IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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JAMIE KALVEN, Plaintiff,	)	
v.	)	09 CH 51396
CITY OF CHICAGO, et al., Defendants.	)	

ENTERED
Judge Neil H. Cohen-2021
JAN 24 2012
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

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MEMORANDUM AND ORDER

Defendants the City of Chicago and the Chicago Police Department filed a Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005. Plaintiff Jamie Kalven filed a Second Amended Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005.

I. Background

Plaintiff Jamie Kalven filed a Complaint against the City of Chicago ("City"), the Chicago Police Department and Jody Weis, in his official capacity as Superintendent of Police. Plaintiff is seeking relief under the Freedom of Information Act ("FOIA"), 5 ILCS 140/1 *et seq.*, for the alleged wrongful withholding of documents regarding charges of official misconduct against Chicago police officers and the City's investigation of those charges. Plaintiff seeks an order requiring Defendants to release the requested documents for inspection and copying pursuant to his FOIA request and an award of attorney's fees and costs.

II. Cross-Motions for Summary Judgment

Plaintiff and Defendants are both moving for summary judgment. "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Continental Casualty Co. v. Law Offices of Melvin James Kaplan, 345 Ill. App. 3d 34, 37 (1st Dist. 2003). "When . . . parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." Id.

A. *FOIA*

Under FOIA, a public body must comply with a request for public documents unless the documents fall within one of the narrowly construed exceptions of Section 7 of FOIA. Bluestar Energy Svcs., Inc. v. Illinois Commerce Comm'n, 374 Ill. App. 3d 990 (1st Dist. 2007). "'If the public body seeks to invoke one of the exemptions in section 7 as grounds for refusing disclosure, it is required to give written notice specifying the particular exemption claimed to authorize the denial.'" Id. at 994, quoting, Illinois Educ. Ass'n v. Illinois State Bd. of Educ., 204

Ill. 2d 456, 464 (2003). "Thereafter, the party seeking disclosure of information under FOIA can challenge the public body's denial in the circuit court." Id. The agency carries the burden of proof to establish that the documents at issue are exempt from disclosure. "'To meet this burden and to assist the court in making its determination, the agency must provide a *detailed* justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing.'" Id. at 595, quoting, Illinois Education Ass'n, 204 Ill. 2d at 464 (emphasis in original). Because FOIA is patterned after the federal Freedom of Information Act, Illinois courts should look to federal case law in interpreting the FOIA. Cooper v. Department of the Lottery, 266 Ill. App. 3d 1007, 1012 (1st Dist. 1994).

B. *The Applicable Version of FOIA*

FOIA was amended effective January 1, 2010. Plaintiff contends that the Court should apply the version of FOIA in effect when Plaintiff made his FOIA requests to Defendants in November 2009. Defendants contend that the Court should apply the current version of FOIA in determining whether the documents sought by Plaintiff are subject to disclosure.

Plaintiff relies on section 4 of the Statute of Statutes which provides in relevant part as follows:

> No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.

5 ILCS 70/4. The only rights protected against retroactive legislation by section 4 are vested rights. In re Estates of Dance, 16 Ill. App. 2d 122, 126 (3d Dist. 1958). "[T]here is no vested right in the mere continuance of a statute, a vested right has been defined as an expectation that is so far perfected that it cannot be taken away by legislation." Harraz v. Snyder, 283 Ill. App. 3d 254, 263 (2d Dist. 1996).

Plaintiff fails to identify any vested right he possesses in the application of the 2009 version of FOIA. Nor does there appear to be any authority that making a FOIA request or filing a lawsuit pursuant to FOIA creates any vested rights. The case of City of Chicago v. U.S. Bureau of Alcohol, Tobacco and Firearms, 423 F.3d 777 (7th Cir. 2005), while not directly on point, supports the lack of any vested right which would prevent application of the current version of FOIA in this case.

In City of Chicago, the City issued a FOIA request to the Bureau which was mostly denied based on certain FOIA exemptions. Id. at 778-79. The City filed suit and the district court granted the City's motion for summary judgment. Id. at 779. The Seventh Circuit affirmed and more appeals and remands followed. Id. While the case was still in the appeals

process, Congress passed legislation amending the 2005 Appropriations Act which made the requested information "immune from legal process." Id. at 780. In applying the amended 2005 Appropriations Act, rather than the version of the Act which was in effect when the Seventh Circuit affirmed the district court, the Seventh Circuit noted that the City was seeking only prospective relief, the production of documents, and therefore had no vested right in the prior decision in its favor. Id. at 783. The relevant event for determining retroactivity was the production of the documents which had yet to occur. Id. In this case, Plaintiff is seeking prospective relief in the form of the production of documents under FOIA and has not shown a vested right in this prospective relief.

The current version of FOIA should be applied to this case.

C. ***The Complaint Register Files***

Plaintiff is seeking in part Complaint Register files ("CRs") for five police officers filed at any time during their careers. When a complaint is made against a police officer, documents generated by the investigation of the complaint are placed in CRs. (Defendants' Motion, Ex. A, Affidavit of Michael Duffy at ¶3 ("Duffy's Affidavit")). At the close of the investigation, the investigator completes a Summary Report or Summary Digest Report which sets forth the allegations, a summary of the investigation and the investigator's findings and recommendations. (Id. at ¶4). In cases where the investigator sustains the allegations, the Summary Report also include a summary of the police officer's previous disciplinary history. (Id.). The Summary Report is then sent to CPD for further review and the CR is closed. (Id. at ¶¶5-6). Upon receiving the Summary Report, the Superintendent decides whether to adopt the investigator's recommendation in whole or in part. (Id. at ¶7).

Defendants contend that the CRs are exempt from production under section 140/7(1)(n) of the current version of FOIA which provides as follows

> Exemptions. (1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains 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. Subject to this requirement, the following shall be exempt from inspection and copying:
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> * * *
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> (n) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

5 ILCS 140/7(1)(n).

"When the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory

construction." Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255 (2004). "'One of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole. Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute.'" Id. at 255-56, quoting, Michigan Ave. Nat'l Bank v. County of Cook, 191 Ill. 2d 493, 504 (2000). A court must construe a statute "so that each word, clause or sentence is given reasonable meaning and not deemed superfluous." Id. at 256. The statutory phrase "relating to" is a "very broad term." Goff v. Teachers Retirement Sys., 305 Ill. App. 3d 190, 195 (5th Dist. 1999).

There are no Illinois cases interpreting section 140/7(1)(n) to guide the Court. However, several federal district courts have considered the issue before the Court and found that CRs fall within the exemption of section 140/7(1)(n). In Bell v. City of Chicago, 09 C 0754 (N.D. Ill. Feb. 26, 2010), the court granted the defendants' motion for a protective order finding that CRs fall within the exemption of section 140/7(1)(n). Id. at 6. The Bell court rejected as "specious" the plaintiff's argument that the CRs did not fall within the exemption because they were not "adjudications." Id. The Bell court stated that "[c]learly a CR is a record relating to the public body's adjudication of employee disciplinary cases." Id.; see also, Livingston v. McDevitt, 09 C 7725 (N.D. Ill. May 10, 2010)(applying the reasoning in Bell in granting the defendants' motion for a protective order).

In Pierce v. City of Chicago, 09 C 1462 (N.D. Ill. Apr. 16, 2010), the court granted the defendants' motion for a protective order based on the amended section 140/7(1)(n). The court noted that the term "related to" must be broadly construed under Illinois law and stated that "[w]ithout a CR, the adjudication of an employee disciplinary case would not take place – the adjudication follows from the investigation . . . Therefore, it is not that the CRs ultimately may be relevant in a later adjudication, but that the CRs comprise the bulk of *what is relevant* to the adjudication." Id. at 3-4. See also, Alva v. City of Chicago, 08 C 6261 (N.D. Ill. Apr. 16, 2010)(holding same).

The only case finding that the exemption of section 140/7(1)(n) does not apply to CRs is Macias v. City of Chicago, 09 C 1240 (Mar. 10, 2010), which does not address the broad construction that must be afforded the term "related to." The Macias decision was not followed by the well-reasoned opinions in Livingston, Pierce and Alva.

The decisions rendered in Bell, Livingston, Alva and Pierce are well-reasoned and in accordance with Illinois principles of statutory interpretation. Contrary to Plaintiff's assertions, CR files are "related to" adjudicatory proceedings because, as noted by the court in Pierce, there can be no adjudicatory proceedings without CRs. Section 140/7(1)(n) exempts the CRs from production.

Because the CRs fall within the exemption of section 140/7(l)(n), the public's interest in these documents is not relevant. "Most of the exemptions set forth in section 7 of the Act are specific, identifying the particular public records that are not subject to disclosure. Where the public body claims that a requested document falls within one of these specifically enumerated categories and is able to prove that claim, no further inquiry by the court is necessary." Lieber v. Board of Trustees of Southern Ill. Univ., 176 Ill. 2d 401, 408 (1997).

Plaintiff's is not entitled to production of the CRs. Defendants are entitled to summary judgment on this issue.

B. *The Bond and Moore Lists*

As part of litigation against the City and individual police officers in Bond v. City of Chicago, 04 C 2617 (N.D. Ill.), and Moore v. City of Chicago, 07 C 5908 (N.D. Ill.), the defendant's attorneys received discovery requests from the plaintiffs. (Defendants' Motion, Ex. E; Plaintiff's Motion, Ex. L). To respond to these discovery requests, Sergeant Daniel Kivel of the Internal Affairs Division ("IAD") of the CPD conducted queries of the CPD's computer database and created reports responsive to the discovery requests. (Defendants' Motion, Ex. E). The parties refer to these reports as the Litigation Lists and the Repeater Lists. For the sake of clarity, these reports will be referred to as the Bond and Moore Lists. Agreed, Qualified Protective Orders were entered in Bond and Moore in connection with the production of the Bond and Moore Lists. (Defendants' Motion, Exs. G and H). On June 28, 2010, an Agreed Order to Preserve was entered in this case requiring Defendants to preserve the Bond and Moore Lists. (Plaintiffs' Motion, Ex. N).

Defendants contend that the Bond and Moore Lists fall within the exemption of section 140/7(1)(m) which provides as follows:

> Exemptions. (1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains 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. Subject to this requirement, the following shall be exempt from inspection and copying:
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> (m) Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

5 ILCS 140/7(1)(m).

Contrary to Defendants' assertions, it is clear that the Bond and Moore Lists were not prepared in anticipation of litigation for Defendants' attorneys, but prepared in response to discovery requests from the opposing party during the course of litigation. The Bond and Moore Lists do not fall within the exemption of section 140/7(1)(m).

Defendants also argue that they should not be required to produce the Bond and Moore Lists based on the protective orders entered in Bond and Moore. The Seventh Circuit, however, stated that the Bond protective order, which is substantively identical to the Moore protective

order, did not prohibit the City from disclosing the documents on public request. Bond v. Utreras, 585 F.3d 1061, 1076 n. 10 (7th Cir. 2009). The production of the Bond and Moore Lists is not contrary to the protective orders as asserted by Defendants.

Defendants also suggest that the Bond and Moore Lists are not CPD documents because they were created on the request of another City department. FOIA defines "public records" as follows:

> (c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

5 ILCS 140/2(c). The Bond and Moore Lists are reports prepared by the CPD. (Defendants' Motion, Ex. E). Therefore, they are public records subject to disclosure.

Defendants have not presented any valid basis for denying Plaintiff's request for the Bond and Moore Lists and Plaintiff is entitled to summary judgment on this issue.

C. ***Plaintiff's Request for Attorney's Fees and Costs***

Plaintiff's Complaint requests attorney's fees and costs. Section 140/11(i) of FOIA, allows for the award of attorney's fees. However, the current version of this subsection expressly applies only to actions filed on or after January 1, 2010. 5 ILCS 140/11(i) (2012). Therefore, Plaintiff's request for attorney's fees is governed by the version of section 140/11(i) in effect on December 22, 2009:

> If a person seeking the right to inspect or receive a copy of a public record substantially prevails in a proceeding under this Section, the court may award such person reasonable attorneys' fees and costs. If, however, the court finds that the fundamental purpose of the request was to further the commercial interests of the requestor, the court may award reasonable attorneys' fees and costs if the court finds that the record or records in question were of clearly significant interest to the general public and that the public body lacked any reasonable basis in law for withholding the record.

5 ILCS 140/11(i) (2009).

The issue here is whether Plaintiff substantially prevailed in this litigation. Plaintiff has not.

III. Conclusion

Defendants' Motion for Summary Judgment is granted as to Plaintiff's FOIA request for the CRs and denied as to Plaintiff's FOIA request for the Bond and Moore Lists. Plaintiff's

Motion for Summary Judgment is granted as to his FOIA request for the Bond and Moore Lists and denied as to his FOIA request for the CRs. Plaintiff's request for attorney's fees and costs is denied. The status date of February 3, 2012 is stricken.

Enter: 1.24.12

Judge Neil H. Cohen