

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

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS,

Plaintiff,

v.

No. 07 CH 3622

SUPERINTENDENT OF THE
CHICAGO POLICE DEPARTMENT,
CHIEF OF THE EVANSTON POLICE
DEPARTMENT, and DIRECTOR OF
THE ILLINOIS STATE POLICE,

Defendants.

MEMORANDUM OPINION AND ORDER

This case comes before the court on the parties' Cross-Motions for Summary Judgment. Plaintiff National Association of Criminal Defense Lawyers ("NACDL") filed its Complaint seeking declaratory and injunctive relief under the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1 *et seq.*, seeking access to certain records compiled and maintained by Defendants, Chicago Police Department ("CPD"), Evanston Police Department, and Illinois State Police.¹ A hearing on the parties' Motions was held on December 20, 2007, and following supplemental briefs from NACDL and CPD, a further hearing was held on May 1, 2008.

In 2003, the Illinois General Assembly passed Senate Bill 472, enacted as Public Act 93-605, which directed the Illinois State Police to conduct a year-long field study of eyewitness identification procedures in criminal investigations ("the Pilot Program"). Specifically, the Pilot Program was intended to compare the effectiveness and accuracy

¹ Both the Evanston Police Department and the Illinois State Police have agreed to be bound by this Order.

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of sequential, double-blind lineups and photo arrays with that of the more traditional simultaneous approach.² The Pilot Program was conducted in 2004 and 2005 using actual criminal cases in Chicago, Evanston, and Joliet. A report of the Pilot Program was released in April 2006 by the administrators of the project (the "Report"), indicating their findings that the sequential, double-blind approach (that touted by proponents of criminal investigation procedure reforms) produced more inaccurate identifications, in contrast to most previous research studies conducted on the subject. The Report was met with skepticism from the scientific community for its failure to submit to peer review and its general lack of reliability; however, the Report has been relied upon by many opponents of criminal investigation procedure reforms to argue against new legislation and public policy.

NACDL filed a FOIA request with CPD on July 31, 2006, seeking the full protocols used in the design of the Pilot Program, the training materials for the police personnel participating in the Pilot Program, and all of the raw data upon which the report was based, which consists of, among other materials, lineup reports, police reports, and photographs from approximately 170 criminal investigations. CPD denied NACDL's request, stating that the materials requested are exempt from production under various provisions of FOIA. NACDL filed the instant Complaint on February 8, 2007, seeking declaratory relief to the effect that it is entitled to the materials it requested from each defendant, as well as injunctive relief compelling the defendants to allow NACDL access

² The sequential double-blind lineup procedure is described as follows by the authors of the Report: Though the protocols for the sequential double-blind procedure are not yet standardized, this method generally involves showing the photos one at a time rather than side-by-side, with the witness required to make a decision on each photo before viewing the next one. The "double-blind" component requires that the lineup be conducted by an administrator who does not know which photo or live participant is the suspect and which are the fillers or "foils." SHERI H. MECKLENBURG ET AL., REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES, at i (2006).

to those materials. The parties filed Cross-Motions for Summary Judgment, and for the reasons stated herein, both motions are granted in part and denied in part.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2002). For purposes of summary judgment, the court should construe the facts strictly against the movant and liberally in favor of the opponent. Adams v. N. Ill. Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). The purpose of a summary judgment proceeding is not to try an issue of fact, but to determine whether any genuine issue of material fact exists. Happel v. Wal-Mart Stores, 199 Ill. 2d 179, 186, 766 N.E.2d 1118, 1123 (2002). Summary judgment should not be granted unless the right of the moving party is clear and free from doubt. Horwitz v. Holabird & Root, 212 Ill. 2d 1, 8, 816 N.E.2d 272, 276 (2004); Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

At the outset, the parties disagreed as to the exact scope of NACDL's FOIA request. As CPD originally understood the request, NACDL sought access to the data relied upon by the authors of the Report ("the Report Data"). This data consists of standardized forms designed to be used by the police detectives participating in the Pilot Program to capture eyewitness identification information relevant to the study. In most cases, the Report authors also relied upon Case Supplementary Reports, documents which describe the allegations of the particular offense; the witnesses, victims, suspects, and police personnel involved in the case; and descriptions of any lineups or photo arrays used, along with the actual photographs. Following the first oral argument on the present

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motions, CPD discovered that in fact NACDL seeks access to the entire police investigatory file for each case in the Pilot Program, including a substantial volume of material not reviewed or used by the authors of the Report. The parties filed supplementary briefs on the issue, and addressed the issue at the second oral argument.

CPD suggests that NACDL's request should be interpreted narrowly to include only the Report Data. The court declines to decide this case on the issue of the scope of NACDL's FOIA request. The language of the request, specifically in paragraph 5, seeks "[t]he complete database of information used to generate the data tables in the Report regarding the Pilot Program and the Appendix thereto, as well as any other information contained in the database that was not included in the Report and Appendix." According to NACDL, when it submitted its request, it assumed that the "complete database" relied upon by the Report authors included the entire criminal investigatory file, and only discovered the limited scope of the Report Data following the argument on December 20, 2007. It is the opinion of the court that NACDL's assumption was reasonable, and that given the parties' current mutual understanding of NACDL's position and the opportunity afforded to both sides to address the issue, resolving the case on a narrow interpretation of the FOIA request would not aid the resolution of the more important issues in this case that are ripe for determination. The court finds that the entire criminal investigatory files are within NACDL's FOIA request.

The investigatory files requested by NACDL fall into two distinct categories: those pertaining to cases in which the criminal investigation is closed ("the Closed Files"), and those pertaining to cases in which the investigation remains open and ongoing ("the Open Files"). According to CPD, of the 171 total cases comprising the

Pilot Program, approximately half were open and half closed at the time CPD filed its motion, on August 14, 2007. Given the time that has elapsed since its filing, the parties agree that Closed Files now outnumber the Open files.

Open Files

With respect to the Open Files, CPD argues that disclosure is exempted under several sections of FOIA. The relevant sections are as follows:

Sec. 7. Exemptions. (1) The following shall be exempt from inspection and copying:

- (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.
- (b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. ... Information exempted under this subsection (b) shall include but is not limited to:

...
(v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies; provided, however, that identification of witnesses to traffic accidents, traffic accident reports, and rescue reports may be provided by agencies of local government, except in a case for which a criminal investigation is ongoing, without constituting a clearly unwarranted per se invasion of personal privacy under this subsection....

(c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:

- (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;

...
(vi) constitute an invasion of personal privacy under subsection (b) of this Section;

... or

- (viii) obstruct an ongoing criminal investigation, 5 ILCS 140/7(1).

In addition, a public body may deny access to records if "compliance with the request would be unduly burdensome for the complying public body and there is no way to

narrow the request and the burden on the public body outweighs the public interest in the information." 5 ILCS 140/3(f).

The court need look no further than section 7(1)(c) to determine that the Open Files are exempt from production under FOIA. In the affidavits of Lt. James Gibson, the Commanding Officer of the Detective Division Support Section of the CPD, Lt. Gibson persuasively argues that redaction of the requested records may not be sufficient to protect the identity or safety of victims and witnesses. Lt. Gibson's affidavit states that, in his experience, "simply redacting specific information will not always keep the identity of victims, witnesses and informants confidential," and that "[n]o one Police Department employee possesses the knowledge and discretion to adequately redact each of the Study's open investigations." Lt. Gibson also details the possible consequences should such information be released to the public. For example, if a report was released to the public and subsequently linked to an ongoing case, a suspect may be alerted to the fact that a witness has come forward, possibly with a description of that suspect. According to Lt. Gibson, it is possible that the suspect could then, based on his or her own personal knowledge of the incident, be able to discern the identity of that witness.

Lt. Gibson also persuasively argues that redaction would be insufficient to prevent an ongoing investigation from being impeded. For example, if a released report were linked to an ongoing investigation, a suspect may learn about evidence the police have in their possession, such as a description of the clothing the perpetrator was wearing at the time of the incident. According to Lt. Gibson, if an at-large perpetrator were to learn such information, it could lead to the destruction of evidence.

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NACDL argues that CPD has failed to meet its burden of showing that the section 7(1)(c) exemptions apply. Under FOIA, "the burden of proof is on the City to establish that the material in question is exempt from disclosure; however, governmental agencies cannot clothe material regarding the affairs of government with an exemption from public disclosure by *ipse dixit* statements that the material is exempt." Baudin v. Crystal Lake, 192 Ill. App. 3d 530, 535, 548 N.E.2d 1110, 1113 (2nd Dist. 1989); see also 5 ILCS 140/11(f). NACDL, relying on Baudin, contends that the affidavits appended to CPD's memoranda are not sufficiently specific to warrant exemption. According to FOIA, "[i]n any action considered by the court, the court shall consider the matter de novo, and shall conduct such *in camera* examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act." 5 ILCS 140/11(f). "Whether the material is exempt under the Act is necessarily a factual determination to be made by the court based on its examination of the affidavits and, if required, based on an examination of the documents themselves *in camera*." Baudin, 192 Ill. App. 3d at 535, 548 N.E.2d at 1113 (citing Hoffman v. Dep't of Corrections, 158 Ill. App. 3d 473, 475-76, 511 N.E.2d 759 (1st Dist. 1987)).

It is the position of NACDL that the evidence and arguments presented by CPD are speculative and not sufficiently particularized, and, thus, that it is the court's responsibility to perform an *in camera* inspection of each file in order to determine whether CPD's concerns are valid given the information that is contained in any given individual file. The court rejects this argument. It is true that FOIA contemplates that a court "shall conduct such *in camera* examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld" under the

FOIA exemptions. 5 ILCS 140/11(f) (West 2000). This provision, however, "has been interpreted by our appellate court to mean that the circuit court need not conduct an in camera review where the public body meets its burden of showing that the statutory exemption applies by means of affidavits," unless the affidavits are "conclusory, merely recite statutory standards, or are too vague or sweeping." Ill. Educ. Ass'n v. Ill. State Bd. of Educ., 204 Ill. 2d 456, 469, 791 N.E.2d 522, 530 (2003) (citing Williams v. Klincar, 237 Ill. App. 3d 569, 572, 604 N.E.2d 986, 989 (3d Dist. 1992); Baudin v. Crystal Lake, 192 Ill. App. 3d 530, 538, 548 N.E.2d 1110, 1115 (2d Dist. 1989)).

CPD has satisfied its burden in this case. The supporting affidavits provided by CPD, especially those from Lt. Gibson, recite with specificity CPD's reasoning for believing the records to be exempt from production, and inform the court of the possible repercussions should they be disclosed. Lt. Gibson's second affidavit also specifically addresses NACDL's contention that redaction of the records would cure any disclosure issues. Furthermore, the first affidavit of Lt. Gibson provides a very detailed list of all of the information contained in the records NACDL seeks. Thus, CPD has provided the court with a factual basis from which to determine whether the exemption should apply without resorting to an *in camera* review of each and every file.

CPD also argues that the Open Files are exempt under section 7(1)(c)(vi). Under that section, records are exempt from production if their release would "constitute an invasion of personal privacy under subsection (b)" of section 7(1). In order to determine whether this exemption applies, the court must determine whether, given the particular circumstances of each case, the invasion of privacy caused by disclosure of the requested information would rise to the level of "clearly unwarranted." Lieber v. Bd. of Trustees of

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So. Ill. Univ., 176 Ill. 2d 401, 408-09, 680 N.E.2d 374, 377-78 (1997); Local 1274, Illinois Fed'n of Teachers v. Niles Twp. High Schools, 287 Ill. App. 3d 187, 192, 678 N.E.2d 9, 12-13 (1st Dist. 1997). In doing so, the court should balance factors such as "(1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." Lieber, 176 Ill. 2d at 409, 680 N.E.2d at 378; Niles Twp. High Schools, 287 Ill. App. 3d at 192, 678 N.E.2d at 13.

In this case, NACDL's interest in disclosure and the public interest in disclosure are one and the same. NACDL eloquently describes the need for independent scientific review of the information underlying the study, particularly given the influence the Report has had in policy debates in Illinois and nationwide and the impact of the subject matter on the criminal justice system. CPD also makes a strong argument about the degree of invasion of privacy that would result should a victim or witness be identified through the disclosure of this information. Lt. Gibson relates in his affidavits the difficulty police encounter in obtaining the cooperation of victims and witnesses in criminal investigations given their understandable fear of retribution. According to Lt. Gibson, it is primarily due to the trust these civilians place in the investigators to hold their personal information in the highest confidence that their cooperation is obtained. Breaching this confidence would have far-reaching consequences, not just in these individual investigations, but in all future investigations, if the public lost the ability to trust police investigators.³ The final factor, availability of other means of obtaining this information, weighs in favor of NACDL. CPD is the sole repository of its files, and is obviously reticent to share them with the public. In all, when balancing the interests

³ In this respect, the public also has an interest in nondisclosure.

involved, the court finds that the interest of victims and witnesses in maintaining anonymity with respect to ongoing criminal investigations outweighs NACDL's interest in obtaining these files.⁴ Thus, the exemption found in section 7(1)(c)(vi) of FOIA also applies to protect the investigatory files of open cases from production.

For all of these reasons, the cross-motions relate to Open Files, CPD's Motion for Summary Judgment is granted, and NACDL's Motion for Summary Judgment denied.

Closed Files

This leaves only the disposition of NACDL's request for the Closed Files. With respect to the Report Data from the Closed Files, the parties are in substantial agreement as to the form and method of production. CPD has agreed to produce these materials to NACDL with all identifying information redacted, and NACDL has agreed to the sufficiency of the remaining information, with two exceptions.

First, NACDL takes issue with CPD's intention to redact the faces from the photographs in the photo arrays contained in the supplementary reports. NACDL argues strenuously that the intact photographs are necessary in order for their retained expert to compare the physical characteristics of the lineup participants and determine the overall fairness of the eyewitness identification procedures used in the Pilot Program.

In order to resolve this dispute as to the redaction of the photographs, the court must determine whether their release without redaction would constitute a "clearly unwarranted invasion of personal privacy" under section 7(1)(b) of FOIA. As stated above, this determination is made by weighing factors such as "(1) the plaintiff's interest

⁴ NACDL persuasively argues, and the court accepts, that it has no intention of publicly disseminating the information obtained pursuant to its FOIA request, and, therefore, the likelihood that such information will fall into the hands of suspects in ongoing criminal investigations is slight. Notwithstanding the foregoing, information released under FOIA is released into the public domain, and FOIA does not contemplate the imposition of restrictions on the use of information following its release.

in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." Lieber, 176 Ill. 2d at 409, 680 N.E.2d at 378; Niles Twp. High Schools, 287 Ill. App. 3d at 192, 678 N.E.2d at 13. Here, the court finds that the privacy interest of the lineup participants depicted in the photographs sought by NACDL to be paramount, outweighing any interests of NACDL or the public in their release. While it is true that all identifying information will be redacted from the photographs, it is also true that to release these photographs intact would be to release to the public images of real people, most of whom were never suspects in any crime (the so-called "fillers"), in the context of a police supplementary report. There is no evidence in the record that these "fillers" ever contemplated or consented to this clear invasion of privacy. Furthermore, while both NACDL and the public may indeed have an interest in the disclosure of the photographs, NACDL concedes that, although they may be an important component of the critical analysis NACDL seeks to undertake, redaction of these photographs will not render the remaining materials worthless to its pursuits. Finally, recognizing the substantial privacy interest in play here, NACDL represents that it has no intention of disseminating the photographs to the public, and argues that this should be taken into account in weighing these competing interests. However, FOIA provides no mechanism by which the materials that are ordered to be produced can be safeguarded once they are produced, and thus the court cannot rely on NACDL's representations in this regard. As a result of the balancing of these interests, the court finds that CPD may redact the faces in the photographs contained in the supplementary reports.

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140/3(f). Consequently, the court must again weigh the competing interests of the parties and the public in order to determine if the burden of redacting these materials is warranted in this case.

CPD submitted two affidavits in support of its contention that the redactions required in order to respond to NACDL's request for the underlying criminal investigatory files would be unduly burdensome. First, Amber Achilles Ritter, an attorney representing the City of Chicago in the instant litigation, testified that she performed a sample redaction of the Report Data from two cases in the Pilot Program in order to determine the time necessary to perform the redactions as well as the level of sophistication required of the person performing the redactions. Ms. Ritter concluded that it would take no fewer than thirty minutes to properly redact each file's Report Data, and that the person performing the redactions would need to possess an understanding of the particular facts of the case as well as a thorough understanding of FOIA and the law interpreting its exemptions. The second affiant is David Smith, a supervising paralegal with the City of Chicago Department of Law. Mr. Smith testified that he reviewed several samples of entire investigatory files from cases in the Pilot Program and found them to contain many more documents than merely the Report Data, sometimes numbering in the hundreds of pages.

At the argument held on May 1, 2008, Ms. Ritter estimated that to adequately redact exempt information in the Report Data from all the Closed Files in the Pilot Program would take approximately 42 work-hours, or roughly one week. Coupled with the fact that the entire investigatory files contain many more types of documents, in much larger quantities (sometimes hundreds more pages) than the Report Data, proper

redaction of the Closed Files could take several weeks of full-time work by CPD personnel, personnel who would need to possess a high level of knowledge and sophistication.

There is no question that NACDL has an identifiable interest in the production of the entire investigatory files of closed cases. Considering the type of information contained in these files, there exists the possibility that NACDL's retained expert might discover additional bases on which to attack the reliability and scientific merits of the Report. However, it is important to note that NACDL will not come away empty-handed without disclosure of the entire investigatory files – NACDL's retained expert will still be able to examine the same data relied upon by the authors of the Report from the Closed Files, albeit in redacted form. NACDL's expert, therefore, will be able to critique the Report based on what NACDL claims is the insufficient basis upon which the Report's conclusions are founded. On balance, the court finds that the potential relevance of the additional information contained in the investigatory files is not sufficient to outweigh the substantial burden that would be imposed on CPD by being forced to redact the entire investigatory files.

As a final note, CPD argues that the FOIA exemption in section 7(1)(a) also applies here. Section 7(1)(a) exempts from production "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law." 5 ILCS 140/7(1)(a). CPD contends that disclosing the information sought by NACDL would violate its obligations under the Juvenile Court Act of 1987⁵

⁵ "Law enforcement officers may not disclose the identity of any minor in releasing information to the general public as to the arrest, investigation or disposition of any case involving a minor." 705 ILCS 405/1-7(E).

and under the Federal Health Insurance Portability and Accountability Act of 1996.⁶

Both of these acts prohibit the disclosure of identifying information relating to certain groups of individuals. As a result of the aforementioned findings of the court requiring that no identifying information be produced, no further analysis of the section 7(1)(a) exemption is necessary.

For the foregoing reasons, IT IS HEREBY ORDERED that both parties' Cross-Motions for Summary Judgment are granted in part and denied in part as follows:

- 1) As to Open Files, CPD's motion is granted, the court finding that the information sought is exempt from disclosure under FOIA.
- 2) As to Closed Files, NACDL's motion is granted in part, and CPD is ordered to produce to NACDL for inspection and copying all Report Data from the Closed Files, subject to the redactions contained in the sample redacted files attached as Defendant's Exhibits C-1 and C-2 to CPD's Response to NACDL'S Supplemental Memorandum, with the exception of the RD number, which CPD shall not redact.
- 3) As to the investigatory materials beyond the Report Data in Closed Files, CPD's motion is granted, the court finding that redaction of the information contained in those materials would impose an undue burden on CPD.

⁶ The HHS Privacy Rule, adopted by HHS pursuant to HIPAA, 110 Stat. 1936, in order to protect from disclosure "individually identifiable health information," is codified in the Code of Federal Regulations at 45 C.F.R. 164.102 *et seq.* Under § 514(a), "[h]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information." 45 C.F.R. 164.514(a).

The court having resolved all matters in controversy in this case, this Order shall be final and appealable.

DATE: June 30, 2008

ENTER:

Mary Anne Mason
JUDGE MARY ANNE MASON

