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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

KIRK ALLEN,)	
EDGAR COUNTY WATCHDOGS,)	
)	
Plaintiffs,)	
)	No. 2020CH56
vs.)	
)	
CITY OF URBANA,)	
URBANA POLICE DEPARTMENT,)	
)	
Defendants.)	

REPORT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled cause came on for hearing on the 9th day of December, 2020, before the Honorable Jason M. Bohm, judge presiding.

APPEARANCES:

Mr. Merrick Wayne
Attorney At Law
On behalf of the Plaintiffs

Mr. James Simon
Attorney At Law
On behalf of the Defendants

COURTNAY C. ORMAN
Certified Shorthand Reporter
C.S.R. #084-004628
Moultrie County Courthouse
Sullivan, Illinois

1 THE COURT: This is 20-CH-56, Kirk Allen versus
2 the City of Urbana. Mr. Wayne appears on behalf of the
3 Plaintiff. Mr. Simon appears in person in the courtroom
4 on behalf of the Defendants. Set this morning, I think
5 after the supplemental briefing the Court is ready to
6 rule on the pending Motion For Summary Judgment. I'll
7 just give you the ruling here.

8 In response to the Plaintiff's FOIA request, the
9 Defendant City of Urbana invoked three exemptions to the
10 disclosure. Two of those exemptions can be dealt with
11 rather quickly, the third requires a bit more of an
12 explanation. First, the Defendant invoked 5 ILCS
13 140/7(b), which allows for the nondisclosure of private
14 information. The term "private information" is defined
15 in 5 ILCS 140/2 Section (c)(5) to include Social
16 Security numbers, driver's licenses, home and personal
17 telephone numbers and that sort of thing. I believe, as
18 we discussed at an early hearing, that invocation of
19 private information should be dealt with by redaction of
20 that information, as opposed to the wholesale denial of
21 a FOIA request. So, the Defendant's invocation of
22 Section 7(b) to give a blanket nondisclosure of the
23 information would not be proper.

24 Second, the Defendant invoked 5 ILCS 140/7(c),
25 which allows for the nondisclosure of personal

1 information. The statute says that this is information
2 which the discloser of that information would constitute
3 a "clearly unwarranted invasion of personal privacy".
4 To make a determination of whether this section was
5 properly invoked, the Court ordered an in camera
6 inspection of the information, which is comprised of a
7 police report and security footage. After review of
8 that information, it is clear that there's no
9 information contained in the materials that would
10 constitute an unwarranted invasion into anyone's
11 privacy, so I don't believe that the invocation of
12 Section 7(c) to refuse to disclose the information was
13 proper.

14 This brings me to the third exemption, which, as
15 I said, requires more of an explanation. This is the
16 invocation of 5 ILCS 140 Section -- I'm sorry /7(d)(i).
17 This allows for the nondisclosure of information that
18 would, quote, "interfere with pending or actually and
19 reasonably contemplated law enforcement proceedings".
20 I'll use the term "pending investigation" to cover that
21 longer phrase. As I said, the information sought here
22 is a police report and video footage which dates to
23 January the 10th, 2020. The police report in this case
24 was made in the course of an investigation of an alleged
25 misdemeanor. The investigation was eventually

1 transferred from the Urbana Police to the Illinois State
2 Police, but Urbana is allowed to invoke interference
3 with ISP's investigation even if Urbana was no longer
4 the investigating agency. For that proposition, see
5 Kelly versus The Village of Kenilworth, 2019 Ill.App
6 (1st) 170780 at Paragraph 33. So, in this case, Urbana
7 then becomes dependent upon the assertions made by ISP
8 and the State Appellate Prosecutor's Office with respect
9 to FOIA and the nondisclosure under FOIA. The question
10 presented is would the disclosure of the information
11 interfere with a pending investigation. It is not
12 enough for there to have simply been an investigation,
13 rather there must be an explanation of how the
14 disclosure would have interfered with the investigation.
15 Again, see the Kelly case, which I just cited, this time
16 at Paragraph 39.

17 In an attempt to comply with this burden, Urbana
18 submitted in August a host of affidavits. Those
19 affidavits were all dated from August of 2020 and
20 essentially stood for the proposition that as of
21 February of 2020 the investigation was pending and the
22 disclosure of that information would have interfered
23 with an investigation. Those affidavits would have been
24 fine if we were still in 2020, but claiming that there
25 is a pending investigation is temporal in nature. See

1 NLRB versus Robbins Tire and Rubber Company, 437 U.S.
2 214 at pages -- I'm sorry, at pages 230 to 32 -- that's
3 a U.S. Supreme Court case from 1978 -- and Citizens for
4 Responsibility in Ethics in Washington, 746 F 3d 1082 at
5 1097. That's a D.C. Circuit case from 2014. In that
6 case, the D.C. Circuit said that the investigation,
7 quote, "must remain pending at the time of the Court's
8 decision not only at the time of the FOIA -- of the
9 initial FOIA request".

10 So, when we had a hearing on October the 16th,
11 2020, I ordered Urbana to provide affidavits on whether
12 the disclosure would interfere at that time with a
13 currently pending investigation. Urbana, of course,
14 turned back to the Illinois State Police and the State
15 Appellate Prosecutor's Office for the answer. The State
16 -- Illinois State Police provided Urbana with an October
17 23rd, 2020, affidavit of Sergeant Chad Dumonceaux.
18 Sergeant Dumonceaux said, quote, "The ISP concluded its
19 investigation on March the 10th, 2020. The complete
20 investigation was submitted to the State Appellate
21 Prosecutor's Office on March the 11th, 2020. No
22 additional follow-up investigation was requested."

23 The fact that the ISP had concluded its
24 investigation in March had not been disclosed to the
25 Court previously. In fact, I would say that this

1 information is conspicuously absent from another ISP
2 affidavit. That is the August 12th, 2020, affidavit of
3 Bruce Kugler, an attorney with ISP. By August of 2020,
4 when Mr. Kugler signed his affidavit, the ISP portion of
5 the investigation had been over for five months, but
6 there was no mention of that fact in the August
7 affidavit. When people swear to things, they promise to
8 tell the truth, the whole truth, and nothing but the
9 truth. Telling the "whole truth" means that you don't
10 leave material information out. As a result, the August
11 affidavit of Mr. Kugler seems less than forthright.

12 The State Appellate Prosecutor's response is also
13 troubling. Rather than submit an affidavit as the Court
14 requested, Matthew Jones, an attorney with the State
15 Appellate Prosecutor's Office, provided Urbana with a
16 letter dated October 21st, 2020. That letter says,
17 quote, "It has never been our policy to provide
18 affidavits such as those requested by the Judge in this
19 case. We will not be deviating from that policy." This
20 representation is wholly inconsistent with the fact that
21 Mr. Jones did submit an affidavit in this case on this
22 subject, and he either obviously chose to deviate from
23 the so-called policy at that time or the representation
24 in the letter is not consistent with this submission of
25 an affidavit.

1 The Court feels compelled to mention one other
2 thing. Both Mr. Jones and Mr. Kugler are attorneys, and
3 as such, they are officers of the court. As an
4 attorneys, they owe a duty of candor to the court under
5 Rule 3.3 of Professional Conduct. While their
6 affidavits may not technically have violated the rule,
7 they certainly appear to violate the spirit of the rule.
8 Being "candid" means that when you sign affidavits in
9 August and say that there was a pending investigation in
10 February, you shouldn't leave out the fact that that
11 investigation appears to have concluded in March. Now,
12 it might very well be true that the State Appellate
13 Prosecutor's Office believed that disclosure of the
14 information would have undermined their deliberative
15 process in determining what to do with ISP's
16 investigation, but what they needed to do was say so and
17 to say how the disclosure of that information would have
18 interfered with that process. They did not do that. As
19 a result, the Court finds that the invocation of Section
20 7(d)(i) to refuse to disclose the information was not
21 proper. Therefore, the Plaintiff's Motion For Summary
22 Judgment is granted.

23 Mr. Simon, I believe you need to provide this
24 information to the Plaintiff by the end of the week.
25 Having said that, you do need to still redact the

1 private information, Social Security numbers, driver's
2 license, telephone numbers that is provided in the
3 police report. That will be the order of the Court.

4 Counsel, anything else you'd like to add?

5 MR. SIMON: The only comment I would like to add,
6 Your Honor, is, with all due respect, I think the
7 temporal scope as provided in this case of FOIA requests
8 is the temporal scope provided in the FOIA requests, not
9 when the court hears an argument. We could go on for
10 several years and enter an order and all, and I believe
11 that federal cases are crystal clear that the temporal
12 scope is that which was stated in the FOIA request; i.e.
13 90 days prior to the date the Plaintiff submitted their
14 request on January 23. We have no problem going out to
15 January 30 when we submitted our requests.

16 Supplementing the requests or because of changes of
17 circumstances after the requests have been responded to,
18 January 31, are not to be considered.

19 THE COURT: I think the supplemental briefing of
20 the parties, as I read the cases cited, I think in
21 general you're correct that the FOIA request is limited
22 to the time of the FOIA request. I believe that general
23 rule, however, has a caveat for this exemption to FOIA,
24 which is that there has to be a pending investigation.
25 I think that case from the D.C. Circuit is crystal clear

1 that in that case it's not just at the time of the
2 initial denial of the FOIA request but it's pending, and
3 once it ceases to be pending, there's no longer a reason
4 to use that exemption, and there the court said that it
5 has to remain pending not only at the time of the
6 initial FOIA request but at the time of the court's
7 ruling. So, therefore, I understand your position. I
8 don't think it's accurate with respect to this exemption
9 from FOIA, but your position is noted for the record.

10 Mr. Wayne, anything you'd like to add?

11 MR. WAYNE: I would just say that that temporal
12 -- Your Honor's correct about it's temporal in nature.
13 I believe what Defendant was referring to though would
14 be more applicable if a shoplifting incident happened
15 yesterday, Defendant would not be obligated to produce
16 that police report in response to the request. But the
17 only police report at issue here was created before the
18 request was made, so it is within the temporal scope of
19 Plaintiff's request.

20 Your Honor, and since you've ordered Defendant to
21 produce the records, assuming that there's no issues
22 with those redactions, the only issues that remain are
23 attorney fees, cost and civil court fees. Typically I'm
24 able to come to some sort of agreement with Defendant's
25 attorney when we are trying to discuss resolving those.

1 So assuming we don't need to file a fee petition, we can
2 come to a resolution of that, that's truly the only step
3 that's left in the case.

4 THE COURT: What I would ask then in that case is
5 if you're unable to come to resolution on that, file a
6 motion for it. If you are able to come to it -- if you
7 -- I think we'll need -- since this is the final, I'll
8 need a written order of judgment, but I think that's
9 only appropriate once the issue of attorney's fees and
10 costs has been resolved. So, either file the motion for
11 attorney's fees, if you can't resolve it, or if you
12 could submit a proposed written order entering summary
13 judgment in your favor. One of those two steps needs to
14 be taken once you've had an opportunity to discuss it
15 with Mr. Simon.

16 I will also, for the record and for any court of
17 review, I'm going to place, Mr. Simon, the materials you
18 tendered for in camera inspection to the Court under
19 seal in the court file but unredacted portions, that way
20 a court of review can review what this Court reviewed to
21 see if my determination was correct.

22 MR. SIMON: Thank you, Your Honor, and as to
23 counsel's suggestion, if he reaches out to me, we will
24 be happy to discuss the issue. We will reserve our
25 rights to appeal.

1 THE COURT: Sure.

2 MR. SIMON: I have to talk to the powers that be
3 in the City to decide what they want to do with this.

4 THE COURT: All right. Thank you very much.

5 MR. SIMON: Thank you.

6 THE COURT: We will be in recess.

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8 Which were all of the proceedings had
9 and entered of record at said hearing.

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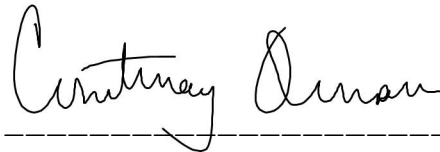
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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

I, Courtney Orman, an Official Court Reporter,
for the Circuit Court of the Sixth Judicial Circuit of
Illinois, transcribed the electronic recording of the
proceedings in the above-entitled cause to the best of
my ability and based on the quality of the recording,
and I hereby certify the foregoing to be a true and
accurate transcript of said electronic recording.



Official Court Reporter

License No. #084-004628

Dated this 18th
of December, 2020.