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

Cynthia Brzana and Tim Grant,	)	
Plaintiffs,	)	
	)	**19-CH-1143**
v.	)	
	)	**John C. Anderson**
Wesley Township and	)	**Circuit Judge**
Wesley Township Road District,	)	
Defendants.	)	

ORDER

This dispute originally involved 35 FOIA requests. Defendants eventually responded to the FOIAs, but not before the deadlines passed. So, from a "live issue" standpoint, the case is no longer about open government and the free flow of information. Instead, the case is about money.

Defendants filed a 2-619 motion to dismiss, contending the case is moot because they responded to the requests. Motion is denied.

I. Background

Plaintiffs allege that, on August 11, 2018, Cynthia Brzana submitted the first in a substantial series of FOIAs to defendants. Plaintiffs filed this lawsuit on August 6, 2019, and amended their Complaint on April 2, 2020. On May 6, 2020, Defendants produced the requested records. On May 19, 2020, Plaintiffs filed a motion for summary judgment. On May 28, 2020, defendants sought dismissal on the basis of mootness. The Court notified the parties that it would hear the motion to dismiss before it considered the propriety of summary judgment.

The parties stipulated during oral argument that Sarah Norton was, at all relevant times, the FOIA officer for both defendants. Plaintiffs' response to the motion to dismiss includes an affidavit executed by Ms. Norton. She avers that she was the Wesley Township clerk from July 2018 until August 2019. She states that she "did not respond to numerous FOIA requests from people I perceived as opposing my political interests." She further states that her failure to respond was "not the act of negligence or inadvertence" but, rather, her "willful actions" and her "personal desire to not respond."

II. Analysis

A. Standards for a 2-619 Motion

A motion pursuant to section 2-619 of the Code "'admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the claim.'" *Becker v. Zellner*, 292 Ill. App. 3d 116, 122 (1997) (*quoting Brock v. Anderson Road Ass'n*, 287 Ill. App. 3d 16, 21 (1997)). It assumes that a cause of action has been stated. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (2003). A section 2–619 motion "raises defects, defenses or other affirmative matter which appears on the face of the complaint or is established by external submissions which act to defeat the plaintiff's claim." *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000). "[A] section 2–619 proceeding enables the court to dismiss the complaint after considering issues of law or easily proved issues of fact." *Neppl*, 316 Ill. App. 3d at 585. In ruling on a section 2–619 motion, the circuit court may consider the pleadings, depositions, and affidavits. *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 296 (1997).

B. Interpretive Principles Regarding the FOIA Statute

Illinois enacted the FOIA statute in accordance with the public policy principle 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." 5 ILCS 140/1 (West 2016); *see also Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989) (statute's purpose is "to open governmental records to the light of public scrutiny"). "Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." 5 ILCS 140/1. For these reasons, public records are presumptively open and accessible under FOIA. *See McGee v. Kelley*, 2017 IL App (3d) 160324, ¶12. Courts liberally construe the FOIA statute to achieve the goal of "provid[ing] the public with easy access to government information." *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006).

The Act also provides that "[r]estraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." 5 ILCS 140/1 (West 2016). Thus, the Act's exceptions are narrowly construed. *City of Chicago v. Janssen Pharmaceuticals*, 2017 IL App (1st) 150870, ¶ 15; *Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838, ¶ 11.

C. The Merits of the Motion

1. Production of Documents to Plaintiffs' Counsel

During oral argument, there was some discussion regarding whether, to this day, defendants have produced the FOIA'd documents. There is no dispute that defendants' counsel sent them to plaintiff's counsel. However, plaintiffs contend that defendants have not complied with FOIA because the requested documents were not sent directly to the plaintiffs/requestors.

The Court rejects plaintiffs' position. First, it would be a violation of RPC 4.2 for defendants' counsel to send the documents directly to plaintiffs. Plaintiffs stated during oral argument that RPC 4.2 would not have prevented defendants (rather than defendants' counsel) from producing the documents directly to plaintiffs. This may be true, but the Court will not fault defendants for communicating and acting through their attorney; that is one reason he is involved. Further, producing the documents to plaintiffs' attorney is tantamount to producing them to plaintiffs. *See F.D.I.C. v. Glynn*, No. 91 C 3723, 1993 WL 413958, at *2 (N.D. Ill. Oct. 15, 1993) (it is "well established that notice to an agent/attorney constitutes notice to the principal/client."); *Coryell v. Klehm*, 157 Ill. 462, 474 (1895) ("Notice to an agent touching the subject-matter of his agency is notice to his principal, and notice to an attorney is notice to his client."). At this point, defendants have produced the requested material.

2. Mootness

Defendants argue that, because they provided the requested information (albeit months if not years late) the case is moot or partially moot. A cause of action is deemed moot if no actual controversy exists or if events occur that make it impossible for the court to grant effectual relief. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 12. A "moot case is one which seeks to determine an abstract question or a judgment which when rendered cannot have any practical legal effect on the controversy." *Betts v. Ray*, 104 Ill.App.3d 168, 171 (1982).

Plaintiffs counter that, at this point, they are entitled to more than just documents and information. They point to section 11(j) of the FOIA, which states:

> 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 also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence. In assessing the civil penalty, the court shall consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations

of this Act. The court may impose an additional penalty of up to $1,000 for each day the violation continues if:

(1) the public body fails to comply with the court's order after 30 days;

(2) the court's order is not on appeal or stayed; and

(3) the court does not grant the public body additional time to comply with the court's order to disclose public records.

5 ILCS 140/11(j)

Additionally, Plaintiffs point to section 11(i), which provides that when a "person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorney's fees and costs." 5 ILCS 140/11(i).

Under FOIA, claims for civil penalties and attorneys' fees survive even after the request for documents becomes moot. *Roxana Cmty. Unit Sch. Dist. No. 1 v. Envtl. Prot. Agency*, 2013 IL App (4th) 120825, ¶42, *citing Duncan Publishing, Inc. v. City of Chicago*, 304 Ill.App.3d 778, 782 (1999). Defendants' reliance on *Turner v. Joliet Police Dept.*, 2019 IL App (3d) 170819, does not require a contrary result. While *Turner* also involved a request for civil penalties, the court held that the facts and evidence did not justify the imposition of penalties. Specifically, the defendant had properly withheld the documents under a FOIA exception, and plaintiff failed to allege or establish a willful FOIA violation.

3. The Catalyst Theory

A primary issue is whether the existence of this lawsuit and the eventual production of the requested documents means plaintiffs "prevailed" for purposes of section 11(i) of the FOIA statute. A bit of history and context is helpful.

The catalyst theory holds that if a lawsuit forces the government to modify its conduct on its own before a court orders it, the plaintiff is entitled to damages because the lawsuit served as the catalyst to the modified conduct. See, e.g., *Harrington v. DeVito*, 656 F.2d264-66 (7th Cir. 1981); *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 787 (1999). Eventually, the United States Supreme Court rejected the catalyst theory in the context of the Fair Housing Amendments Act of 1988 and the Americans With Disabilites Act of 1990. *See Buckhannon Board & Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598 (2001). In *Buckhannon*, the Court held that a party "prevails" by virtue of a court finding or judgment.

In response to *Buckhannon*, the United States Congress amended the federal FOIA statute to reinstate the catalyst theory. *See Cornucopia Inst. v. United States Dep't of Agric.*, 560 F.3d 673, 677 (7th Cir. 2009). As amended, the federal FOIA statute made reference to a party who "substantially prevailed" as a result of a judicial order, an agreement, or a consent decree, or a voluntary change in the government's position. This context is helpful because

the Illinois FOIA statute was modeled after the federal version (*see Uptown People's Law Center v. Dept. of Corrections*, 2014 IL App (1st) 130161), and Illinois courts often follow federal law when interpreting the state statute. *See People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 203 (1997).

Around a decade ago, the Illinois general assembly also amended the state statute. However, up until that time, FOIA gave the Court latitude when it came to penalties such as attorneys' fees. Under the prior iteration of FOIA, the statute provided that the court ***may*** award attorneys' fees to a party who ***substantially*** prevails. But, under the current iteration, that discretion has now been removed and the statute dictates that the court ***shall*** award fees to a litigant who ***prevails***. 5 ILCS 140/11(i).

This leads the Court to two Illinois cases, and they point in two directions.

The first is *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879. In that case, a newspaper sued after it submitted a FOIA request to a school, and the school failed to comply. Before the court issued its ruling, the school released requested information and filed a motion to dismiss the newspaper's complaint. The newspaper asked the court to deny the school's motion to dismiss, and filed a petition seeking attorney fees and imposition of a civil penalty. The school then sought summary judgment, contending that the newspaper had not "prevailed" in its FOIA suit, and thus was not entitled to attorney fees.

The trial court denied the newspaper's request for attorneys' fees but granted its request for civil penalties. The trial court concluded that the statute's textual change from "substantially prevailed" to "prevailed" demonstrated a legislative intent to reject the catalyst theory. The trial court concluded that "prevailed" meant "judicially sanctioned relief," and therefore, the newspaper did not prevail in its suit and was not entitled to attorney fees. *Id.* at ¶18. The second district appellate court agreed with the trial court and held that "[b]y deleting the word 'substantially'" the General Assembly demonstrated an intent to require nothing less than court-ordered relief in order for a party to be entitled to attorney fees under the FOIA." *Id.* ¶40. Therefore, the newspaper did not "prevail" and was not entitled to attorneys' fees. *Id.* ¶41.

The second case is *Uptown People's Law Center v. Dept. of Corrections*, 2014 IL App (1st) 130161, where the First District reached an opposite result. In *Uptown*, the court rejected *Rock River Times* and found that the term "prevails" is ambiguous. *Id.* at ¶12. The court noted that the statute does not define the term "prevails." *Id.* The court stated that "prevails" could entail judicial action, but that courts could also interpret the term to mean compliance without the necessity of a court order. *Id.* "Either interpretation would arguably further FOIA's goals, albeit in varying degrees, of expeditiously disclosing information to the

public and encouraging the public to seek judicial relief." *Id.* In other words, *Uptown* sought to restore application of the catalyst theory.

The only other case this Court is aware which interprets the more recent version of the statute, in this context, is *Perdue v. Village of Tower Hill*, 2015 IL App (5th) 140357-U. In that case, the Fifth District recognized a split of authority and embraced the *Uptown* approach, but for whatever reason, chose to dispose of the case as a Rule 23 order. Plaintiffs violate Rule 23 by improperly citing *Perdue*. The plain text of Rule 23 places a restriction on parties from citing Rule 23. Some appellate cases have held (consistent with Rule 23's plain language) that ***courts*** are not prohibited from citing Rule 23 cases.[1] The Illinois Supreme Court Rules Committee is currently reviewing a proposal to abolish Rule 23. But, however much life is left in Rule 23 remains to be seen, and the Court is not inclined to rely on *Perdue*. Plaintiffs should not have cited it.

That leaves *Uptown* and *Rock River Times*. When a circuit court is "faced with conflicting decisions from the various appellate districts" and "the absence of controlling authority from its home district," it is "free to choose between the decisions of the other appellate districts." *See State Farm Fire & Casualty Co. v. Yapejian*, 152 Ill.2d 533, 540 (1992).

The Court agrees with *Uptown's* finding that "prevailed" can be rather nebulous. Textually, modifying "substantially prevails" to "prevails" could be read alternatively as raising the bar ***higher*** (*i.e.*, one must prevail ***all*** the way, not just most of the way), or it can be read to ***lower*** the bar (*i.e.*, one need only prevail ***a bit***, but need not prevail substantially).

In other contexts, reviewing courts have held that, a "prevailing party" is "one that is successful on a significant issue and achieves some benefit in bringing suit." *J.B. Esker & Sons, Inc. v. Cle–Pa's Partnership*, 325 Ill. App. 3d 276, 280 (2001); *see also Jackson v. Hammer*, 274 Ill. App. 3d 59, 70 (1995). A litigant does not have to succeed on all claims to be considered a prevailing party. *Powers v. Rockford Stop–N–Go, Inc.*, 326 Ill. App. 3d 511, 515 (2001). And, "when the dispute involves multiple claims and both parties have won and lost on different claims, it may be inappropriate to find that either party is the prevailing party." *Id.*

The Court finds *Uptown* is the better-reasoned case and is more consistent with the FOIA statute's promise of a government that will "operate openly and provide public records as expediently and efficiently as possible." Further, and more specifically, *Uptown* is consistent with FOIA's fee and penalty provisions, which "encourage[] requestors to seek

[1] Illinois Supreme Court rules are to be interpreted similar to statutes, with the courts being restrained from adding language which does not exist. *See In re Estate of LaPlume*, 2014 IL App (2d) 130945, ¶¶ 23-24 (court relied on the reasoning in a nonprecedential decision because nothing in the language of Illinois Supreme Court Rule 23(e) prevents a court from doing so); *see People ex rel. Webb v. Wortham*, 2018 IL App (2d) 170445, ¶ 27 (Illinois Supreme Court Rule 23(e)(1) (eff. Apr. 1, 2018) states that parties may not cite nonprecedential orders except for limited purposes, but that rule does not bind courts).

judicial relief in the event of an unlawful withholding of records by government agencies." *See People ex rel. Ulrich v. Stukel*, 294 Ill.App.3d 193, 203 (1998). Indeed, the primary purpose of the FOIA's attorney fee provision "is to prevent the sometimes insurmountable barriers presented by attorney's fees from hindering an individual's request for information and from enabling the government to escape compliance with the law." *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill.App.3d 778, 786 (1999). A litigant cannot drag their feet for years without answering a FOIA request, intentionally disregard their legal obligation until they are sued, and then evade negative consequence with compliance only after a lawsuit is filed. The *Rock River Time* approach renders FOIA toothless and opens the door to shenanigans that impede open government.

Note, however, that the Court does ***not*** hold that the mere filing of a lawsuit, followed by compliance without the necessity of a court finding, would automatically entitle the plaintiff to potential penalties and fees. Nor does the Court hold today that plaintiffs have "prevailed." Whether this lawsuit was the "catalyst" that led to compliance is a question of fact, and that question is not quite before the Court today. But in light of the facts and arguments presented, the Court finds that the catalyst theory is the more reasoned approach, and plaintiffs may seek to show that the lawsuit was the catalyst that led to compliance. If they are able to clear that hurdle, the Court will address the imposition of penalties and fees.

III. Conclusion

The Court concludes that the *Uptown* approach is mandated by the text, context, and intent of the FOIA statute. Motion to dismiss is denied.

There is a pending motion for summary judgment, filed by plaintiffs. Defendants are to answer the complaint, and respond to that summary judgment motion, by October 13, 2020. Plaintiff is directed to reply by November 3, 2020. Hearing on the motion for summary judgment is set for November 12, 2020, at 9:30AM.

Counsel notified via email.

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ENTERED:

Dated: September 1, 2020

John C. Anderson
Circuit Judge