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

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, Plaintiff, v. CHICAGO POLICE DEPARTMENT, CITY OF CHICAGO Defendants.	)	No. 18 CH 07758 Hon. Anna Demacopoulos

NOTICE OF FILING

TO: See Attached Certificate of Service

PLEASE TAKE NOTICE that on **August 17, 2018,** the undersigned caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, **Plaintiff's Memorandum in Support of Its Motion to Strike and Dismiss Defendants' Third Affirmative Defense**, a copy of which is attached and served upon you.

Date: August 17, 2018

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS

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CERTIFICATE OF SERVICE

I, Louis A. Klapp, an attorney, hereby certify that I caused a true and correct copy of the foregoing **Notice of Filing**, and **Plaintiff's Memorandum in Support of Its Motion to Strike and Dismiss Defendants' Third Affirmative Defense** referenced therein, to be served upon the following:

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via e-mail to the addresses indicated and via U.S. Mail, proper first-class postage prepaid, sent on this 17th day of August, 2018, on or before 5:00 p.m.

Louis A. Klapp

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE AND DISMISS DEFENDANTS' THIRD AFFIRMATIVE DEFENSE

Plaintiff American Civil Liberties of Illinois ("the ACLU"), through its undersigned attorneys, respectfully moves the Court to strike and dismiss the Third Affirmative Defense of Defendants Chicago Police Department and City of Chicago ("Defendants").

I. Introduction

This is an action under the Illinois Freedom of Information Act ("FOIA"), where the ACLU seeks records related to software acquired and used by the Chicago Police Department ("CPD"), a department of the City of Chicago. The public—including the ACLU—is entitled to review these records. Per the public policy of the State of Illinois, all persons are entitled to full and complete information regarding the affairs of their government. *See* 5 ILCS 140/1. All public records maintained by Defendants are open to inspection unless Defendants prove by clear and convincing evidence that the records fall within a FOIA exemption. *See* 5 ILCS 140/1.2.

In their Answer, Defendants admit that they failed to respond to the ACLU's FOIA request, and they raise three affirmative defenses, each of which asserts a FOIA exemption. Defendants' Third Affirmative Defense merely quotes statutory language of a possible defense without pleading specific facts showing the applicability of the defense in this case. As a result,

the ACLU is left guessing how this exemption supposedly justifies withholding important documents, which Illinois law has deemed open for public inspection absent clear and convincing evidence that they may be withheld. Since the Third Affirmative Defense makes only conclusory assertions without alleging any facts—let alone facts showing the applicability of the claimed exemption—the Court should strike and dismiss the Third Affirmative Defense.

II. Background and Posture of Motion

In January 2018, the ACLU submitted a FOIA request to CPD seeking records regarding CPD's acquisition and use of software that enables CPD to monitor citizens' social media accounts. (Complaint ¶¶ 1, 16–17; *id.* at Ex. B pp. 1–2.) For example, the ACLU sought all "invoices related to social media monitoring software." (*Id.* ¶ 17; *id.* at Ex. B p. 2.) The term "social media monitoring software" was defined to include several commercially-available software programs that facilitate monitoring of social media accounts (e.g., Facebook accounts), such as "Dunami," "LexisNexis Social Media Monitor," and "Geofeedia." (*Id.* at Ex. B p. 2.)

The records requested by the ACLU are of significant public concern. The ACLU contends that law enforcement agencies have a history of impermissibly spying on political activist groups and harassing individuals for doing no more than peacefully exercising their First Amendment rights. (Complaint ¶ 3.) The ACLU's requests are relevant to—among other things—whether CPD is using social media monitoring software to disrupt lawful First Amendment activity. (*See id.* ¶¶ 2–7.) This is not an abstract concern: public records show that CPD monitored citizens' social media accounts in connection with the January 2017 protests of Donald Trump's presidential inauguration. (*Id.* ¶ 5; *id.* at Ex. A.)

Although CPD made repeated promises to turn over the requested public records, CPD never did. (Complaint ¶¶ 18–29; Answer ¶ 29.) This lawsuit seeks to compel release of the records. (Complaint ¶ 1.)

Defendants responded to the Complaint on July 27, 2018, admitting that CPD did not produce the requested records. (Answer ¶ 29.) In addition to filing an Answer, Defendants put forth the following Affirmative Defenses:

> The following information contained within these records is exempt from production under FOIA:
>
> - Home addresses, instagram addresses, and internal record ("IR") numbers were redacted pursuant to Section 7(1)(b), which exempts "private information," which is defined in Section 2(c-5) to specifically include the types of information listed.
> - Victim's name, Instagram addresses, icons on facebook, screennames, phots [sic], names, twitter name and account, snapchat information, and school and employment information were redacted pursuant to Section 7(1)(c), which exempts "personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Graphic detail of an unrelated attempted sexual assault were also redacted pursuant to Section 7(1)(c).
> - A unique and specialized investigative technique is exempt and was properly withheld pursuant to Section 7(1)(d)(v), which exempts records that would, "[d]isclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request."

(Answer at 8–9.) Although not numbered by Defendants, the ACLU refers to these defenses as the First, Second, and Third Affirmative Defenses, respectively.

Through this motion, the ACLU moves to strike and dismiss the Third Affirmative Defense because it is conclusory and lacks factual basis.[1]

III. Argument

A. Legal Principles

"Because Illinois is a fact pleading jurisdiction, [its courts] must disregard conclusions of fact or law that are unsupported by ***specific factual allegations***." *Northbrook Bank & Tr. Co. v.*

[1] The ACLU also contends that the First and Second Affirmative Defenses are conclusory and lack factual basis, but in the interest of preserving the parties' and the Court's resources, this motion is limited to the Third Affirmative Defense.

2120 Div. LLC, 2015 IL App (1st) 133426, ¶ 23, 46 N.E.3d 783, 794.[2] Consequently, the "facts constituting any affirmative defense" must be set forth in a defendant's answer. 735 ILCS 5/2-613(d). Such facts "must be plainly set forth and the court will disregard any conclusions of law or fact not supported by ***allegations of specific fact***." *Farmers Auto. Ins. Ass'n v. Neumann*, 2015 IL App (3d) 140026, ¶ 16, 28 N.E.3d 830, 835*; see also Northbrook Bank*, 2015 IL App (1st) 133426, ¶ 15, 46 N.E.3d at 792 (facts establishing an affirmative defense must be stated in the defendant's answer "with the same degree of specificity that is required of a plaintiff stating a cause of action").

When an affirmative defense lacks specific factual support, the defense should be stricken. *See* 735 ILCS 5/2-615(a); *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 21, 13 N.E.3d 350, 358 (affirming order striking affirmative defenses for "fail[re] to allege sufficient facts to establish [affirmative defense]"); *Richco Plastic Co. v. IMS Co.*, 288 Ill. App. 3d 782, 783, 785 , 681 N.E.2d 56, 57, 58 (1997) (affirming order striking affirmative defenses for being "wholly conclusory and devoid of any factual allegations sufficient to support the conclusions stated therein").

B. The Court Should Strike Defendants' Third Affirmative Defense

Defendants' Third Affirmative Defense is facially deficient. It alleges ***no facts whatsoever***; instead, it merely quotes a section of the FOIA statute and makes conclusory assertions that records were properly withheld under that provision. (Answer at 9.) Although Section 7(1)(d)(v) of FOIA exempts records that would disclose "unique or specialized investigative techniques other than those generally used and known . . . and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request," Defendants offer no facts to support the

[2] All emphasis added unless otherwise noted.

application of that exemption in this case. (Answer at 9.) This facial deficiency is sufficient to strike the defense.

The pleading is so deficient that it does not even identify which of the six categories of requested records are supposedly covered (or otherwise affected) by the Third Affirmative Defense. For example, the ACLU requested "invoices related to social media monitoring software." (Complaint ¶ 17; *id.* at Ex. B p. 2.) Do Defendants seriously contend that disclosing the amount of taxpayer money spent on social media monitoring software would reveal an "investigative technique"? Without factual allegations, there is no way to know. And, to the extent Defendants contend as much, they allege no facts showing that financial records would reveal "investigative techniques." These same problems exist for the other five categories of requested records because, again, no facts whatsoever are alleged.

Even if Defendants had sufficiently alleged that certain requested records would disclose an "investigative technique" (they did not), Defendants also failed to allege facts showing that the Section 7(1)(d)(v) exemption applies. That section does not apply to ***any*** "investigative technique," but is limited to those (i) that are "unique or specialized," (ii) that are not "generally used and known," and (iii) whose disclosure "would result in demonstrable harm to [Defendants]." *See* 5 ILCS 140/7(1)(d)(v). Defendants allege no facts that could support any—let alone all—of these requirements. (Answer at 9.) Nor could they, because—as shown by the ACLU's identification of specific, commercially-available software programs (*i.e.*, "Dunami, PATHAR, LexisNexis Social Media Monitor, Dataminr, Geofeedia, NetBase, TransVoyant, and Tweet Deck")—such programs are publically known. (Complaint at Ex. B p. 2.)

IV. Conclusion

For the reasons stated above, the ACLU respectfully asks this Court to GRANT its motion and strike and dismiss Defendants' Third Affirmative Defense.

DATED: August 17, 2018

Respectfully submitted,

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