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

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff American Civil Liberties Union of Illinois ("the ACLU") files this motion for summary judgment and asks the Court to order Defendants Chicago Police Department ("CPD") and City of Chicago to produce records related to Defendants' purchase and use of social media monitoring software.[1]

I. BACKGROUND

A. The FOIA Request

In January 2018, the ACLU submitted a request under the Illinois Freedom of Information Act ("FOIA") to CPD seeking records regarding CPD's purchase 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

[1] ACLU will separately address its request for fees and penalties later, should the Court grant this motion in whole or in part.

(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. First, Defendants have paid hundreds of thousands of dollars *annually* for the software, yet refuse to specify how these public funds are spent. (*See* Ex. 2.)[2] Second, public records show that CPD monitored citizens' social media accounts in connection with the January 2017 protests of Donald Trump's presidential inauguration. (Complaint ¶ 5; *id.* at Ex. A.) 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.)

Although CPD made repeated promises to turn over the requested public records, CPD failed to do so by the time this lawsuit began. (Complaint ¶¶ 18–29; Answer ¶ 29.)

B. Defendants' Redacted Document Production

Having received no documents nearly seven months after sending the FOIA request, the ACLU filed its Complaint on June 20, 2018. Defendants answered to the Complaint on July 27, 2018, admitting the following facts (among others):

- Defendants are public bodies under FOIA;
- CPD is a department of the City of Chicago;
- CPD had responsive records in its possession; and
- CPD had not produced the requested records.

(Answer at ¶¶ 13-14, 32-34.)

Defendants finally replied to the FOIA request on August 17, 2018. Defendants stated that, for each of the six categories of requested records, either (i) Defendants found no responsive

[2] Exhibit 2 contains excerpts from Defendants' production of records in response to the ACLU's FOIA request.

records; (ii) Defendants found responsive records, and were producing them; or (iii) Defendants found responsive records, but Defendants were producing only redacted versions. (Ex. 1 at 1-2.)[3] Defendants attempted to justify their withholding (*i.e.*, redactions), through citations to four FOIA exemptions:

- Section 7(1)(b) regarding "private information…";
- Section 7(1)(c) regarding "personal information…";
- Section 7(1)(d)(v) regarding "specialized investigative techniques…"; and
- Section 7(1)(v) regarding "vulnerability assessments…"

(Ex. 1 at 1-2.)

Defendants Amended Affirmative Defenses—the operative pleading in this case—asserted the same four FOIA provisions. (Am. Affirmative Defs. at 9-10.)

II. LEGAL STANDARDS

A. Summary Judgment

In response to a summary judgment motion, the party bearing the burden of proof (here, Defendants), must come forward with supporting evidence and may not rest on mere argument or its own pleadings. *Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 470 (2003). The burden of proof and level of detail required under FOIA are exacting, and Defendants must come forward with that proof now. *See id.*

B. FOIA Generally

The General Assembly and Illinois courts have recognized that government secrecy is rarely appropriate and often abused:

> We are not surprised that governmental entities, including the United States Attorney generally prefer not to reveal their activities to the public. If this were not a truism, no FOIA would be needed. Our legislature enacted the FOIA in recognition that (1) blanket government secrecy does not serve the public interest

[3] Exhibit 1 is the cover letter accompanying Defendants' response to the ACLU's FOIA request.

> and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the sunshine of public scrutiny is the best antidote to public corruption, and Illinois courts are duty-bound to enforce that policy.

Better Gov't Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 818 (2008). Because of this, the FOIA statute and interpreting caselaw impose a demanding standard on public bodies seeking to keep records from the public.

First, every public record is presumed by law to be open to the public, and so a public record may only be withheld if a specific statutory exemption applies and is proven by clear and convincing evidence. 5 ILCS 140/1.2; *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (2009). If records contain both exempt and non-exempt material, the exempt material may be redacted but the remainder must be released. 5 ILCS 140/7(1).

Second, a public body asserting an exemption must "provide a *detailed* justification for its claimed exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." *Day*, 388 Ill. App. 3d at 74 (quoting and citing *Illinois Educ. Ass'n*, 204 Ill. 2d at 464) (emphasis in original). Public bodies may not treat exemption language "as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue." *Id.* at 75. Rather, the public body can meet its burden "only by providing some *objective* indicia that the exemption is applicable under the circumstances." *Id.* (emphasis in original); *see also id.* at 80 ("These affidavits are one-size-fits-all, generic and conclusory. . . . That is rubber stamp judicature. We decline to take part in it. The City is asking us, as it did the trial court, to take the affiants' word for it. For us to do so would be an abdication of our responsibility.").

Further, FOIA exemptions must be "read narrowly" and in furtherance of the statutory purpose: "to open governmental records to the light of public scrutiny." *E.g., Day*, 388 Ill. App. 3d at 73; *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 407 (1997) ("In conducting

our analysis, we are guided by the principle that under the Freedom of Information Act, public records are presumed to be open and accessible. The Act does create exceptions to disclosure, but those exceptions are to be read narrowly.").

Finally, the "function of the courts is to interpret the [FOIA] statute as it is written," and not to vary from clear statutory text on policy or other grounds. *Fagel v. Dep't of Transp.*, 2013 IL App (1st) 121841, ¶ 35 (citing *Pritza v. Village of Lansing*, 405 Ill.App.3d 634, 645 (2010) (courts may not legislate but must interpret the law where the language of the statute is plain and certain)). The Illinois Supreme Court has repeatedly held that unless records are exempt under a specific FOIA provision, they must be produced. *Illinois Educ. Ass'n*, 204 Ill. 2d at 463 ("Thus, when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in section 7 of the Act applies."); *Am. Fed.'n of State, Cty. & Mun. Employees (AFSCME), AFL-CIO v. Cty. of Cook*, 136 Ill. 2d 334, 341 (1990) ("The Act, therefore, creates a simple mechanism whereby a public body must comply with a proper request for information unless it can avoid providing the information by invoking one of the narrow exceptions provided in the Act.").

C. The Constitution and the FOIA Statute Demand Complete Public-Funds Transparency

The FOIA statute unequivocally allows members of the public to review their government's expenditures of public funds:

> ***All records relating to the obligation, receipt, and use of public funds*** of the State, units of local government, and school districts ***are public records subject to inspection*** and copying by the public.

5 ILCS 140/2.5 (emphasis added) (the "Public-Funds Provision").

FOIA's Public-Funds Provision makes no allowance for redactions or other withholdings. *See id.* This is unlike other provisions of FOIA, which permit redactions in some instances.

Compare id. (no exemptions) *with* 5 ILCS 140/2.20 (some exemptions). The Public-Funds Provision ensures complete financial transparency, consistent with the Illinois Constitution:

> Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.

Ill. Const., art. VIII § 1(c).

D. The FOIA Exemptions Cited By Defendants

First, Defendants cite Section 7(1)(b), which exempts "private information" from public inspection. 5 ILCS 140/7(1)(b). The statute defines the term narrowly:

> "Private information'" means unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person."

5 ILCS 140/2(c-5).

Second, Defendants cite Section 7(1)(c), which exempts the following limited type of "personal information" from public inspection.

> Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of personal privacy" means 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 public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

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

Third, Defendants cite Section 7(1)(d)(v), which exempts certain law enforcement records that would disclose "specialized investigative techniques" for law enforcement purposes that are not generally used or known and the disclosure of which would result in demonstrable harm:

> Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would. . . disclose 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.

5 ILCS 7(1)(d)(v).

Finally, Defendants cite Section 7(1)(v), which exempts specific types of "vulnerability assessments" (and the like) if disclosure would jeopardize effectiveness or safety:

> Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations.

5 ILCS 7(1)(v).

III. ARGUMENT

It is undisputed that Defendants are public bodies and failed to produce complete public records responsive to the ACLU's requests. The ACLU need not make any further showing at this time because the burden of proof on exemption claims lies with the public body asserting them. 5 ILCS 140/1.2. The ACLU will address in its reply brief whatever purported factual and legal justification Defendants provide in response to this motion.

IV. CONCLUSION

For these reasons, the ACLU is entitled to summary judgment and un-redacted records should be immediately released.

Date: November 21, 2018

Respectfully submitted,

AMERICAN CIVIL LIBERTIES
UNION OF ILLINOIS

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