2017 IL App (1st) 150032-U

FOURTH DIVISION
February 9, 2017

No. 1-15-0032

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH DOLE, Plaintiff-Appellant, v. CITY OF CHICAGO, a municipal corporation, GARY F. McCARTHY in his official capacity as Superintendent of of the Chicago Police Department, OLIVIA MEDINA as FOIA Officer of the Chicago Police Department, TERRENCE COLLINS of the Office of Legal Affairs of the Chicago Police Department, and RALPH M. PRICE as the general counsel of the Chicago Police Department, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. Nos. 13 CH 12227 13 CH 18387 Honorable Neil Cohen, Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court's dismissal of plaintiff's FOIA complaints is affirmed; (2) the trial court did not abuse its discretion in declining to award civil penalties; (3) the trial court did not abuse its discretion in declining to grant plaintiff's motion for an index where the information required under an FOIA index had been disclosed to plaintiff; and (4) we remand to consider plaintiff's request for videotapes and

the amount of costs plaintiff should be awarded since he partially prevailed under his complaints.

¶ 2 Plaintiff Joseph Dole appeals *pro se* the trial court's dismissal of his complaints filed under the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2012)) against defendants, the City of Chicago and individuals employed by the Chicago Police Department. Plaintiff was convicted in the 1998 homicide and aggravated kidnapping of Jose Segura and Jose Romero, and is currently incarcerated in the Illinois Department of Corrections with a sentence of two concurrent terms of natural life for first degree murder and 60 years for aggravated kidnapping. Plaintiff sent requests under the FOIA to defendants seeking copies of all documents relating to his criminal investigation. Plaintiff subsequently filed two complaints, which were consolidated, in the trial court seeking production of documents, civil penalties, and attorney fees and costs. Defendants filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)). The trial court ordered defendants to remove redactions to documents, but dismissed plaintiff's complaints and denied his requests for civil penalties and attorney fees and costs.

¶ 3 Plaintiff appeals, arguing that (1) the trial court erred in granting defendants' motion to dismiss where defendants failed to establish any affirmative matter which completely negated any of plaintiff's claims; (2) the trial court abused its discretion in finding that defendants acted reasonably and denied plaintiff's request for civil penalties; (3) the trial court abused its discretion in failing to grant plaintiff's motion for an index under the FOIA; and (4) the trial court erred in declining to award plaintiff any costs.

¶ 4 On December 21, 2011, plaintiff sent his first FOIA request to the Chicago police department, records inquiry section. Plaintiff stated that he was trying to "re-obtain all of [his] paperwork as [his] lawyer inadvertently destroyed the file upon moving." He requested "all

documents" concerning his arrest and booking. In January 2012, plaintiff sent a letter to the Public Access Bureau (PAB) seeking assistance under the FOIA because he had not received a response to his December 2011 request. On February 8, 2012, an assistant attorney general with the PAB sent a letter to the Chicago Police Department regarding plaintiff's FOIA request and asked for an explanation of its receipt and handling of said request. On February 14, 2012, the Office of Legal Affairs of the Chicago Police Department responded to the PAB's letter. The letter stated that the FOIA unit "has no record that it received and processed" plaintiff's FOIA request, and will process plaintiff's request as newly received.

¶ 5 On February 29, 2012, defendants sent plaintiff a response to his FOIA request for documents related to his arrest and booking in May 1998. A search of the police department records under homicide file case number C-203532 yielded 135 pages pertaining to his case. "The records include your arrest report, a hospitalization case report, supplementary reports (investigative detective reports), crime scene processing reports, Polygraph Subject Consent forms, Polygraph Case Review forms, Polygraph Examiner's Worksheets, Polygraph Examination results (have already been provided under FOIA # 12-0084), and Polygraph machine printouts." The letter stated that this information can be released with certain information redacted. The redactions pertain to the identities of individuals who filed a complaint and/or provided information, including addresses, telephone numbers, and dates of birth. These exemptions fall under sections 7(1)(b) and (d)(iv) of the FOIA (5 ILCS 140/7(1)(b), (d)(iv) (West 2012)). Defendants also indicated that "the disclosure of the identity and private information of individuals who cooperated and provided information (statements) regarding crimes to third parties will endanger the life or physical safety of this individual," and is exempt under section 7(1)(d)(vi) (5 ILCS 140/7(1)(d)(vi) (West 2012)). The response stated that the

responsive pages would be mailed to plaintiff upon receipt of a payment of $9.15 for duplication costs.

¶ 6 On March 25, 2012, plaintiff sent a letter to the PAB to contest defendants' response to his FOIA request. Plaintiff contended that defendants were in violation of the FOIA because (1) they improperly assessed him the duplication costs because the response exceeded the 5-day time limit (5 ILCS 140/3(d) (West 2012)); (2) defendants are "withholding dozens, likely hundreds, of pages of documents without providing any reasoning for why they are exempt, nor describing what they are," and (3) the stated exemptions are inapplicable.

¶ 7 In January 2012, while the previous FOIA request remained pending, plaintiff sent another FOIA request to defendants. The request sought documents relating to the polygraph examinations of Juan Cruz and George Hernandez. Defendants responded by sending plaintiff a letter stating that a search of their records disclosed 21 pages, which were released with redactions under the same exemption provisions of the FOIA as the previous request.

¶ 8 In February 2012, plaintiff sent a letter to the PAB challenging the claimed exemptions in the documents. In March 2012, the assistant attorney general with the PAB wrote defendants regarding plaintiff's challenge of the redactions and stated that the PAB determined that further review was warranted. Following its review, the PAB issued a nonbinding opinion to defendants. The PAB found that the redaction of the home address of a polygraph examinee is private information under the FOIA and exempt under section 7(1)(b) (5 ILCS 140/7(1)(b) (West 2012)). The PAB also found that disclosure of the names and identifying information of individuals who provide information to police, but have not have testified in open court was within the exemption of section 7(1)(d)(iv) (5 ILCS 140/7(1)(d)(iv) (West 2012)), but the disclosure of identifying information of polygraph examinees who testified in open court is not

exempt from disclosure. The PAB further concluded that defendants failed to sustain their burden of demonstrating by clear and convincing evidence that the names and identifying information of polygraph examinees was exempt from disclosure under section 7(1)(d)(vi) (West 2012)). The PAB directed defendants to "release the polygraph records to [plaintiff] with names, addresses, and identifying information of polygraph examinees who have not testified in open court redacted."

¶ 9 In March 2012, plaintiff mailed a third FOIA request seeking "the arrest report and criminal history record of George Hernandez." Defendants responded to plaintiff's request, noting that plaintiff and his relatives were "aggressively seeking records that pertain specifically to George Hernandez," and therefore, the arrest and criminal history record could only be released with redactions. The redactions included "private and personal information such as the address, unique identifiers/descriptions, social security numbers, date of birth and the mug shot," these redactions were exempted under sections 7(1)(b), (c), and (d)(vi) (5 ILCS 140/7(1)(b), (c), and (d)(vi) (West 2012). Defendants disclosed eight pages for this request.

¶ 10 In April 2012, plaintiff contacted the PAB to object to the redactions in the disclosed documents. The PAB notified defendants that further inquiry was warranted. In February 2013, the PAB issued its nonbinding opinion related to this FOIA request. The opinion found that defendant could redact home addresses, employee identification numbers, and dates of birth from the records, but all other information was not exempt from disclosure.

¶ 11 In May 2013, plaintiff filed his first FOIA complaint in the trial court against defendants based on his second FOIA request seeking the polygraph documents for Cruz and Hernandez. Plaintiff requested injunctive and declaratory relief "in the form of a court order ordering Defendants to produce all of the requested documents with the names and identifying

information of George Hernandez and Juan Cruz (and anyone else whose name was redacted by should not have been because they had already been disclosed in open court or through discovery) left unredacted." Plaintiff also sought reasonable attorney fees and costs and a civil penalty of $5,000 for willfully and intentionally failing to comply with the FOIA.

¶ 12 In August 2013, plaintiff filed his second FOIA complaint against defendants based on his first and third FOIA requests. Regarding his December 2011 FOIA request, plaintiff alleged that defendants were in violation of the FOIA because (1) they claimed to not have received the request, (2) they are withholding "dozens if not hundreds of pages of documents" responsive to his request, and (3) are claiming exemptions that are not applicable. As for his third FOIA request, plaintiff alleged that defendants were in violation of the FOIA for failing to disclose the arrest report and criminal history of Hernandez in unredacted form. Plaintiff sought an injunction against defendants, ordering them to produce the relevant documents pertaining to the two FOIA requests, and specifically requested his "entire case file" for his case number C203532. Plaintiff also requested civil penalties for each claim.

¶ 13 Also in August 2013, plaintiff filed a motion for an index of records and a statement of exemptions claimed. Plaintiff requested an order under section 11(e)(i) of the FOIA (5 ILCS 140/11(e)(i) (West 2012)) for defendants to "produce a complete index of all records maintained" under the case number C203532, as well as any other number concerning the murder investigation.

¶ 14 Defendants subsequently moved to consolidate the two FOIA cases, which the trial court granted in September 2013. In November 2013, defendants sent plaintiff a letter addressing his two complaints. The letter stated that the office of legal affairs was contacted to obtain all responsive documents. An extensive search by the Chicago Police Department has produced 545

pages of responsive documents, 488 of which were disclosed to plaintiff. 57 pages of documents related to his March 2012 were not sent to plaintiff because they were nonresponsive to the lawsuit and had previously been mailed to plaintiff in October 2013. The disclosed documents were redacted under the same exemptions under the FOIA as previously raised. Defendants also stated that they disagreed with the PAB's nonbinding opinion relating to the exemptions.

¶ 15 In December 2013, the trial court ordered plaintiff to respond to defendants' letter indicating that they had produced all responsive documents and if the production satisfied plaintiff's requests. Before plaintiff filed his response, defendants sent him a letter in February 2014, which stated that they "expanded the document search to include the Evidence and Recovered Property Section (ERPS), the Forensic Services Division, and the Bureau of Detectives." The search yielded several documents, the majority of which were duplicative of previously disclosed documents, but nine additional pages were discovered and sent to plaintiff, with redactions under the same claimed exemptions.

¶ 16 Also in February 2014, plaintiff filed his response to defendants' production of documents. Plaintiff stated that the production did not satisfy his requests and still violated Illinois law. Plaintiff claimed that defendants' production was "insufficient, incomplete," and still violated the FOIA and plaintiff's constitutional rights to due process and fundamental fairness. Plaintiff also objected to the redactions in the documents. Plaintiff also filed a motion for the trial court to conduct an in camera review of the disclosed documents. Later that month, plaintiff filed a motion for discovery of documents, seeking any "internal memos, letters, emails, directives, etc." relating to defendants' handling of plaintiff's FOIA requests.

¶ 17 Additionally in February 2014, defendants sent plaintiff another letter informing him that an additional search was conducted to ensure that all inventory sheets under two inventory

systems used by ERPS were disclosed. Plaintiff was sent 32 inventory sheets, totaling 51 pages. The forensic services division also sent 15 pages of documents printed from microfiche as well as 86 photographs that were reprinted from negatives in bulk storage. The letter noted that 5 of the 86 photographs were withheld because they depicted graphic images of the victims. Again, some information on the documents was redacted under the same exceptions previously used.

¶ 18 In March 2014, defendants moved to dismiss plaintiff's consolidated complaints as moot under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)), or in the alternative to dismiss the individual defendants. In the motion, defendants asserted that it "has now exhausted its search for records relating to RD #C203532 and all responsive, non-exempt records within its possession and control have been provided to Plaintiff." Defendants maintained that they have removed any controversy raised in plaintiff's complaints and the proceedings were now moot. Defendants also argued that the exemptions claimed under the FOIA properly withheld information. Defendants attached 10 affidavits from Chicago police department personnel who participated in the search.

¶ 19 Marilyn Pritza stated in her affidavit that she was a police officer in the office of legal affairs and her duties and responsibilities included production of discovery requests and assisting the City's law department in gathering documents which are part of litigation. She said that upon receiving plaintiff's FOIA requests, she sent requests for responsive documents to the records division, the Chicago police department FOIA section, the office of legal affairs, and the bureau of detectives. She forwarded all documents received in response to the City's law department.

¶ 20 Melina Linas stated that she was a sergeant in the FOIA section of the Chicago police department. Her duties and responsibilities included overseeing the day to day operations of the FOIA section and ensuring all requests are responded to efficiently and appropriately. When she

received plaintiff's requests, she obtained approval from the general counsel to forward the request to the appropriate bureaus as well as to forensic services and ERPS. She also forwarded the request to defendant Medina, the public information officer in the FOIA section, to gather information related to plaintiff's past FOIA requests, and Mayda Corral, a sergeant in the bureau of detectives, to gather the investigative file. She forwarded all the documents she received to the law department.

¶ 21 Olivia Medina stated she is a civilian employee and is the public information officer with the Chicago police department. Her duties include receiving, reviewing, and responding to document requests from the public under the FOIA. In August 2013, she received a request from her supervisor, Sergeant Linas, related to all documents from past FOIA requests by plaintiff. She searched the database for plaintiff's prior requests and found nine prior requests. She determined that one request was not related to the office of legal affairs's request and made copies of the remaining documents associated with eight FOIA file numbers and sent the copied files to the officer of legal affairs. She stated that she "made a diligent and thorough search of the FOIA files and no other records relating to 2012 and 2013 FOIA request from [plaintiff] were located."

¶ 22 Terrence Collins stated that he was employed as a legal officer in the office of legal affairs and part of his duties included responding to FOIA request for review from the public access counselor of the Illinois Attorney General, and other FOIA related inquiries and requests. In August 2013, he received a request from Pritza for all documents relating to the FOIA request filed by plaintiff. He searched the FOIA database by entering plaintiff's full legal name and his Illinois Department of Corrections identification number and determined that he had responded to four FOIA requests filed by plaintiff. He then searched the file cabinets for the FOIA request

file numbers from his database search and provided Pritza with those four files. He stated that he made a "diligent and thorough search of the FOIA filing area and no other records" relating to FOIA requests filed by plaintiff were located.

¶ 23 Andrew Robertson stated that he was a civilian employee of the Chicago police department and worked in the records storage warehouse in the records services division. His duties included maintaining the order of the records kept in the warehouse, securing the records, and retrieving the records as necessary. When he received a request for the record division file and the investigative file, he conducted a search in the records storage warehouse, which is organized in drawers by year and file number. He retrieved plaintiff's records division file and made a copy. He also searched the investigative file area and retrieved plaintiff's file and made a copy. The recovered file was sent to the office of legal affairs. Robertson stated that "[a]fter a diligent and thorough search, no other records with RD number C203532 were located in the records storage warehouse."

¶ 24 Mayda Corral stated that she was employed as the administrative sergeant in the bureau of detectives. Her duties included identifying and collecting documents related to FOIA requests. When she received a request from the department of law, she searched the criminal history records information system, which indicated that plaintiff's case was closed and sent to the records storage division. She contacted the record storage division to obtain the file. Michael Colander, a clerk in the records storage division, retrieved the file and made a copy for Corral. All documents she received were forwarded to the department of law. She stated that after a "diligent and thorough search," the records from the bureau of detectives in the possession of the records storage division were retrieved and produced.

¶ 25 Michael Colander stated that he was a civilian employee in the records storage warehouse in the records services division, and his duties included maintaining the order of the records kept in the warehouse, securing the records, and retrieving the records as necessary. When he received a request for the records division file and the investigative file, he conducted a search of the records storage warehouse. His search was the same as Robertson's search for files. He located the files and made copies, which were sent to the office of legal affairs. He stated that no other records under plaintiff's case number were located in the records storage warehouse.

¶ 26 Jacqueline Ja stated that she was employed as a unit secretary in the ERPS, and her duties includes retrieving records from ERPS pursuant to FOIA. Ja searched the inventory systems for records related to plaintiff's file number. She found records relating to 32 inventory numbers, which were retrieved, copied, and sent to the office of legal affairs. No other inventory sheets were located in the inventory systems.

¶ 27 Michael Nowaczyk stated that he was employed as a patrolman with the Chicago police department and was assigned to the forensic services division. He received a request for any forensic records related to plaintiff's file number. Because the case was from 1998, the responsive records were stored on microfiche. He searched the computer database under plaintiff's file number and the victims' names. He then located the reels with responsive records stored in the forensic services division and printed the requested reports. The recovered documents were sent to the office of legal affairs. No other forensic records related to the victims or plaintiff's file number was located in the forensic services division.

¶ 28 David Grant stated he was employed as a sergeant and assigned to the forensic services division. His duties included overseeing day to day operation of the division and performing various functions within the division, including fulfilling requests for forensic evidence. He

received a request from Sergeant Linas for any photographs relating to plaintiff's file number. Because the case was from 1998, he requested the negatives from bulk storage. When he received the negatives, he printed a set of 86 photographs, which were forwarded to the office of legal affairs. No other photographs related to plaintiff's file number were located in the forensic services division.

¶ 29 In March 2014, defendants responded to plaintiff's objection that the production was incomplete and overly redacted. In their response, defendants also asked the trial court to conduct an in camera review of the documents. The trial court granted plaintiff's motion for an in camera inspection.

¶ 30 In November 2014, the trial court entered an order with the following findings: (1) the court confirmed the public access counselor's opinion that plaintiff is entitled to the requested responsive documents and defendants shall provide said record to plaintiff; (2) plaintiff's request for attorney fees was denied; (3) the court found that defendants' position was reasonable and denied awarding civil penalties; (4) plaintiff is entitled to receive copies of the documents his attorney would have received, subject to redaction of witness addresses and telephone numbers; and (5) the case was dismissed and off call.

¶ 31 This appeal followed.

¶ 32 When ruling on the motion to dismiss, the trial court "should construe the pleadings and supporting documents in the light most favorable to the nonmoving party" and "accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id.* (quoting *Kedzie*

& 103rd Currency Exchange, Inc. v. Hodge, 156 Ill. 2d 112, 116-17 (1993)). We review the section 2-619 dismissal of a complaint *de novo*. *Sandholm*, 2012 IL 111443, ¶ 55.

¶ 33 A motion for involuntary dismissal pursuant to section 2-619(a) admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter which avoids the legal effect or defeats a plaintiff's claim.735 ILCS 5/2-619(a) (West 2010). An "affirmative matter" under section 2-619(a)(9) is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004).

¶ 34 Affidavits in support of motions to dismiss under section 2-619 are controlled by Illinois Supreme Court Rule 191 (eff. July 1, 2002). Rule 191(a) provides that affidavits submitted in connection with a motion for involuntary dismissal "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002). "Once a defendant satisfies the initial burden of presenting affirmative matter, the burden then shifts to the plaintiff to establish that the defense is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Reilly v. Wyeth*, 377 Ill. App. 3d 20, 36 (2007) (quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116). "When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted." *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995).

¶ 35 Plaintiff argues that the trial court erred in dismissing his complaints because defendants failed to establish any affirmative matter which completely negated his cause of action. Specifically, plaintiff contends that his claims are not moot because (1) production is incomplete, claiming that defendants have withheld "videotapes, luminol photos, field notes, and more;" (2) the redactions were unlawful; (3) he requested civil penalties against defendants because of the willful and intentional refusal to comply with FOIA; and (4) he largely prevailed and was entitled to recover costs.

¶ 36 We first point out that the trial court ruled in plaintiff's favor regarding the redactions and ordered the documents to be disclosed without the redactions, other than witnesses' addresses and telephone numbers. Plaintiff argues extensively that defendants incorrectly relied on exemptions to redact information, but he has not asserted that defendants failed to comply with the trial court's order, and we need not consider this allegation.

¶ 37 "A claim is moot when no actual controversy exists or events occur which make it impossible for a court to grant effectual relief." *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1999). "Actions will be dismissed as moot once plaintiffs have secured what was originally sought." *Id.* "Once an agency produces all the records related to a plaintiff's request, the merits of a plaintiff's claim for relief, in the form of production of information, becomes moot." *Id.* Part of plaintiff's argument that the case was not moot is based on his claims for costs. However, although a plaintiff's claim for production of records and information is moot, "its motion for attorney's fees, which is 'ancillary to the underlying action,' is not." *Id.* Like attorney fees, a request for costs is ancillary to the underlying matter and will not impact the question of mootness. Thus, our review on the issue of mootness is limited to the production of

documents as requested by plaintiff under the FOIA and the denial of civil penalties under the FOIA.

¶ 38 "The purpose of the FOIA is to open governmental records to the light of public scrutiny." *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 994 (2007). " 'The legislature patterned the Illinois law after the Federal Freedom of Information Act and case law construing the Federal statute should be used in Illinois to interpret our own FOIA.' " *Id.* (quoting *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1012 (1994)). " 'Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden.' " *Id.* at 996-97 (quoting *Carney v. United States Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)).

¶ 39 Here, defendants provided affidavits from ten employees working in six different departments describing their job duties and their actions in searching for documents responsive to plaintiff's FOIA requests. In total, plaintiff received over 800 pages of documents and photographs responsive to his requests as defendants expanded the search to the different departments.

¶ 40 Plaintiff contends that additional documents have been withheld from him, but he has not identified what these documents are or where they may be stored. Plaintiff asserts that defendants have failed to release "luminol" photographs and field notes. Plaintiff bases his allegation that luminol photos were part of his file on references from disclosed investigation documents. However, defendants provided an affidavit from Grant stating that he searched for photographs related to plaintiff's case in the forensic services division. He requested the negatives from the case and printed 86 photographs, which were forwarded to the office of legal

affairs. In turn, 81 of the photographs were disclosed to plaintiff. The remaining five were withheld because they contained graphic images of the murder victims. Courts have found that "the fact that a particular document was not found does not demonstrate the inadequacy of a search." *Boyd v. Criminal Division of U.S. Department of Justice*, 475 F.3d 381, 391 (D.C. Cir. 2007). "When a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). Defendants' affidavits detail a thorough and wide reaching search throughout the Chicago police department's departments. Plaintiff has not offered anything beyond speculation to controvert defendants' affidavits.

¶ 41 Further, plaintiff's contentions that additional documents exist is not based on any factual basis, but rather on his fanciful allegations that defendants have a "sordid history of hiding files in boiler rooms and elsewhere in order to conceal records from defense lawyers and the public in general." These allegations are not sufficient to rebut defendants' uncontroverted affidavits of its exhaustive search for responsive documents. "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Id.* We conclude that defendants conducted a more than adequate search for responsive documents requested by plaintiff in his three FOIA requests, which yielded several hundred pages of documents and photographs. Accordingly, plaintiff's claims for production of additional documents and photographs are moot and the trial court properly dismissed his complaints for these requests.

¶ 42 However, plaintiff also argues that defendants have withheld videotapes from disclosure. Plaintiff bases this claim on references to surveillance videotapes from a gas station and a grocery store in disclosed police reports. The FOIA definition for "public records" includes "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) (West 2012). Therefore, videotapes can fall within the FOIA public records.

¶ 43 Defendants maintain that plaintiff did not properly request videotapes because his FOIA request stated that he was "trying to re-obtain all of [his] paperwork" and was "writing to request all documents concerning his arrest *** and booking." Nevertheless, defendants responded in the trial court to plaintiff's claim that defendants had failed to produce videotapes by stating that "Only documents were requested from the Evidence and Recovered Property Section. Inventoried evidence from criminal investigations is not subject to FOIA and [defendants] will not release evidence without a court order." Defendants did not include a citation to a provision of the FOIA or another statute supporting their response. On appeal, defendants do not acknowledge this response, but maintain that plaintiff did not request videotapes when he requested all documents in his file. Additionally, none of the submitted affidavits addressed whether such videotapes exist or any search to recover responsive tapes. The trial court's order did not specifically address plaintiff's request for videotapes.

¶ 44 Based on the record, plaintiff did not specifically request videotapes in his any of his FOIA requests. In his December 2012 request, he asked for "documents" after referencing his need for his "paperwork" because his lawyer inadvertently destroyed the file. Plaintiff first

requested videotapes in his second complaint in the trial court. However, we need not determine whether plaintiff validly requested the videotapes. Nothing in the FOIA prohibits plaintiff from filing a subsequent request, so in the interest of judicial economy, we remand for the limited purpose to address plaintiff's request for videotapes to determine if the videotapes exist and if plaintiff is entitled to receive them. We offer no opinion as to whether the videotapes are subject to any exemptions under the FOIA. We affirm the dismissal of plaintiff's complaint related to production of documents for all other documents.

¶ 45 Next, plaintiff argues that the trial court erred in denying his request for civil penalties. Specifically, plaintiff contends that defendants "repeatedly, willfully, and intentionally failed to comply with the [FOIA] and otherwise acted in bad faith." Defendants maintain that the trial court's finding that the City acted "reasonably" was not against the manifest weight of the evidence. Since the trial court made factual determinations in considering whether to impose civil penalties, we will affirm the trial court's decision unless it was against the manifest weight of the evidence. *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 48.

¶ 46 Section 11(j) of the FOIA provides, in relevant part: "If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less that $2,500 nor more than $5,000 for each occurrence." 5 ILCS 140/11(j) (West 2012).

¶ 47 Plaintiff argues that he was entitled to civil penalties because the City failed to respond to his requests in a timely manner and its redactions under sections 7(1)(b), (d)(iv), and (d)(vi) were made in bad faith and the City willfully continued to assert these exemptions after the PAB's nonbinding opinion holding that the exemptions did not apply. The FOIA provides that "[e]ach

public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request." 5 ILCS 140/3(d) (West 2012). Section 7(1)(b) exempts disclosure of "private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." 5 ILCS 140/7(1)(b) (West 2012). Sections 7(1)(d)(iv) and (d)(vi) exempt disclosure of

> "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:
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> ***
>
> (iv) unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request;
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> ***
>
> (vi) endanger the life or physical safety of law enforcement personnel or any other person." 5 ILCS 140/7(1)(d)(iv), (d)(vi) (West 2012).

¶ 48 Plaintiff's January 4, 2012 FOIA request sought records relating to the polygraph examinations of Hernandez and Cruz. Defendants received plaintiff's request on January 10, and sent a response on January 18, which was within 5 business days. We take judicial notice that January 14 and 15 were a weekend and January 16 was the business holiday for Martin Luther King, Jr.'s birthday. Accordingly, plaintiff's allegation of an untimely response is without merit.

¶ 49 Defendants produced 21 pages of documents with redactions claimed under the above exemptions. The PAB and ultimately the trial court found that many of the instances of the exemptions did not apply. Plaintiff does not cite any authority that a public body's mistaken reliance on exemptions is akin to willful or intentional conduct, or indicative of bad faith. In *Rock River Times*, the reviewing court agreed with the trial court's initial decision not impose civil penalties where the public body's exemptions "were made in accordance with the FOIA, and the school was simply mistaken as to whether these exemptions applied." *Rock River Times*, 2012 IL App (2d) 110879, ¶ 51. However, the reviewing court affirmed the trial court's subsequent imposition of a civil penalty when the public body claimed a new exemption after the initially claimed exemptions were denied, finding no support in the FOIA for these actions. *Id.* ¶ 52.

¶ 50 Here, defendants maintained the same exemptions throughout until the trial court determined some did not apply and ordered disclosure of unredacted documents, with which defendants complied. The trial court had the opportunity to review the documents in camera and found that the City acted "reasonably" in claiming its exemptions. Likewise, we find no merit in the remaining claims by plaintiff relating to this FOIA request. This determination was not against the manifest weight of the evidence where the City acted in accordance with the FOIA and nothing in the record indicates willful or intentional conduct, nor bad faith.

¶ 51 Plaintiff claims that he was entitled to civil penalties related to his December 21, 2011 request because defendants failed to respond within five business days, demanded an unlawful fee for copying costs, improperly redacted information under the above exemptions, and "repeatedly lying" when additional documents were produced after previously stating defendants had exhausted its search.

¶ 52 On February 8, 2012, the PAB forwarded plaintiff's December 2011 FOIA request to defendants asking for an explanation as defendants had not responded to the request. On February 14, 2012, defendants responded to the PAB that they had no record of plaintiff's request and would consider it newly received. On February 29, 2012, defendants sent plaintiff a letter stating that 135 pages of responsive documents had been found in accordance with his request. This letter included a request for payment of $9.15 in copying costs. Subsequently, defendants continued to disclose responsive documents to plaintiff, including 488 pages in November 2013, and two disclosures in February 2014. None of the subsequent responses included requests for payment for copying.

¶ 53 We decline to find willful or intentional actions, or bad faith regarding the claimed exemptions for the same reasons previously stated. We decline to find any willful or intentional actions, or bad faith in the continued disclosure of documents regardless of whether the initial disclosure indicated that defendants completed its search. The subsequent disclosure letters stated that the search was expanding to additional departments and storage locations. There is nothing unreasonable in continuing to find responsive documents.

¶ 54 Under the FOIA, "[a] public body that fails to respond to a request within the requisite periods in this Section but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies." 5 ILCS 140/3(d) (West 2012). It is undisputed

that defendants did not respond to plaintiff's December 2011 request within five business days. Accordingly, it could not impose a fee for copies. While defendants initially requested a fee for copies with the February 2012 disclosure, no such request was made for subsequent disclosures. Additionally, plaintiff does not assert that he paid the fee in error, only that defendants mistakenly made the initial request. The documents were provided to him without collection of the fee. Since defendants corrected any error in requesting the fee by providing documents without such collection, we cannot say that this error amounted to willful or intentional conduct, or was made in bad faith. Accordingly, the trial court's decision declining to impose civil penalties related to the December 2011 FOIA request was not against the manifest weight of the evidence.

¶ 55 Plaintiff's third FOIA request was dated March 11, 2012, defendants received it on March 20, 2012, and produced responsive documents on March 26, 2012. We take judicial notice that March 24 and 25 were a weekend. Thus, defendants' response was timely under the FOIA. Plaintiff's claim for civil penalties for this FOIA request only involves the same claim of redactions made pursuant to the improper use of exemptions. As we have already rejected this argument, we need not consider it again under this claim and conclude that defendants did not act willfully or intentionally, nor did they act in bad faith. Accordingly, we find that the trial court's decision was not against the manifest weight of the evidence.

¶ 56 Next, plaintiff contends that the trial court erred in failing to consider his motion for an index under section 11(e) of the FOIA. Defendants maintain that they provided plaintiff with the information to which he was entitled under section 11(e), and an index would be duplicative.

¶ 57 Section 11(e) provides:

> "On motion of the plaintiff, prior to or after in camera inspection, the court shall order the public body to provide an index of the records to which access has been denied. The index shall include the following:
>
> (i) A description of the nature or contents of each document withheld, or each deletion from a released document, provided, however, that the public body shall not be required to disclose the information which it asserts is exempt; and
>
> (ii) A statement of the exemption or exemptions claimed for each such deletion or withheld document." 5 ILCS 140/11(e) (West 2012).

¶ 58 Each of defendants' production during the pendency of the case included an explanation of under what exemption the information was redacted. The letter stated, "please note that the individual indicators marked on the face of the documents next to the redactions, or at the top of the page, link to the exemption based on the following key," the letter then listed the statutory exemption language with notations that a "b" equaled an exemption under section 7(1)(b), or a "d" equaled an exemption under section 7(1)(d)(iv) or (vi).

¶ 59 The statutory index under section 11(e) is derived from a federal holding, first allowed in *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977 (1974), where the public body would "provide detailed justifications for non-disclosure cross-referenced to specific segments of non-disclosed material" to the requester. *Hinton v. Department of Justice*, 844 F.2d 126, 128 (3d Cir. 1988). "An order requiring a federal agency to prepare a *Vaughn* index is designed to balance an individual's right to disclosure of documents pursuant to FOIA's underlying purpose of opening government conduct to scrutiny by an informed, active citizenry, [citations] with the agency's right to withhold documents that fall within FOIA's clearly-

delineated exceptions to the general rule of disclosure." *Id*. There is no set formula, the courts considered function over form. *Id.* at 129. "All that is required, and it is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Id.*

¶ 60 Defendants assert that the required information was disclosed to plaintiff, in that he was able to discern what was redacted and under what exemption it was withheld. We agree. The information required under the statute was disclosed to plaintiff and a specific index would have been duplicative.

¶ 61 Moreover, we find the necessity of an index to be moot following the trial court's order. In its order dismissing the case, the court, in addition to confirming the PAB nonbinding opinion, held that "plaintiff [was] entitled to receive copies of the documents his attorney would have received, subject to the redaction of witness addresses and telephone numbers per Supreme Court Rule 415(c)." Therefore, plaintiff would have received the withheld information as a result of the court's ruling. Any index would not be unnecessary as plaintiff has received the information being exempted. Accordingly, we are unable to grant him any relief, and find this claim to be moot.

¶ 62 Plaintiff also asserts that the trial court erred in failing to rule on his motions for discovery, but that granting of the motion to dismiss effectively denied his motion. " 'A trial court is vested with broad discretion in ruling on discovery matters, and the exercise of such discretion will not be interfered with on appeal unless there has been a manifest abuse of such discretion.' " *BlueStar*, 374 Ill. App. 3d at 996 (quoting *Hanes v. Orr & Associates*, 53 Ill. App. 3d 72, 74 (1977)). " 'Affidavits submitted by an agency are "accorded a presumption of good faith * * *." ' 'Accordingly, discovery relating to the agency's search and the exemptions it

claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face.' When this is the case, the trial court may 'forgo discovery and award summary judgment on the basis of affidavits.' " *Id*. at 996-97 (quoting *Carney*, 19 F.3d at 812).

¶ 63 "In order to justify discovery once the agency has satisfied its burden, the requester must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise improper." *Id.* Plaintiff claims that discovery was necessary for him "to marshall the evidence to support" his claims for civil penalties based on defendants' bad faith. Plaintiff has made no claim of bad faith that impugns defendants' affidavits detailing its diligent, thorough, and exhaustive search. The trial court did not abuse its discretion in declining to grant plaintiff's motion for discovery.

¶ 64 Finally, plaintiff argues that the trial court erred in failing to award him costs because he has sufficiently prevailed on both of his FOIA complaints. "If a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorneys' fees and costs." 5 ILCS 140/11(i) (West 2012). Plaintiff concedes that since he appeared *pro se*, he is not entitled to attorney fees, but he is entitled to costs. Defendants agree.

¶ 65 Under section 11(i), prevailing plaintiffs can "obtain attorney fees regardless of the extent to which they had prevailed, no matter how slight." *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, ¶ 20. Since the statute provides for the recovery of both attorney fees and costs to a prevailing plaintiff, the conclusion in *Uptown* applies equally to obtaining costs. Plaintiff partially prevailed because the trial court ordered defendants to remove the redactions, and therefore, he is entitled to some costs. As we have already remanded for

limited inquiry into plaintiff's request for videotapes, the trial court on remand should determine the amount of costs to which plaintiff is entitled.

¶ 66 Based on the foregoing reasons, we remand the case to the trial court to consider plaintiff's request for videotapes and an award of costs; and we affirm the trial court on all other matters.

¶ 67 Affirmed in part, remanded with directions.