IN THE CIRCUIT COURT OF THE TWELFTH CIRCUIT
WILL COUNTY

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18 JAN 30 AM 9:54
WILL COUNTY, ILLINOIS
WILL COUNTY COURT ANNEX

JOSEPH HOSEY,	)	
Plaintiff,	)	**John C. Anderson**
v.	)	**Circuit Judge**
THE CITY OF JOLIET,	)	
Defendant.	)	**Case No. 17-MR-1334**

MEMORANDUM OPINION AND ORDER

This case is before the Court on cross-motions for summary judgment. The Court, having been advised in the premises and having taken the matter under advisement, finds and orders as follows:

I. BACKGROUND

This declaratory judgment case involves a Freedom of Information Act ("FOIA") (5 ILCS 140 /1 *et seq.*) request submitted by plaintiff, Joseph Hosey, to the City of Joliet (the "City"). Mr. Hosey alleges that, on January 4, 2016, while working as a journalist for the Joliet Patch, he submitted a FOIA request to the City. The request sought video of police interrogations of four defendants who were eventually convicted in connection with a 2013 double murder on Hickory Street. (See Will County cases *People v. Adam Landerman*, 13-CF-98; *People v. Alisa Massaro*, 13-CF-99; *People v. Bethany McKee*, 13-CF-100; and *People v. Joshua Miner*, 13-CF-101 (collectively, the "Hickory Street Defendants")).

According to the Complaint, the City denied Mr. Hosey's FOIA request. Subsequently, the Illinois Attorney General made a nonbinding determination that Mr. Hosey was entitled to access to the videos. Mr. Hosey filed this action seeking (1) an order directing the City to provide the video to Mr. Hosey; (2) an award of fees pursuant to 5 ILCS 140/11(i); and imposition of a civil penalty pursuant to 5 ILCS 140/11(j). The Attorney General's opinion did not, however, address all of the arguments currently at issue.

In August 2017, the City answered the Complaint and asserted an affirmative defense on two statutory bases 5 ILCS 140/3(g) (asserting an undue burden) and 5 ILCS 140/7(1)(c) (asserting a violation of privacy). Mr. Hosey sought to dismiss these statutory defenses, and the Court advised the parties that it would consider the viability of the City's defenses at the time in ruled on the parties' summary judgment motions. The Court now considers those two statutory defenses, along with the City's contention that disclosing the video is prohibited under 725 ILCS 5/103-2.1(g).

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II. ANALYSIS

A. Standards for Summary Judgment

Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). While summary judgment is considered a "drastic measure," it is an appropriate tool when the movant's rights are clear and free from doubt. *Morris*, 197 Ill. 2d at 35. Indeed, summary judgment should not be granted where a reasonable person could draw divergent inferences from undisputed facts. *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶14. However, at the summary judgment stage of a suit, the nonmoving party must present the evidence it has; it is the moment in a lawsuit where one must "put up or shut up." *Korzen*, 2013 IL App (1st) 130380, ¶ 14.

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.

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Because the City has denied Mr. Hosey's access to public records, the City has the burden of proving, by clear and convincing evidence, the application of an exception to FOIA's broad sweep. *See Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 408 (1997); *see* 5 ILCS 140/11(f).

C. Application of the FOIA Statute

The Court's interpretation and application of three statutory defenses will determine which party, if either, should be entitled to summary judgment: (1) privacy concerns under 5 ILCS 140/7(1)(c); (2) whether satisfying Mr. Hosey's request would be an undue burden under 5 ILCS 140/3(g); and (3) whether the video recordings are exempt from FOIA under 725 ILCS 5/103-2.1(g). Those issues are addressed in turn.

1. Privacy Concerns Under 5 ILCS 140/7(1)(c)

The City relies on section 7(1)(c) of the FOIA statute, which exempts "personal information contained within public records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 ILCS 140/7(1)(c). The exemption considers an "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate pubic interest in obtaining the information." *Id.* A "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the public body to prove that the standard has been met. *Schessler v. Dept. of Conservation*, 256 Ill. App. 3d 198, 202 (1994).

Few cases address section 7(1)(c), but a number of public access counselor ("PAC") opinions from the Illinois Attorney General's office do. For example, PAC opinions suggest that when the victim of a crime is deceased, the personal privacy interest of the victim ceases to exist. See 2010 PAC 6137 (Ill. Att'y Gen. PAC Pre-Auth. dl6137, issued August 24, 2010, at 2); 2011 PAC 12456 (Ill. Att'y Gen. PAC Pre-Auth. al dl12456 issued June 15. 2011, at 2). The Attorney General has also opined that, in limited circumstances, a decedent's surviving family members do possess a separate personal privacy interest in things such as their "close relative's death-scene images" and similar records. Ill. Att'y Gen. Pub. Acc. Op. No. 10-003, issued October 22, 2016); Ill Att'y Gen Pub. Acc. Op. No. 10-003, at 11; 2011 PAC 15438 (Ill. Att'y Gen. PAC Pre-Auth. dl6137, issued August 24, 2010, at 2). However, even with regard to the victims' families, their right to privacy does not exempt a report from disclosure in its entirety. 2011 PAC 12456 (Ill. Att'y Gen. PAC Pre-Auth. al dl12456, issued June 15, 2011, at 2).[1]

[1] The Court observes that no person claiming to be a relative of the victims has sought to intervene in this case for purposes of advancing a privacy interest.

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Of course, Illinois Attorney General opinions are not binding on this Court, and to the extent the Court makes reference to them, it is for purposes of guidance and not precedent. When making a determination under section 7(1)(c) the Court must consider (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information. *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (2010) ("*Criminal Defense Lawyers*").

Having considered the factors set forth in *Criminal Defense Lawyers*, the Court finds that Mr. Hosey, as a journalist, has a legitimate, meaningful, and substantial interest in accessing the videos. The Court further finds that the public likewise has an interest in the videos being made public. The Court has little basis to identify the degree of invasion of personal privacy because the City made no effort to supply the Court with evidence to make that determination, despite it being the City's burden. Indeed, at oral argument, the Court had to made an inquiry regarding this issue, and the City indicated a willingness to provide video for an *in camera* inspection—but making that offer at oral argument upon the Court's inquiry is insufficient and untimely to survive summary judgment. Turning to the fourth consideration, the Court is not aware of any other means for Mr. Hosey to obtain the video he seeks. The Court observes that excerpts from the video interrogations were played in open court during the criminal cases, and the Court considered whether statements from the played video were transcribed by the court reporters. The Court's review of its records in the criminal cases establishes that they were not.

Taking the *Criminal Defense Lawyers* factors into consideration, the Court rejects the City's reliance on section 7(1)(c).

2. <u>Undue Burden Under 5 ILCS 140/3(g)</u>

The City also argues that it should be excluded from providing the video pursuant to section 3(g) of FOIA. Section 3(g) states in pertinent part as follows:

> Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information.
> 5 ILCS 140/3(g)

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"A request that is overly broad and requires the public body to locate, review, redact and arrange for inspection a vast quantity of material that is largely unnecessary to the [requestor's] purpose constitutes an undue burden." *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, ¶25 (2013), *quoting Criminal Defense Lawyers*, 399 Ill.App.3d at 17. The Court finds that the City has failed to adequately establish that satisfying Mr. Hosey's FOIA request would be an undue burden.

3. Interplay Between 5 ILCS 140/7(a)(1) and 725 ILCS 5/103-2.1(g)

The City also relies on the interplay between 5 ILCS 140/7(a)(1) and 725 ILCS 5/103-2.1(g) to justify its rejection of the FOIA request. Specifically, the City first cites 5 ILCS 140/7(a)(1), which permits a public body to withhold "information specifically prohibited from disclosure by federal of State law or rules and regulations implementing federal or State law." The City further contends, in turn, that 725 ILCS 5/103-2.1(g) prohibits release of the video by stating as follows:

> Any electronic recording of any statement made by an accused during a custodial interrogation that is compiled by any law enforcement agency as required by this Section for the purposes of fulfilling the requirements of this Section shall be confidential and exempt from public inspection and copying, as provided under Section 7 of the Freedom of Information Act, and the information shall not be transmitted to anyone except as needed to comply with this Section.

Mr. Hosey focuses on the statute's reference to an "accused" and contends that the Hickory Street Defendants are no longer *accused* but, rather, have been *convicted*. The Court observes, however, that the conviction of one Hickory Street Defendant, Adam Landerman, is pending on appeal. (See Illinois Appellate Court No. 3-15-684). If the appellate court were to order a new trial, the recordings—even statements by the other three Hickory Street Defendants—might be used on remand.

More importantly, Mr. Hosey's argument requires this Court to read an exception into the statute that simply does not exist. The videos depict the Hickory Street Defendants as being "accused" at the time the interrogations were conducted. As such, from the moment the videos came into existence, they became confidential and exempt from public inspection—period. The statute does not state that the videos are exempt for a particular period of time, or that they will lose their exempt status upon a future event. The Court simply cannot limit the statute's language in this fashion. *See Wilkins v. Williams*, 2013 IL 114310, ¶¶ 20, 22 (stating "[t]here is no rule of construction that authorizes a court to declare that the legislature did not mean what the plain language of the statute imports"); *see also Seyller v. County of*

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Kane, 408 Ill.App.3d 982, 991 (2011) (courts are not permitted to read exceptions or limitations into a statute that do not expressly exist).

To be sure, Mr. Hosey's argument is not an unreasonable one. The Court can conceive at least four reasons as to why Mr. Hosey should prevail. First, it is apparent that 725 ILCS 5/103-2.1 designed to limit the situations in which statements by a criminal defendant may be used in a criminal trial. That is not the situation that exists here. Second, the Code of Criminal Procedure in general, of which subsection (g) is a part, is intended to secure simplicity in procedure (725 ILCS 5/101-1(a)); ensure fairness of administration, including the elimination of unjustifiable delay (725 ILCS 5/101-1(b)); ensure the effective apprehension and trial of persons accused of crime (725 ILCS 5/101-1(c)); provide for the just determination of every criminal proceeding by a fair and impartial trial and an adequate review (725 ILCS 5/101-1(d)); and preserve the public welfare and secure the fundamental human rights of individuals (725 ILCS 5/101-1(e)). Withholding the videos does little to advance these purposes. Third, the Court observes that these recordings (or at least parts of them) were already played in open court. Fourth, the City's position is contrary to the State's strong policy interests in "full and complete" government transparency (see 5 ILCS 140/1; *see also Bowie*, 128 Ill. 2d at 378 (1989)) and the notion that exceptions to the FOIA statute must be narrowly construed (*see Janssen Pharmaceuticals*, 2017 IL App (1st) 150870, at ¶ 15. At bottom, and assuming all criminal appeals are exhausted (which is not the case here), the Court can discern no reasonable basis why these videos should remain concealed from the public in perpetuity.

Unfortunately for Mr. Hosey, however, these are contextual or policy arguments, and as such they are trumped by the plain language of the statute. The language in 725 ILCS 5/103-2.1(g) is clear, broad, and unambiguous. The Court is obligated to follow a statute even when the legislative wisdom behind it seems arguably questionable. If the Court liked every ruling it made, it would not be doing its job. Nonetheless, guidance from the appellate court regarding this novel question would be welcome.

III. CONCLUSION

For the reasons stated herein, it is ORDERED:

1. The Court finds that the City of Joliet has failed to meet its burden in establishing the application of privacy (5 ILCS 140/7(1)(c)) and undue burden (5 ILCS 140/3(g)) exceptions to Mr. Hosey's FOIA request.

2. The Court finds that the video recordings are exempted from public disclosure pursuant to 5 ILCS 140/7(a)(1) and 725 ILCS 5/103-2.1(g).

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3. Based on 5 ILCS 140/7(a)(1) and 725 ILCS 5/103-2.1(g), the Court grants summary judgment in favor of the City of Joliet and against Mr. Hosey. Clerk to notify.

ENTERED:

Dated: January 30, 2018

John C. Anderson
Circuit Judge

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