2014 IL App (2d) 140159-U
No. 2-14-0159
Order filed May 19, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN PETER GONIGAM and FIRST ELECTRIC NEWSPAPER, LLC, Plaintiffs-Appellees, v. OFFICE OF THE SHERIFF OF McHENRY COUNTY, Defendant-Appellant, (Keith Nygren, in His Official Capacity as Sheriff of McHenry County, Donald B. Leist, In His Official Capacity as Equal Employment Officer for the Office of the Sheriff of McHenry County, and Jan Weech, in His Official Capacity as Freedom of Information Officer for the Office of the Sheriff of McHenry County, Defendants).	)	Appeal from the Circuit Court of McHenry County. No. 13-MR-309 Honorable Thomas A. Meyer, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: In defendant's Rule 307(a)(1) interlocutory appeal, we affirmed the trial court's order directing defendant to release certain documents requested by plaintiffs pursuant to the Freedom of Information Act; the documents at issue were not exempt from disclosure because they were not related to an adjudication of a

> disciplinary case within the meaning of section 7(1)(n) of the Freedom of Information Act.

¶ 2 Plaintiffs, John Peter Gonigam and the First Electric Newspaper, LLC, filed a request seeking certain documents from defendant, Office of the Sheriff of McHenry County, pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq*. (West 2012)). When defendant denied their request, plaintiffs filed suit in the trial court seeking declaratory and injunctive relief. On plaintiffs' motion for summary judgment, the trial court found that most, but not all, of the requested documents were exempt from disclosure. The court directed defendant to release specific documents that it found were not exempt. Defendant filed a notice of interlocutory appeal under Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) from that portion of the court's order directing it to release the nonexempt documents. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The genesis of this case was an October 23, 2012, petition to appoint a special prosecutor filed in the trial court by McHenry County Sheriff's Deputy John Koziol. In the petition, Koziol alleged misconduct by McHenry County Undersheriff Andrew Zinke. On November 2, 2012, the trial court denied the petition. On December 18, 2012, the McHenry County State's Attorney announced in a press release that Zinke had not violated Illinois law. Meanwhile, from November 19 through December 21, 2012, at the direction of McHenry County Sheriff Keith Nygren, Donald Leist, defendant's equal employment and legal affairs officer, conducted an internal investigation of Zinke's alleged misconduct. At the conclusion of his investigation, Leist provided Sheriff Nygren with a binder of documents from his investigation. After reviewing the binder, on January 14, 2013, Nygren determined that the allegations against Zinke were unsubstantiated.

¶ 5 On January 24, 2013, John Peter Gonigam, who owns and publishes The First Electric Newspaper, submitted a FOIA request to defendant, seeking "a copy of the report of the Sheriff's Office[']s internal investigation into whether Undersheriff Andrew Zinke violated any general orders in conveying information to Brian Goode as alleged in Sgt. John Koziol's petition for a Special Prosecutor." Jan Weech, defendant's FOIA officer, sent plaintiffs a letter denying their request. Weech indicated that the denial was based on section 7(1)(n) of the FOIA (5 ILCS 140/7(1)(n) (West 2012)), which exempts from disclosure records relating to a public body's adjudication of a disciplinary case. Weech's letter also informed plaintiffs that the final outcome of the Zinke investigation was that the "[c]harges were not sustained."

¶ 6 Plaintiffs sought review of the denial of their FOIA request with the public access counselor of the Attorney General's office (see 5 ILCS 140/9.5 (West 2012)). On May 1, 2013, the public access counselor issued a nonbinding determination letter in which it found that the requested documents related to defendant's internal investigation, not to an adjudication under section 7(1)(n) of the FOIA. The public access counselor concluded that defendant was required to produce the requested documents.

¶ 7 Notwithstanding the public access counselor's determination, defendant adhered to its position that the documents were exempt from disclosure and refused to release them. On June 18, 2013, plaintiffs filed suit in the trial court seeking declaratory and injunctive relief (see 5 ILCS 140/11(a) (West 2012)). In addition to defendant, the suit named as defendants the following persons in their official capacities: Sheriff Nygren, Donald Leist, and Jan Weech. Ultimately, plaintiffs voluntarily nonsuited Nygren, Leist, and Weech.

¶ 8 Plaintiffs moved for summary judgment. The trial court ordered defendant to tender to the court all of the documents at issue as well as an index to those records (see 5 ILCS 140/11(e)

(West 2012)). Thereafter, the court conducted an *in camera* review of the documents (see 5 ILCS 140/11(f) (West 2012)). On February 5, 2014, the court entered an order denying plaintiffs' summary judgment motion. The court found that Sheriff Nygren "did adjudicate the underlying disciplinary inquiry and file." The court ruled that plaintiffs' "FOIA request is denied, subject to the following: (A) that, the court finding that the documents contained in [the binder] Tabs 3, 5, 11 (except the letter from the State's [Attorney] to Sheriff Nygren), 13 and 14 are not related specifically to this adjudication, the documents in these tabs shall be released; All other documents are exempt." The court stayed its order and continued the matter to February 14, 2014, for further hearing. The court also granted plaintiffs' motion to file the index to the records under seal.

¶ 9 On February 14, 2014, the trial court granted defendant's motion to stay enforcement of the February 5, 2014, order to release the records, pending appellate review. Also on February 14, pursuant to Supreme Court Rule 307(a)(1), defendant filed a notice of interlocutory appeal from that portion of the February 5 order directing it to release the specified documents. We granted defendant's motion to supplement the record on appeal and to file under seal the binder containing the documents reviewed *in camera* by the trial court.

¶ 10 II. ANALYSIS

¶ 11 As an initial matter, we clarify our jurisdiction. "Rule 307(a)(1) allows an appeal from an interlocutory order 'granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.' " *Craine v. Bill Kay's Downers Grove Nissan*, 354 Ill. App. 3d 1023, 1025 (2005) (quoting Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010)). The trial court's February 5, 2014, order directing defendant to release certain documents is injunctive in nature because it required a party "to do a particular thing, or to refrain from doing a particular thing" (Internal

quotation marks omitted.) (*Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1039 (2005)). Accordingly, the injunctive portion of the trial court's order is appealable under Rule 307(a)(1), and we have jurisdiction over defendant's appeal.

¶ 12 Nonetheless, we must consider the scope of our review. To determine the propriety of the court's order directing the release of the documents at issue, we must decide whether they were exempt from disclosure under section 7(1)(n) of the FOIA, that is, whether they were related to defendant's adjudication of a disciplinary case (5 ILCS 140/7(1)(n) (West 2012)). Plaintiffs urge that, in order to determine whether the documents at issue were related to an adjudication of a disciplinary case, we must decide, as a threshold matter, whether there even was an adjudication. The trial court made a finding that there was an adjudication. However, that portion of the court's order is not properly before us in this interlocutory appeal because it did not grant, modify, refuse, dissolve, or refuse to dissolve or modify an injunction (Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010)). Thus, we decline plaintiffs' invitation to exceed the scope of our review (see *Hamilton v. Williams*, 237 Ill. App. 3d 765, 779 (1992) (noting that Rule 307 jurisdiction allows review of only those aspects of the order involving injunctive relief)), and we will assume, without deciding, that the trial court correctly determined that there was an adjudication within the meaning of section 7(1)(n). Accordingly, the only question properly before us is whether the documents at issue were "relat[ed] to" the adjudication within the meaning of section 7(1)(n) of the FOIA.

¶ 13 Under the FOIA every public body in Illinois is required to make available to any person for inspection or copying all public records, unless an exception applies. 5 ILCS 140/3(a), 7 (West 2012); *Nelson v. County of Kendall*, 2013 IL App (2d) 120635, ¶ 3. The FOIA's public policy statement (5 ILCS 140/1 (West 2012)) makes clear that "public records are presumed to

be open and accessible" (*Rockford Police Benevolent & Protective Ass'n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 149 (2010)). Section 7(1) of the FOIA delineates certain information as "exempt from inspection and copying." 5 ILCS 140/7(1) (West 2012). Section 7(1)(n) provides an exemption for "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases." 5 ILCS 140/7(1)(n) (West 2012). If a FOIA requestor challenges a public body's denial of its request in the trial court, the public body bears the burden of proving that the records at issue are within the claimed exception. *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 464 (2003). Effective January 1, 2010, the legislature added section 1.2 to the FOIA to provide that the public body's burden of proof is clear and convincing evidence. 5 ILCS 140/1.2 (West 2012) (added by Pub. Act. 96-542 (eff. Jan. 1, 2010)); *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶ 22. Because defendant appeals from a portion of the trial court's ruling on a summary judgment motion, and because the issue before us involves statutory interpretation, our standard of review is *de novo*. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 32 (*de novo* review of a trial court's summary judgment ruling); *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 421 (2006) (*de novo* review of an issue of statutory interpretation); see also *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶ 10 (*de novo* review in Rule 307(a)(1) interlocutory appeal where the question presented was one of law).

¶ 14 It is well settled that the goal of statutory construction is to ascertain and effectuate the intent of the legislature. *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 12. "The best indication of legislative intent is the statutory language given its plain and ordinary meaning." *People ex rel. Madigan v. Kinzer*, 232 Ill. 2d 179, 184 (2009). "Courts should not attempt to

read a statute other than in the manner it was written." *Kinzer*, 232 Ill. 2d at 185. Well-established FOIA law requires liberal construction of the FOIA, consistent with its purpose of opening governmental records to the public scrutiny. *Kalven*, 2014 IL App (1st) 121846, ¶ 19. Thus, we must read narrowly the statutory provisions exempting certain information from such scrutiny. *Kalven*, 2014 IL App (1st) 121846, ¶ 19.

¶ 15 The documents at issue are included in several tabs of the binder reviewed *in camera* by the trial court. We have conducted our own *in camera* review of the documents at issue contained in tabs 3, 5, 11, 13, and 14. Broadly speaking, these documents include, but are not limited to, some of defendant's general orders, a press release from the McHenry County State's Attorney's Office, and Koziol's petition to appoint a special prosecutor, along with his affidavit in support thereof.[1]

¶ 16 Defendant asserts that Sheriff Nygren "received all of the documents related to the investigation, transcripts of all interviews, and any and all other documentary findings and notes from the investigation," reviewed them thoroughly and "adjudicated the matter." Defendant offers a dictionary definition of "relate": "to show or establish logical or causal connection between," "to have relationship or connection," or "to have or establish a relationship." From this definition, defendant reasons that, because the "records at issue were part of the information relied upon and weighed in," they relate to the adjudication. In its reply brief, defendant specifically asserts that Nygren relied on defendant's four general orders, which Zinke allegedly violated. Defendant urges that Nygren also relied on the State's Attorney's press release and

[1] Cognizant of defendant's concern about the confidential nature of the documents filed under seal, we limit our description to the same general terms adopted by defendant in its reply brief.

maintains that the State's Attorney's opinion on whether Zinke broke the law, as well as the general orders, provided the standards by which Zinke was being judged. Finally, defendant contends that Nygren relied on Koziol's affidavit, which was filed with the petition to appoint a special prosecutor, and that the petition was the impetus for the investigation.

¶ 17 In considering defendant's arguments, we are mindful of the legislature's admonition:

> "Restraints 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. The provisions of this Act shall be construed in accordance with this principle." 5 ILCS 140/1 (West 2012).

We reject defendant's expansive definition of "related to" and its attenuated conclusion that, because Nygren relied on the documents at issue, they are related to the adjudication.

¶ 18 In its opening brief, defendant does not differentiate between the documents at issue and the other documents in the binder that the trial court found were exempt from disclosure. That the documents at issue were contained in the same binder with exempt documents, in itself, does not render the documents at issue exempt as well. See *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 412 (2009) ("The fact that an employment contract may be physically maintained within a public employee's personnel file is insufficient to insulate it from disclosure."). Even in its reply brief, where defendant mentions some of the specific documents at issue, defendant merely repeats that Sheriff Nygren relied on them in adjudicating the disciplinary case. Defendant offers no "detailed explanation for asserting the exemption[]" (*State Journal-Register*, 2013 IL App (4th) 120881, ¶ 22). Defendant's vague assertions—that

Nygren relied on the documents in adjudicating the case, that the Koziol petition was the impetus for defendant's investigation, and that the State's Attorney's opinion provided a standard by which Zinke was to be judged—do not constitute the requisite "detailed explanation for asserting the exemption[]" (*State Journal-Register*, 2013 IL App (4th) 120881, ¶ 22). See *Kalven*, 2014 IL App (1st) 121846, ¶ 22 (holding that the documents at issue were not related to disciplinary adjudications "in a way that might exempt them from disclosure"). Defendant's arguments evince an interpretation of "related to" far too broad to be consistent with the public policy underlying the FOIA. See *Southern Illinoisan*, 218 Ill. 2d at 416 (stating that "the exceptions to disclosure set forth in the FOIA are to be read narrowly so as not to defeat the FOIA's intended purpose").

¶ 19 Our *de novo*, *in camera* review of the documents at issue leads us to conclude that they do not relate to the underlying adjudication within the meaning of section 7(1)(n) of the FOIA. The documents at issue did not contain "information concerning" the adjudication (*Kalven*, 2014 IL App (1st) 121846, ¶ 15 (noting that a recent change in the statutory language, from "information concerning" to "related to" an adjudication, was not intended to broaden the exemption in section 7(1)(n) because, *inter alia*, there was no real difference between the plain meaning of the two phrases)). Indeed, the documents at issue had existence independent of, and for the most part, prior to, any adjudication of the allegations against Zinke. Most were independently generated before Leist began the investigation, and certainly before Nygren rendered his adjudication. None of the documents at issue was generated in the course of Leist's investigation, let alone in the course of Nygren's adjudication. Accordingly, because the documents at issue were not related to the adjudication within the meaning of section 7(1)(n), the trial court properly ordered defendant to release them to plaintiffs.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of McHenry County.

¶ 21 Affirmed.