

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

JOHN KRAFT,)
)
 Plaintiff,)
) 17 MR 25
 v.)
)
 CITY OF CARLINVILLE,)
)
 Defendant.)

**PLAINTIFF’S REPLY IN SUPPORT OF SECOND MOTION FOR PARTIAL
SUMMARY JUDGMENT**

The Illinois Appellate Court explicitly stated that in a FOIA case the public body bears “the burden of showing that its search was adequate.” Yet Carlinville provided no affidavit at all proving it performed an adequate search, let alone a sufficiently detailed affidavit. Carlinville attempts to evade its burden of proof by pointing out that in some instances Illinois courts do not follow federal precedent. Those examples change nothing about the fact that the Appellate Court explicitly did so here. And despite repeated opportunities, Carlinville refused to provide the required affidavit. The reason for this seems clear: no one is willing to submit an affidavit because the unsupported claims made by Defendant are not true.

This Court should grant Plaintiff’s second motion for partial summary judgment, order Carlinville to perform an adequate search for records, and grant Plaintiff leave to take discovery to ensure that the search is adequate.

I. ARGUMENT

A. Defendant's Misstatements Of Law Regarding Its Burden To Prove It Performed An Adequate Search For Records

Carlinville disputes the explicit statement of the Illinois Appellate Court that a public body bears the “burden of showing that its search was adequate.” *BlueStar Energy Servs., Inc. v. Illinois Commerce Comm’n*, 374 Ill. App. 3d 990, 996-97 (2007) (quoting and citing federal case law); Def. Resp. at 5-7. Defendant is also confused about when Illinois courts look to federal FOIA law and when they do not. Def. Resp. at 5-7. Carlinville cites various FOIA cases where Illinois courts declined to follow federal precedent, but none of those are about the adequacy of the search issue present here. In short, Defendant only tells part of the story. Federal precedent can provide persuasive authority when there is no Illinois law on point, but when federal FOIA and state FOIA differ in material ways Illinois courts do not follow federal decisions. *Better Gov’t Ass’n v. Blagojevich*, 386 Ill. App. 3d 808, 815 (2008). In *Bluestar*, the Illinois Appellate Court left no room for doubt regarding public bodies’ burden to prove that they performed an adequate search for records. 374 Ill. App. 3d at 996-97 (citing federal case law). There the court looked to federal case law for guidance and explicitly adopted federal language since the adequacy of the search issues are similar in both the Illinois and federal statutes. The Appellate Court laid out the governing legal standards citing federal case law and stated that public bodies have the burden to provide affidavits “supplying facts indicating that the agency has conducted a thorough search.” *Id.* (quoting and citing federal case law).

Nor is *Shehadeh v. Madigan* relevant or applicable here as Defendant argues. 2013 IL App (4th) 120742; Def. Resp. at 6-7. Carlinville falsely claims that Plaintiff stated Carlinville must provide a basis for invoking an “exemption,” and then proceeds through an entire argument based on that false premise. Def. Resp. at 6. Exemptions, including the Section 3(g) undue

burden exemption, are not at issue in Plaintiff's second motion for partial summary judgment and the word "exemption" does not even appear once in the opening motion.¹ Rather, it is the adequacy of the search that is at issue. *Shehadeh*'s passing reference to adequacy of the search is simply not relevant here as that case dealt with Section 3(g), which is not, and has never been cited in this case.

In addition to failing under FOIA legal standards specifically, Defendant also failed to carry its burden of proof under the most basic tenets of summary judgment law. A party countering a motion for summary judgment must present facts and evidence supported by affidavits or else summary judgment will be granted in favor of the movant party. *Ralston v. Casanova*, 129 Ill. App. 3d 1050, 1059 (1984). A non-moving party "may not rely on the factual issues raised by the pleadings, but must submit affidavits or refer to depositions or admissions on file which present a contrary version of the facts." *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 369 (2006) (quotations and citations omitted).

Defendant's attempts to evade the Appellate Court decision directly addressing adequacy of the search by citing to a variety of cases that correctly, but unhelpfully point out that federal law is not always followed by Illinois courts. This simply fails to refute the explicit holding of the Appellate Court that Carlinville bears the "burden of showing that its search was adequate."

¹ Although not relevant here, Section 3(g) is explicitly an exemption regardless of which Section it appears in. 5 ILCS 140/3(g) ("Before invoking *this 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." (emphasis added)); *NACDL*, 399 Ill. App. 3d at 14-15 (referring to "the undue burden exemption") *Heinrich*, 2012 IL App (2d) 110564, ¶ 21 (referring to "the undue-burden exemption").

B. Carlinville Failed To Prove Beyond Material Doubt That It Performed An Adequate Search For Records

i. Carlinville Submitted No Affidavit

Carlinville submitted no affidavit at all regarding its search for records, let alone an affidavit containing sufficient detail to carry its burden of proof. On August 1, 2018, in response to an email from Plaintiff, Carlinville stated that:

There were no audio or visual recordings prepared of the meetings of the Carlinville Municipal Officers Electoral Board (“CMOEB”). All meetings of the CMOEB were recorded by a certified shorthand reporter. The transcripts produced represent all of the meetings of the CMOEB.²

Ex. A. The email also stated:

No such ‘meeting at Mr. Bertinetti’s private office’ of the members of the CMOEB, formally or informally, occurred on December 28, 2016 or at any other time. No ‘Executive Session’ of the CMOEB occurred on December 28, 2016 or at any other time.

Id. Upon follow-up communication from Plaintiff, Defendant refused to produce an affidavit, even an affidavit simply repeating these same claims. Defendant has again failed to produce such an affidavit in response to Plaintiff’s second summary judgment motion. The reason for this appears obvious: no one is willing to submit an affidavit on Carlinville’s behalf because these claims are untrue and would constitute perjury. Instead, Carlinville asks this Court to accept bare assertions from its attorney lacking any support. For example, Carlinville conclusorily states without any supporting citation: “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.” Def. Resp.

² While not currently at issue, it is worth noting that when an electronic record is requested, public bodies must produce that record in the format requested when feasible. 5 ILCS 140/6(a); *Fagel v. Dep’t of Transp.*, 2013 IL App (1st) 121841, ¶¶ 30-36. If not feasible then the records must be produced in the format maintained by the public body. Defendant does not dispute and therefore concedes that Plaintiff requested recordings not transcripts. Compl. Ex. A. Instead, Defendant argues that no recordings exist.

at 5; *See Day v. City of Chicago*, 388 Ill. App. 3d 70, 73, 75 (2009) (“These affidavits are one-size-fits-all, generic and conclusory. . . . That is rubber stamp judicature. We decline to take part in it. The City is asking us, as it did the trial court, to take the affiants’ word for it. For us to do so would be an abdication of our responsibility.”).

While Plaintiff is under no obligation to refute a claim that was never proven in the first place, Plaintiff includes an affidavit proving that at least one such meeting did occur on December 28, 2016. Ex. B. Carlinville Alderman Beth Toon personally witnessed a meeting occurring on December 28, 2016 behind closed doors. Ex. B ¶¶ 4-9. Present at this meeting was every single member of the Electoral Board: Alderman Jim Direso, Alderman Tim Coonrod and the City Clerk, Carla Brockmeier. *Id.* Attorney Dan Schuering, Attorney Rick Bertinetti, and Mr. Schuering’s son were also present. *Id.* Alderman Toon also took a photograph of those present at the meeting. *Id.* All of this evidence stands unrefuted as Defendant has offered nothing to the contrary.³

ii. Carlinville’s Attempt To Evade Its Burden Of Proof

Defendant works to distract from the issue in this motion for partial summary judgment—the adequacy of the search—by citing irrelevant law and misstating law. Carlinville begins with a discussion of the Illinois Municipal Code, the Election Code and the Open Meetings Act, stating that these do not require meetings of an electoral board to be recorded. Def. Resp. at 2-3. There are three fundamental problems with Defendant’s points, (1) even if true, this constitutes exactly no evidence at all regarding what Carlinville did to search for records, (2) even if Carlinville is not *required* to have recordings of meetings that in no way

³ “When a party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant’s affidavits stand as admitted.” *Parkway Bank & Tr. Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 49 (2013).

means it does not *have* recordings, and (3) Carlinville misstates black-letter law claiming that no provision of the Open Meetings Act requires recordings when it does. Carlinville itself cites OMA section 2.06, which states: “All public bodies shall keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an *audio or video recording*.” 5 ILCS 120/2.06 (emphasis added); Def. Resp. at 4.

Carlinville also attempts to evade its burden of proving it performed an adequate search for records by pointing to a lone “certification of record of proceedings.” Def. Resp. at 4; Appendix C. This certification fails to carry Defendant’s burden for multiple independent reasons. First, it is not an affidavit. Second, it was not submitted for this case. Third, it describes no search for records at all, let alone a description with the legally required level of detail. *BlueStar Energy Servs., Inc. v. Illinois Commerce Comm’n*, 374 Ill. App. 3d 990, 996-97 (2007); *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73, 75 (2009). Fourth, the language of the certification is so broad and vague that it could be interpreted as Carla Brockmeier truthfully certifying that the record was complete when some but not all of the records were attached. For example, it could be interpreted as complete where transcripts but not recordings were produced because recordings could be duplicative (or not required to be produced). Lastly, Carla Brockmeier only certifies that the record of one particular matter in front of the Electoral Board is complete. The FOIA request was in no way limited to one lone matter. The request sought, among other things:

- Copy of all recordings of all electoral board meetings in the past 60 days.
- Copy of all agendas, minutes, and public notices (IE: newspaper ads) of all Electoral Board meetings, including the meeting at Mr. Bertinetti’s private office and the Executive Session meeting held on December 28, 2016 prior to the open meeting on the same evening.

Compl. Ex. A. In the end, Carlinville goes to extreme lengths to hide the ball here. All it needed to do was provide an affidavit from someone with knowledge. Instead, it chose to fully litigate the issue (briefing, argument and all) in an attempt to avoid its burden of proving beyond material doubt that it performed an adequate search for records.

C. Defendant's Red-Herring Lacking Supporting Authority

Defendant makes the unsupported claim that it produced all responsive records and that therefore Plaintiff's motion should be denied. Not only is this claim false, even if it were true Plaintiff would still prevail. It is Carlinville's burden to prove it performed an adequate search for records and the adequacy of a search is not proven by what records are or are not produced. The "adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Rodriguez v. Dep't of Def.*, 236 F. Supp. 3d 26, 34 (D.D.C. 2017).

D. Other Options

Carlinville bears the "burden of showing that its search was adequate." *BlueStar Energy Servs., Inc. v. Illinois Commerce Comm'n.*, 374 Ill. App. 3d 990, 996-97 (2007). It failed to submit any affidavit at all, let alone one that carries its burden with sufficient detail. This Court need go no further to in order to grant Plaintiff's second motion for partial summary judgment. Should this Court be at all inclined not to grant Plaintiff's motion, however, Plaintiff is also fully prepared to proceed with discovery and/or to proceed with a hearing where he will call witnesses to the stand to testify regarding the fact that meetings occurred that Carlinville says (without any evidentiary support) never happened.

II. CONCLUSION

This Court should grant Plaintiff's second motion for partial summary judgment, order

Carlinville to perform an adequate search for records, and grant Plaintiff leave to take discovery to ensure that the search is adequate.

RESPECTFULLY SUBMITTED,

/s/ Joshua Hart Burday

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CERTIFICATE OF SERVICE

I, Joshua Hart Burday, certify that on October 5, 2018, I caused the foregoing Plaintiff's Reply in Support of Second Motion for Partial Summary Judgment to be served via electronic mail on all counsel of record.

/s/ Joshua Hart Burday



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August 1, 2018

Via E-mail only

Mr. Joshua Burday
Loevy & Loevy
311 North Aberdeen
Third Floor
Chicago, IL 60607

RE: Kraft v. City of Carlinville
Macoupin County Circuit Court Number 2017-MR-25

Dear Mr. Burday:

I am writing in reply to your July 31, 2018 e-mail.

There were no audio or visual recordings prepared of the meetings of the Carlinville Municipal Officers Electoral Board (“CMOEB”). All meetings of the CMOEB were recorded by a certified shorthand reporter. The transcripts produced represent all of the meetings of the CMOEB.

There are no documents responsive to part 4 as identified in your e-mail and the January 16, 2017 Freedom of Information Act request of your client. No such “meeting at Mr. Bertinetti’s private office” of the members of the CMOEB, formally or informally, occurred on December 28, 2016 or at any other time. No “Executive Session” of the CMOEB occurred on December 28, 2016 or at any other time. The information received by your client is in error because the meetings suggested by these simply did not occur.

Please call me if you wish for me to clarify this further.

Thank you for your attention to this correspondence. If I may supply you with additional information, please contact me at your convenience.

Exhibit A



Mr. Joshua Burday

Loevy & Loevy

August 1, 2018

RE: Kraft v. City of Carlinville

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Very Truly Yours,

A handwritten signature in blue ink, reading "Daniel P. Schuering", written over a horizontal line. The signature is enclosed in a light blue rectangular box.

Daniel P. Schuering

cc: Ms. Carla Brockmeier
Freedom of Information Act Officer
City Clerk, City of Carlinville

Mr. Daniel W. L O'Brien
Corporation Counsel

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JOHN KRAFT,)	
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AFFIDAVIT OF BETH TOON

1. My name is Beth Toon.
2. I am over the age of 18 and competent to provide this affidavit.
3. I am an Alderman for the City of Carlinville.
4. On December 28, 2016 as I was approaching Carlinville City Hall to attend a public hearing of the Carlinville City Council Electoral Board proceedings to decide a challenge against the Nomination Petitions of Mayor Deanna Demuzio, I noticed the vehicles of two fellow Alderman in the parking lot, Aldermen Joe Direso and Tim Coonrod and the City Clerk, Carla Brockmeier, the three people who make up the Electoral Board.
5. When I entered City Hall, I did not see any of the three Electoral Board officers anywhere in City Hall or the main Council room. I proceeded to look for the Electoral Board.
6. When I opened the door to the Public Works office, I saw a meeting taking place. The Electoral Board consisting of Alderman Joe Direso, Alderman Tim Coonrod, and City Clerk Carla Brockmeier, as well as Attorney Dan Schuering, Attorney Rick Bertinetti, and Mr. Schuering's son, who is also an attorney were all present.
7. Mr. Dan Schuering turned to me and asked me to leave because they were having a meeting and he was advising his clients. I then left and closed the door behind me.
8. I then went and retrieved my cell phone, opened up the camera, and went back in to meeting taking place in the Public Works office. As I opened the door, I said something to the effect of wanting to take a picture of the meeting for documentation purposes, and then I proceeded to take a picture.
9. The picture was taken on December 28, 2016 at 6:33pm. Attached as Exhibit A.

Exhibit B

AFFIANT SAYS NOTHING FURTHER.

Beth Toon

Beth Toon, October 4, 2018



Kimberly A. Thomas