under penalty of perjury, even though not expressly stated on the Clerk’s Certification. “A person commits perjury when, under oath or affirmation, in a proceeding ... he or she makes a false statement, material to the issue or point in question, knowing the statement is false”, 720 ILCS 5/32-2(a). Notwithstanding the contentiousness of the instant litigation, the presence

³ It is also important to note that no objection or suggestion of any discrepancy was raised by the Plaintiff in the *Brianza v. CMOEB* action.

of a certification subject to an assertion of perjury if false in a collateral proceeding demonstrates the accuracy of the record provided to the Plaintiff.

II. Agenda of Alleged Meetings

This certification and the credence it lends to the accuracy of the records produced here addresses the second objection raised in the Second Motion. According to the second disputed request, the Plaintiff seeks “all agendas, minutes, and public notices (IE: [sic] newspaper ads) of all Electoral Board meetings, *including the meeting at Mr. Bertinetti’s ’s private office and the Executive Session meeting held on December 28, 2016 prior to the open meeting on the same evening*”, Kraft FOIA Request, January 16, 2017 (Emphasis Added.) Returning to the Clerk’s Certification, discussed above, the certification contains “the *complete* record of proceedings”, Clerk’s Certification, p. 2 (Emphasis Added). The enumeration set forth the Notice and Agenda for the first meeting, Items 5 & 6, and the Notice and Agenda for the second meeting of the CMOEB, Item 19, Clerk’s Certification, p. 1 & 2.

This complete record of the proceedings unequivocally demonstrates that “agendas, minutes and public notices” of meetings described by the Plaintiff in this disputed request do not exist because no such meetings occurred.

III. Adequacy of the City’s Search

The Plaintiff argues that the adequacy of the City’s search is subject to the strictures of several cases interpreting the *federal* Freedom of Information Act. In previous filings with this Court, the Plaintiff has expressed the view that Illinois law is properly interpreted by reference to opinions interpreting the federal FOIA. And, again, in reliance on that faulty premise, the Plaintiff retreats to federal cases for propositions that cannot be supported using the proper law for interpretation of the Illinois FOIA.

The proposition that the Illinois FOIA is best interpreted with reference to the federal FOIA is a long since rejected premise. Clearly stated, the appellate court in *Rockford Police Benevolent and Protective Association, Unit # 6 v. Morrissey*, 398 Ill.App.3d 145, 925 N.E.2d 1205, 339 Ill. Dec. 84 (2nd Dist., 2010), articulated the relevance of federal decisions used to interpret the Illinois FOIA:

[W]e note that defendants' use of federal cases ... is doubly dubious. In the first place, decisions of federal district courts are

not binding upon state courts and are, at most, persuasive authority. *Internal Citation Omitted*. Second, and more importantly, however, Illinois courts have repeatedly noted that the Illinois version of the FOIA is different from the federal version and is, therefore, subject to a different interpretation”, *Id.* at 153.

The Illinois Supreme Court has rejected this proposition in *American Federation of State, County & Municipal Employees v. County of Cook*, 136 Ill.2d 334, 144 Ill. Dec. 242, 555 N.E.2d 361 (1990). “[W]e think that the Illinois Act speaks for itself, and none of the cases that the parties cite construe the Illinois Act ...”, *Id.* at 555 N.E.2d 361, 365, rejecting references to federal case law. In the Fifth Appellate District, the court similarly held in *Carter v. Meek*, 322 Ill.App.3d 266, 750 N.E.2d 242, 255 Ill. Dec. 661 (Ill. App. 5th Dist. 2001) stating “[t]he supreme court, as stated in *Lieber*⁴ and *County of Cook*⁵, noted that “Illinois’s act is different than the federal act and subject to a different interpretation”, *Id.* at 269. Finally, the Fourth District Appellate Court has directly addressed the adequacy of a search for records in *Shebadeh v. Madigan*, 2013 IL App (4th) 120742, 996 N.E.2d 1243, 375 Ill. Dec. 187 “Plaintiff cites a series of federal cases for the proposition that a public agency must prove the adequacy of its search. First, we note that federal court decisions are persuasive but not binding on state courts and ‘Illinois courts have repeatedly noted that the Illinois version of the FOIA is different from the federal version and is, therefore, subject to a different interpretation’”, *Id.* at ¶29, *citing Morrissey, supra*.

Shebadeh is important to the analysis of the Plaintiff’s Second Motion for other reasons. Not only is *Shebadeh* binding authority in this appellate district, it also addresses an additional critical flaw in Plaintiff’s argument.

Plaintiff repeatedly refers to the requirement that the City must provide a basis for invoking an “exemption”. Plaintiff’s argument suffers from the same defect as the plaintiff in *Shebadeh*. The City has not claimed an exemption. The City’s FOIA officer has and has had custody and control of all the records relevant to the CMOEB. Those records were compiled and submitted to the Circuit Court as the certified record in the *Brianza* litigation.

⁴ *Lieber v. Board of Trustees of Southern Illinois University*, 76 Ill.2d 401, 680 N.E.2d 374, 223 Ill. Dec. 641 (Ill. 1997)

⁵ *Supra*.

An observation of the court in *Shehadeh* is appropriate here. “Plaintiff also cites *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill.App.3d 990, 313 Ill. Dec. 153, 871 N.E.2d 880 (2007), for the proposition that a defendant agency has the burden of showing its search was adequate. *BlueStar* is inapposite, however, because *BlueStar* involved a claimed section 7 exemption, not a section 3(g) exemption, Id. at ¶30.⁶ The City has claimed no exemption set forth in Section 7; it did not seek to withhold records on the basis of any statutory exemption. The court here should not permit the Plaintiff to morph his claim into a cause of action that he never plead.

IV. CONCLUSION

The FOIA Officer of the City complied with the Court’s order of July 10 fully and completely; she produced all records in the possession or under the control of the City of Carlinville to the Plaintiff. The demand for “recordings” is, at best, specious. The allegation, wrapped in a FOIA request, that undisclosed meetings occurred, not a part of the records disclosed, is speculative, at best.

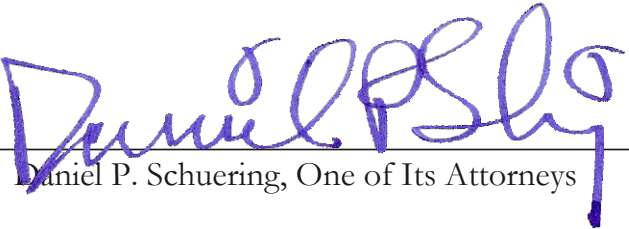
The Plaintiff received the same transcript as filed with the Circuit Court in the *Brianza* action. The same certification was attached to the transcript which on its face stated that it was a “true, correct and complete” record of the proceedings CMOEB. The demand of the Plaintiff for further rulings of the Court, discovery and subsequent proceedings is misguided and inappropriate, particularly when the demand is premised on a discredited proposition of law and only possible by conflating an exemption into a campaign of litigation for records that simply do not exist. And, they do not exist because the events alleged did not occur.

WHEREFORE, the City of Carlinville prays this Court:

1. FIND the production of records by the City to be complete with its delivery of records on July 13-14;
2. DENY the Plaintiff’s Second Motion for Partial Summary Judgment; and,
3. GRANT such other relief as the court may deem necessary and proper upon hearing counsel in argument on the Second Motion.

⁶ A section 3(g) exemption pertains to requests that are unduly burdensome.

Respectfully Submitted,
CITY OF CARLINVILLE, ILLINOIS

By: 
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the Clerk of the Court using the electronic filing system which will send notification of filing of such instrument to the following by electronic mail:

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