

2019 IL App (2d) 180305-U
No. 2-18-0305
Order filed May 6, 2019

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JOSEPH VARAN,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 16-MR-543
)	
JESSE WHITE, in His Official Capacity as)	
Illinois Secretary of State,)	Honorable
)	Paul M. Fullerton,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* In this case brought pursuant to the Illinois Freedom of Information Act, the circuit court erred in denying plaintiff's motion for summary judgment and granting defendant's cross-motion for summary judgment based on plaintiff's non-payment of copying fees, as fees could not be imposed due to defendant's failure to timely respond to the request. Therefore, we reversed and remanded.

¶ 2 This case involves a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) request made by plaintiff, Joseph Varan, seeking various public records from the Illinois Secretary of State (defendant or Secretary). Defendant admitted to receiving the request the same day plaintiff submitted it, but defendant did not respond until approximately six months

later, and it sought to impose a fee of \$19,711.55 for the release of the records. Plaintiff argues that because defendant did not timely respond to the request, defendant could not impose a fee for the records. We agree and reverse and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 The relevant facts are not in dispute. On February 23, 2016, plaintiff submitted a FOIA request to defendant seeking “all of the documents filed with the Illinois Secretary of State, Department of Business Services” during a specified timeframe for 26 named corporations and limited liability companies. Plaintiff requested the documents in “whatever electronic format that you maintain these documents in,” and stated that the documents could either be e-mailed to him or saved to “electronic media” and physically mailed to his address. He e-mailed the request to an address listed on the “contact” webpage for the Secretary’s business services department (department) for those seeking “more information about trademarks and servicemarks.” He also submitted the request via the “contact form” on the department’s website.

¶ 5 That same day, an employee from the Trademark/Servicemark Department replied to plaintiff’s e-mail and advised him to contact the LLC Department and the Corporation Department to request copies of documents relating to limited liability companies and corporations, respectively. The employee provided the phone number and extension for both departments.

¶ 6 On April 27, 2016, plaintiff filed a complaint for declaratory judgment and injunctive relief, alleging that defendant violated FOIA by “fail[ing] to comply with the request, deny the request[,] or properly extend the time for response.” The complaint sought release of the records at no cost, attorney fees and litigation costs, and a civil penalty of up to \$5,000.

¶ 7 On August 31, 2016, defendant’s FOIA officer replied to plaintiff’s e-mail, stating that she received his February 23, 2016, FOIA request from their information technology department on August 29, 2016. She requested an additional five business days to respond to the request because it was “voluminous [and would] require extensive research to locate the requested documents and tally the cost for [plaintiff] to purchase the documents.” She stated that there was a statutory fee of \$25 per document, as plaintiff was “well aware [of] from [his] prior FOIA requests and [her] responses to those requests.”

¶ 8 On September 6, 2016, the FOIA officer sent plaintiff another e-mail. She notified him that the requested documents were located, and she reiterated that there was a statutory fee of \$25 per document. She attached to the e-mail an itemized invoice for the documents that totaled \$19,711.55.¹ She advised that if plaintiff “wish[ed] to purchase the documents,” he would have to send her a certified check payable to the Secretary, and the documents would be released.

¶ 9 On December 2, 2016, defendant filed its answer to the complaint and asserted affirmative defenses. Therein, defendant admitted that the records sought were maintained in an electronic format, that “the Trademark/Service mark Section of SOS Department of Business Services received [p]laintiff’s FOIA request on February 23, 2016,” and that defendant did not deny, comply with, or extend the time to comply with the request before March 14, 2016.

¶ 10 However, defendant denied failing to comply with FOIA. Defendant noted that plaintiff submitted two prior FOIA requests directly to the FOIA officer in 2014—both of which were timely responded to. Defendant stated that, “upon information and belief, [p]laintiff

¹ The invoiced amount is neither a whole nor round number because it includes photocopying fees of 15 cents per page for all summonses and complaints on file related to the companies specified in the FOIA request.

intentionally sent his February 23, 2016[,] FOIA request to [d]efendant’s e-mail address [that is intended] for information about trademarks and servicemarks, instead of to the FOIA Officer as [p]laintiff had previously done, in an attempt to circumvent the process.” As a result, defendant did not realize that the FOIA request had been submitted until late August 2016. Once the FOIA officer became aware of the request, and after requesting an extension of five days, plaintiff was notified that the documents would be released upon payment of the invoiced fee.

¶ 11 Defendant also asserted that section 6 of FOIA (5 ILCS 140/6 (West 2016)) permits public bodies to charge fees imposed by other statutes as a condition precedent to the disclosure of public records. It pointed to section 15.15 of the Business Corporation Act of 1983 (BCA) (805 ILCS 5/15.15 (West 2016)) and section 50-10(c)(1) of the Limited Liability Company Act (LLC Act) (805 ILCS 180/50-10(c)(1) (West 2016)), which both require the Secretary to charge and collect a fee of \$25 “[f]or furnishing a copy or certified copy of any document, instrument, or paper relating to a corporation” or “relating to a limited liability company,” respectively. Because plaintiff submitted no payment, defendant asserted that FOIA was not violated because the records were properly withheld.

¶ 12 On December 7, 2016, defendant filed a motion for summary judgment reiterating its argument that it could not “be found liable for failing to respond to the February 23, 2016[,] FOIA request” because plaintiff intentionally sent the request to an e-mail address that was “not intended to receive FOIA requests” and because plaintiff had not paid the “statutorily required fees.” Defendant also noted that, in May and October 2014, plaintiff e-mailed FOIA requests directly to the FOIA officer who, at that time, advised plaintiff that the documents would be

released upon payment of the itemized invoice attached to each response.² Defendant stated that plaintiff did not pay those fees, either.

¶ 13 Plaintiff filed a response to the Secretary's motion for summary judgment and a cross-motion for summary judgment on January 6, 2017. Therein, he stressed that defendant admitted to receiving his FOIA request on February 23, 2016, but failed to either comply with or deny the request within the time limits prescribed by section 3(d) of FOIA (5 ILCS 140/3(d) (West 2016)). Instead, defendant responded more than six months later, on August 31, 2016. Plaintiff also asserted that his prior FOIA requests in 2014 were not relevant to his instant suit.

¶ 14 On March 16, 2017, the circuit court entered an order (1) denying the secretary's motion for summary judgment and (2) granting in part and denying in part plaintiff's motion for summary judgment. The circuit court determined that defendant violated FOIA by failing to timely respond to the request, noting that it did not comply with or deny the request for public records, nor did it extend the time for a response, within five business days after its receipt as required by section 3(d) of FOIA. However, the circuit court questioned whether plaintiff was "merely attempting to see if [he] can 'catch' [defendant] in a technical violation." Nevertheless, it reasoned that defendant's various admissions concerning the February 23, 2016, request "demonstrate[d] at least a technical violation of the FOIA." The circuit court deemed the remaining issues, "such as the feasibility of [d]efendant providing the requested documents to [p]laintiff, fees for the documents, [and] possible penalties and attorney's fees" to be issues of fact and therefore not subject to summary judgment.

² The invoices for the May and October 2014 FOIA requests were attached to the motion for summary judgment. They totaled \$10,018 and \$9,401, respectively.

¶ 15 Defendant moved for clarification of the circuit court’s order on May 8, 2017, and requested that the court address the “purely legal issues” concerning whether the non-FOIA statutory fee provisions of the BCA and LLC Act precluded defendant from tendering the records without payment. On June 22, 2017, the court granted defendant’s motion for clarification “for the reasons stated on the record,”³ and it scheduled a status hearing to assess whether it was “feasible for [d]efendant to provide the requested documents in an electronic format.”

¶ 16 On November 13, 2017, plaintiff moved for summary judgment on the issues the court declined to resolve in its March 16, 2017, order. He argued that (1) the feasibility of providing the records under section 6(a) was not at issue because he did not request them in a specific electronic format, but rather, he sought them “in whatever electronic format” they were already maintained; (2) defendant could not impose a fee for the records because it failed to respond to the request within the requisite period under section 3(d) of FOIA; (3) defendant willfully violated FOIA by failing to turn over the records; and (4) plaintiff was entitled to reasonable attorney fees because he prevailed on his FOIA complaint. Plaintiff also pointed to certain interrogatory answers provided by defendant, wherein defendant acknowledged that the requested records were stored electronically in PDF format on a database.

¶ 17 On January 10, 2018, defendant filed a cross-motion for summary judgment. It reiterated its argument that plaintiff was required to pay statutory fees of \$25 per document pursuant to section 15.15 of the BCA and section 50-10(c)(1) of the LLC Act in order to receive the records, but that plaintiff had not done so. Defendant stressed that some 850 electronic documents were responsive to plaintiff’s FOIA request, and plaintiff was “informed that he must pay the statutory

³ The record on appeal contains no reports of proceedings.

fee of \$25 per document (for a total amount of \$19,711.55).” Defendant also pointed to section 6(a) of FOIA, and contended that it was not feasible to provide the documents in an electronic format without payment because the documents would have to be printed, manually redacted, certified, and then re-scanned into an electronic format before they could be tendered to plaintiff. Because there was no dispute that plaintiff had not paid the fee, defendant argued it was entitled to judgment as a matter of law.

¶ 18 On March 22, 2018, the circuit court granted defendant’s cross-motion for summary judgment and denied plaintiff’s motion for summary judgment. Plaintiff timely appealed.

¶ 19 ANALYSIS

¶ 20 Summary judgment motions are governed by section 2-1005 of the Illinois Code of Civil Procedure, and they should be granted only where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2016). When parties file cross-motions for summary judgment, as has occurred here, they agree that only a question of law is involved, and they invite the court to decide the case based upon the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. In such case, however, “the mere filing of cross-motions for summary judgment does not establish that there is no issue of fact, nor does it obligate a court to render summary judgment.” *Id.* Rather, we must “determine whether the trial court correctly found that no genuine issue of material fact existed and whether it correctly entered summary judgment.” *Morningside North Apartments I, LLC v. 1000 N. LaSalle, LLC*, 2017 IL App (1st) 162274, ¶ 10. We review *de novo* the grant of summary judgment. *Chicago Tribune v. College of Du Page*, 2017 IL App (2d) 160274, ¶ 29.

¶ 21 At the outset, we observe that defendant apparently remains “prepared to send the requested records to [plaintiff]” upon its receipt of \$19,711.55, which defendant contends are “statutorily mandated fees.” It asserts no basis for withholding the records other than plaintiff’s non-payment of this amount. We agree with the parties that this matter presents no genuine issue of material fact. Accordingly, resolution of this case turns on whether defendant is entitled to collect a fee from plaintiff prior to turning over the records under the facts of this case.

¶ 22 Plaintiff argues that defendant is not entitled to collect a fee for the records for two primary reasons: (1) because defendant did not comply with, deny, or extend the time for response within five business days after it received the FOIA request as required by section 3(d) of FOIA; and (2) his request sought the production of records in an electronic format, and neither section 15.15 of the BCA nor section 50-10(c)(1) of the LLC Act expressly provide that the fees applicable to copies of public records furnished in paper form apply to records when furnished in an electronic format. See *Sage Information Services v. Suhr*, 2014 IL App (2d) 130708; *Sage Information Services v. Humm*, 2012 IL App (5th) 110580.

¶ 23 We agree with plaintiff’s first argument, which we deem dispositive. Section 3(d) of FOIA states, in pertinent part, as follows:

“Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. *** Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request. *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. A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g).” (Emphasis added.) 5 ILCS 140/3(d) (West 2016).

¶ 24 Here, the record demonstrates that plaintiff submitted a written FOIA request to defendant for public records on February 23, 2016. In its answer, defendant admitted that it received the request that same day. Pursuant to section 3(d) of FOIA, within five business days after its receipt of the request, defendant was required to take action in one of three ways: (1) comply with the request; (2) deny the request; or (3) extend the time for response under section 3(e). Defendant admitted in its answer that it did not comply with or deny plaintiff’s request, nor did it extend the time for response on or before March 14, 2016.⁴ Indeed, the record establishes that defendant did not respond to plaintiff’s request until more than six months later, when defendant’s FOIA officer contacted plaintiff to request an extension of time because she was “unable to comply with [his] request within the five-day limit as required under the Freedom of Information Act.”

¶ 25 These facts alone demonstrate a violation of FOIA, and the consequences of such violation are set forth plainly in section 3(d) of FOIA. A public body’s “[f]ailure to comply with a written request, extend the time for response, or deny a request within 5 business days after its

⁴ Although plaintiff correctly stated in his complaint that the fifth business day after February 23, 2016, was March 1, 2016, we observe that his allegations concerning the deadline for response bear a date of March 14, 2016. Defendant’s admissions that it did not comply with, deny, or extend the time for response on or before March 14, 2016, nevertheless demonstrate a failure to respond within 5 business days after its receipt of the request.

receipt shall be considered a denial of the request. 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.” Defendant contends that the language in section 3(d) that prohibits the public body from imposing a fee if did not respond timely to the request does not apply. Defendant points to the phrase “but thereafter provides the requester with copies of the public records,” and argues that because it has not provided plaintiff with any of the requested records, it may impose a fee notwithstanding its failure to respond to plaintiff’s FOIA request within the requisite periods in section 3(d). We reject this circular argument, as defendant’s only basis for withholding the records is plaintiff’s non-payment of the fee in the first place. In this instance, it would defy logic to allow plaintiff’s non-payment of the fee to preempt the statutory language that prohibits the imposition of that same fee. Because defendant did not respond within five business days after it received the request on February 23, 2016, it is precluded from imposing a fee for the records.

¶ 26 Defendant maintains that FOIA was not violated and that it may nevertheless collect a fee for the records because it could be inferred that plaintiff submitted his request to the department of business services, rather than directly to the FOIA officer as he had done previously, in hopes that the department would not recognize it as a FOIA request and neglect the applicable time constraints. Defendant also argues that FOIA was not violated because plaintiff “had not used the proper channels to submit his FOIA request” and that the “FOIA officer timely responded to [plaintiff’s] requests as soon as she received them.”

¶ 27 We find these arguments untenable for several reasons. First, the record establishes that plaintiff directed his request to defendant’s department of business services via two separate methods—both of which defendant admitted in its answer were available as a means of delivery.

See *id.* § 3(c) (“Written requests may be submitted to a public body via personal delivery, mail, telefax, or other means available to the public body”). FOIA also prohibits public bodies from requiring that a request be submitted on a standard form or from requiring the requester to specify the purpose of the request, except to determine whether the records are sought for a commercial purpose or whether to grant a fee waiver. See *id.*

¶ 28 Second, based on a plain-reading of section 3(d), the time limit for response begins to run upon the receipt of the request by the public body. Notably, this subparagraph makes no reference to the receipt of the request by the public body’s FOIA officer and, likely for this reason, section 3(c) directs that “[a]ll requests for inspection and copying received by a public body shall immediately be forwarded to its Freedom of Information officer or designee.” *Id.* §3(c). This was apparently not done here, as the FOIA officer did not personally receive the request until August 29, 2016—when she obtained it from defendant’s information technology department. Defendant also acknowledged at oral argument that the request should have been forwarded to the FOIA officer, but it was not. While these circumstances certainly bear on whether defendant willfully or wantonly violated FOIA during the initial period for response, defendant’s failure to timely respond nevertheless was a violation of FOIA under section 3(d) and, as a consequence, defendant “may not impose a fee for such copies.” *Id.* §3(d).

¶ 29 We are mindful of defendant’s assertion that it is “unable to simply forward electronic copies of these records to [plaintiff]” because, in order to redact information that is exempt from disclosure under section 7 of FOIA (*Id.* §7), the records must be printed, redacted by hand, certified, and then re-scanned into an electronic format before tendering them. Defendant stated at oral argument that, when it receives a FOIA request from an individual, it “always must go into this paper stage.” We note, however, that FOIA does not distinguish between records

maintained in an electronic format and records maintained in an electronic format that may require manual redaction of exempt information. In any event, defendant's argument appears aimed at demonstrating an undue burden, but defendant has forfeited this argument by failing to timely respond to the FOIA request. "A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g)." *Id.* §3(d).

¶ 30 Because defendant may not impose a fee for the requested public records due to its failure to respond within the requisite periods under section 3(d), we need not address plaintiff's additional argument that defendant may not collect a fee pursuant to the BCA and LLC Act.

¶ 31 **CONCLUSION**

¶ 32 Based on the above, we conclude that the circuit court erred as a matter of law in granting defendant's cross-motion for summary judgment, as defendant was not entitled to charge a fee due to its failure to respond to plaintiff's FOIA request within the requisite periods set forth in section 3(d) of FOIA. We reverse the circuit court's order and remand for the entry of an order compelling defendant to produce the electronic records sought in plaintiff's February 23, 2016, FOIA request at no cost, subject to appropriate redactions under section 7 of FOIA, and for a determination of plaintiff's request for attorney fees and costs, and a civil penalty, if warranted.

¶ 33 Reversed and remanded with directions.