No. 128275

IN THE
SUPREME COURT OF ILLINOIS

SANDRA HART, Plaintiff-Appellee, v. ILLINOIS STATE POLICE, Defendant-Appellant.	)	On Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-19-0258, There Heard on Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 18 MR 611, The Honorable DAVID W. DUGAN, Judge Presiding.
KENNETH L. BURGESS, SR., Plaintiff-Appellee, v. ILLINOIS STATE POLICE, Defendant-Appellant.	)	On Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-20-0421, There Heard on Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 20 MR 608, The Honorable CHRISTOPHER P. THRELKELD, Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. The plain and unambiguous language of FOIA exempts the name and other information of individuals who have applied for FOID cards from public disclosure.

The plain and unambiguous language of section 7.5(v) of the Illinois Freedom of Information Act ("FOIA") exempts from disclosure the "[n]ames and information of people who have applied for or received Firearm Owner's Identification ["FOID"] Cards under the [FOID] Act." 5 ILCS 140/7.5(v) (2020). The Illinois State Police ("ISP"), the administrative agency in this State that maintains records of applicants for and recipients of FOID cards, is thus precluded from publicly releasing that information under any circumstance. Indeed, FOIA's clear language prohibiting the public release of FOID card information contains no express exceptions.

The appellate court, however, read an exception into this exemption, concluding that the statute does not prohibit the release of an individual's own FOID card information. *Hart v. Ill. State Police*, 2022 IL App (5th) 190258, ¶¶ 25, 32. But courts are not permitted to "read words into the statute" that are not there or attempt to read it "other than in the manner in which it was written." *Kozak v. Ret. Bd. of Firemen's Annuity & Ben. Fund of Chi.*, 95 Ill. 2d 211, 215-16 (1983). Because the appellate court here contravened that basic statutory construction principle, its judgment requiring ISP to turn over FOID card information to Hart and Burgess should not stand. Even if the appellate court's view of what the law in Illinois should be was reasonable,

that was not the path that the Illinois General Assembly chose to follow. Any amendment to the exemption to allow individuals to obtain their own FOID card information should come from the legislature, not the courts. *See Munoz v. Bulley & Andrews, LLC*, 2022 IL 127067, ¶ 22 (court cannot depart from "plain language" of statute by "reading into it exceptions" "not expressed by the legislature").

In response to ISP's plain language position, Hart and Burgess assert that the General Assembly meant only to prohibit the government from disclosing FOID card information to potential "burglars." AE Br. 7-10. But in making this assertion, they rely on the legislative history behind section 7.5(v) of FOIA. *See id*. at 8-10. This Court, however, turns to legislative history only if a statute's language is ambiguous, *Dynak v. Bd. of Educ. of Wood Dale Sch. Dist. 7*, 2020 IL 125062, ¶ 16, and Hart and Burgess have never argued that the statute here is capable of multiple reasonable readings. Rather, their position has been that ISP's reading of the statute would lead to absurd results, *see* AE Br. 5, which it does not, as explained in ISP's opening brief and below. In any event, as explained, *see* AT Br. 17-19, even if section 7.5(v) were not clear, the legislative history supports ISP's interpretation of the provision.

Furthermore, the statute's plain terms say nothing about "burglars," nor, again, does it provide an exception for an individual to obtain their own FOID card information. As explained, AT Br. 24-25, the General Assembly, in enacting section 7.5(v) of FOIA, could have included an exception for the

release of an applicant's own information. After all, it created an exception for the release of information pertaining to applicants and recipients of concealed carry licenses. 5 ILCS 140/7.5(v) (2020). The statute states that information pertaining to concealed carry licensees and applicants is exempted "unless otherwise authorized by the Firearm Concealed Carry Act," *id*., meaning that if the Firearm Concealed Carry Act were amended to authorize disclosure of that information, section 7.5(v) would not prohibit its release. Similarly, the General Assembly has created exemptions in other statutes addressing the release of information under FOIA based on the identity of the requestor. *See* 5 ILCS 140/7(e-5) – (e-10) (2020); *see also* AT Br. 24-25.

Accordingly, the General Assembly clearly knows how to create an exception to a statute's terms when it intends to do so. This Court presumes that if a statute lists the things to which it refers, any omission should be understood as an exclusion. *Mattis v. State Univ. Ret. Sys.*, 212 Ill. 2d 58, 78 (2004). And the Court "cannot conclude that the legislature simply forgot to include the exemption" in one statute "when the legislature included" one in related statutes. *People v. Legoo*, 2020 IL 124965, ¶ 26. The appellate court's decision to read an exception into the statute's plain text here was, therefore, erroneous.

Contrary to plaintiffs' suggestion, this reading of section 7.5(v) of FOIA does not lead to absurd results such that this Court should intervene to read an unwritten exception into the exemption. Hart and Burgess argue that

section 7.5(v) should not apply to them because they already know their own names, AT Br. 4, and merely need to know why ISP either denied them a FOID card or revoked their FOID card so that they may challenge their ineligibility for a card, *id*. at 2, 4, 7.

To begin, there is no evidence that ISP did not provide Hart and Burgess with notice of the denial or revocation of their FOID cards when those actions occurred, *see* AE Br. 5 (notice "was already mailed"), despite their bare invocation of "due process" and other constitutional concerns, *see* AT Br. 1-2.

And as a practical matter, it is likely too late for either Hart or Burgess to appeal their FOID card denial or revocation. Hart once possessed a FOID card, which was revoked in 2010. *See* 5-19-0258 SEC C5. Burgess's record does not indicate the date of his application, but, because he seeks a duplicate paper copy, it may be inferred that he applied prior to 2015, when the online application portal was created and paper applications were no longer used. *See* AT Br. 21 n.2. Although the FOID Act does not set a time limit for challenging a denial or revocation, ISP's administrative regulations provide that an applicant has 60 days from the date the denial or revocation letter was issued to challenge an individual's eligibility for a FOID card. 20 Ill. Admin. Code § 3500.200(b)(4).

Here, years seem to have passed since either plaintiff had their FOID card revoked or denied. Moreover, an individual's circumstances can change over time in a way that affects the eligibility for a FOID card. For example, a

person who was denied a FOID card because of an existing order of protection against him is no longer ineligible once the order expires. *See* 430 ILCS 65/8.2 (2020). Similarly, an individual whose FOID card was denied or revoked for simple possession of cannabis may re-apply now that such possession is legal. *See* 410 ILCS 705/1-7 (2020). The most expeditious course of action at this late date might be for Hart and Burgess to reapply for a FOID card rather than to challenge the past decisions finding them ineligible.

Beyond that, the information contained in their FOID card documents is not public information. FOIA presumes that upon a request for documents, public information shall be disclosed to the requestor. 5 ILCS 140/1 (2020) ("access by all persons to public records"). But FOID card applications and ISP's denial or revocation letters are not public documents. As explained in the opening brief, AT Br. 20-22, the application is generated by the person applying and contains private and even statutorily protected information. The denial letter is generated by ISP within 30 days of application, 430 ILCS 65/5(a), 65/9 (2020), is directed solely to the applicant and, like the application, contains information that is both private under section 7(1)(b) of FOIA, 5 ILCS 140/7(1)(b) (2020), and potentially statutorily protected. *See* AT Br. 21-22. Neither Hart nor Burgess has responded to ISP's concern, *see* AT Br. 22-23, that requiring it to release this private information pursuant to FOIA would inevitably lead to disclosure to a third party. Nor do they acknowledge that the five-day deadline for responses under FOIA all but guarantees that

some requestors will litigate if ISP responds by seeking further information to confirm their identity. *See* AT Br. 23.

Hart and Burgess also argue that they consented to disclosure of their "personal information" pursuant to section 7(1)(c), 5 ILCS 140/7(1)(c) (2020), and contend that the appellate court determined that section 7(1)(b) "requires consent with disclosure." AE Br. 7. They are incorrect, however, because the appellate court made no reference to section 7(1)(b) in its discussion of section 7(1)(c)'s consent provision, much less construed section 7(1)(b) to "require" disclosure of the information it defined as private. *Hart*, 2022 IL App (5th) 190258, ¶¶ 24-25, 29.

In fact, section 7(1)(b) is a blanket prohibition on the dissemination of "private information," as defined by section 2(c-5), 5 ILCS 140/2(c-5) (2020), and contains no consent provision. As explained in the opening brief, an applicant's application and denial letter contain such private information. AT Br. 20-22.

Instead, seemingly without appreciating the distinction between "private information" under section 7(1)(b), which lacks a consent provision, and "[p]ersonal information contained within public records" under section7(1)(c), which contains a consent provision, the appellate court opined that plaintiffs *could* consent to the disclosure of their application and letters under the latter provision. *Hart*, 2022 IL App (5th) 190258, ¶¶ 24-25, 29. But "private" information is, by definition, not public. FOIA does not grant

anyone who asks access to private information. As explained in the opening brief, AT Br. 25-27, section 7(1)(c) is reserved for access to *public* records that may contain personal and possibly embarrassing information, requiring consent of the person to whom that information pertains. *See*, *e.g.*, *State Journal-Register v. Univ. of Ill. Springfield*, 2013 IL App (4th) 120881, ¶¶ 56, 58 (witness statements in state university investigation of sexual misconduct by coach). Moreover, the General Assembly could have placed a consent provision in section 7(1)(b), as it did in 7(1)(c), but it chose not to do so. That omission has meaning. *See People ex rel. Devine v. $30,700 U.S. Currency*, 199 Ill. 2d 142, 151-52 (2002) (inclusion of provision in one section of statute but omission from another section is meaningful).

And Hart and Burgess mischaracterize ISP's position as contending that they may never access their own FOID card information, AE Br. 5, 10-11, rather than what it is: that they simply may not seek the information via FOIA. In service of that characterization, they make some assertions for the first time in this appeal. For example, they assert that they seek information "that they either lost, or which was never provided to them in the first place, but should have been," meaning the letter denying or revoking their eligibility for a FOID card. *Id.* at 16. This is the first time either plaintiff has indicated that they did not receive the letter that ISP was required to send them based on section 9, and their assertion is belied by the record in each case. During argument before the circuit court, Burgess admitted that ISP "already" sent

him the denial letter "once" and that he "lost" it. 5-20-0421 R5:10-11. And Hart's appellate court record contains a copy of her 2010 revocation letter. 5-19-0258 SEC C5.

Additionally, Burgess now argues – again, for the first time – that he made a general request for his documents, which ISP ignored. AE Br. 12. As support, he cites his letter directed to ISP's FOIA officer in which he made a FOIA demand, stating "[t]his is request for documents, both generally and under [FOIA]. . . ." 5-20-0421 C12. Notably, during oral argument before the circuit court, Burgess did not claim to have made any request other than a FOIA demand. 5-20-0421 R1-17. Indeed, he admitted that he sent no correspondence to the Firearms Services Bureau seeking his information because "[t]hat place is a black hole." 5-20-0421 R15:9-13. Furthermore, through counsel, he claimed that Hart sent a letter to the Firearms Services Bureau seeking a duplicate copy of her misplaced letter and never heard back. *Id.* at R15:17-24. But Hart never pleaded or argued that she had made a request for that document outside of her FOIA demand, nor do any exhibits in either record support the contention that she did.

In addition, Hart and Burgess do not acknowledge that, given the lack of any mechanism in FOIA to verify a requestor's identity, private information could be disseminated to third parties, a possibility that even the circuit court in *Hart* recognized as problematic. *See* 5-19-0258 C100. And that problem will

almost certainly occur if ISP were to be required to release such information pursuant to FOIA requests.

Such unlawful disclosure is nearly inevitable because under FOIA the presumption is openness and transparency of government records. *See Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 13. Normally, under FOIA, anyone may file a written request for information contained in government records, unless that information is subject to protections, such as those listed in section 7.5. The Act contains no provision that limits such disclosure of information only to the applicant or cardholder herself. And, as noted in the opening brief, neither does the Act contain any mechanism for verifying that the person seeking the protected information is the applicant or cardholder to whom it pertains. AT Br. 22-23. Under the appellate court's interpretation of the Act, for example, anyone claiming to be Burgess could file a written FOIA request and automatically obtain the information in his file – even an identity thief. The appellate court's interpretation would effectively nullify the protections in section 7.5(v) and thus should not be allowed to stand. *See*, *e.g.*, *S. Bloom v. Korshak*, 52 Ill. 2d 56, 64 (1972) (courts must avoid interpretations that nullify statutory provisions). The General Assembly surely did not intend such an absurd result.

Plaintiffs contend that ISP waived the argument – that individuals who wish to receive duplicate copies of their documents must use means outside of FOIA to do so – by not making it in the circuit court. AE Br. 11. That is

inaccurate as to Burgess. At oral argument before the circuit court, ISP explained that Burgess must use "other administrative avenues to get the information that he seeks" and that "FOIA is simply not the manner in which to do so." R13:8-11. It further noted that the Firearms Services Bureau would be the office from which to request information on applications and eligibility status. R14:12-15. Thus, this argument was not forfeited as to Burgess. And for reasons discussed below, *see infra* p. 11, the argument should be considered as to Hart, as well, despite forfeiture.

Plaintiffs offer an additional forfeiture argument, contending that the portion of ISP's opening brief that discusses the information available on ISP's website should be "stricken" because it is "waived." AE Br. 12. But information on a government website is a proper subject of judicial notice. *Bd. of Educ. of Richland Sch. Dist. No. 88A v. City of Crest Hill*, 2021 IL 126444, ¶ 5. And the authority plaintiffs cite in support of their forfeiture argument does not carry the day. *Weiser v. Missouri Pacific Railroad Co.*, 98 Ill. 2d 359 (1983), involved a case that had already been fully briefed and set for argument in the Illinois Supreme Court by the time the plaintiff filed her motion to amend the record with a document she had filed in the trial court. *Id*. at 363. ISP is not trying to amend the record here, but merely asking this Court to take appropriate judicial notice of information published on its website.

Moreover, this Court's opinion in *Wagner v. City of Chicago,* 166 Ill. 2d 144 (1994), which the plaintiffs also cite, AE Br. 12, supports the examination of ISP's argument that administrative means, rather than FOIA, are the proper avenue for an individual to request her own FOID card information. In *Wagner*, the City raised a defense in its second post-trial motion, which the appellate court elected to consider on the merits. 166 Ill. 2d at 147. This Court noted that waiver is a limitation on the parties and not the courts. *Id.* at 148. It also considered the City's argument, explaining that "'in the exercise of its responsibility for a just result and the maintenance of a sound and uniform body of precedent, a reviewing court may consider issues not properly preserved by the parties.'" *Id*. (quoting *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 251 (1994)). Here, the proper construction of section 7.5(v) is a matter of first impression in this Court. Thus, even if it were correct that ISP forfeited the argument that both plaintiffs have means other than FOIA to request their information, concern for a just result and a uniform body of precedent warrants its consideration.

II. ISP did not waive reliance on the permanent injunction, and its terms prohibit disclosure of FOID information under FOIA.

As discussed in the opening brief, ISP argued before the circuit court in *Burgess* that it was bound to follow the plain terms of the permanent injunction entered by the circuit court in *Illinois State Rifle Association v. Department of State Police*, No. 11 CH 151. AT Br. 29-31. That injunction

prohibits ISP from releasing records that "identify[ ], directly or indirectly, any person who has applied for a FOID card, who has been issued or denied a FOID card, or whose FOID card has expired or been revoked." 5-20-0421 C92-93. The injunction further specifies the information that is subject to its terms:

> As used in this Order, the term "personally identifying information" means information submitted to [ISP] related to a FOID card application . . . that identifies or describes a person, including but not limited to an individual's name, street address, telephone number, electronic mail address, date of birth, physical description, photograph, medical or mental health information, Social Security number, driver's license number, state identification number, FOID card number, or other similarly unique identifying information.

Id. at 93. Even if section 7.5(v) could be read the way the appellate court read it, the existence of this injunction prevents ISP from releasing the information Hart and Burgess seek.

Hart and Burgess contend, however, that ISP waived reliance on this injunction by failing to raise it in Hart's case and by raising it in Burgess's case for the first time in its amended motion for summary judgment. AE Br. 14-15. Burgess's contention is incorrect. An affirmative defense, such as the existence of the injunction here, may be raised in a motion for summary judgment even though it may not have been raised previously in the pleadings. *Home Healthcare of Ill. v. Jesk*, 2017 IL App (1st) 162482, ¶ 52; *A.C. Cannon v. Bryant*, 196 Ill. App. 3d 891, 894 (1st) Dist. 1990). ISP did not waive the defense that it is prohibited by permanent injunction from disclosing the

requested materials in Burgess's case. And in Hart's, concern for a just result and a uniform body of precedent warrants consideration of the permanent injunction.

As noted, waiver is a limitation on the parties rather than the court. *Wagner*, 166 Ill. 2d at 148. Thus, this Court may choose to consider the application of the permanent injunction to both plaintiffs' actions. And if there were a waiver on ISP's part, this Court should make that choice because it should not require ISP to violate an injunction that plainly prohibits it from taking the action Hart and Burgess requested here.

As to its substance, Hart and Burgess contend that the injunction does not apply to them because they already know their own names and addresses. AE Br. 15-16. But their own knowledge and state of mind are not at issue. The question, rather, is whether the injunction prohibits ISP from releasing their information to anyone – including them or anyone claiming to be them – who requests it under FOIA. It does prohibit that release by its plain terms.

Moreover, as noted in the opening brief, AT Br. 30-31, the injunction has never been lifted, something that this Court has held is a prerequisite to release of information that is the subject of an injunction prohibiting disclosure. *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 67 ("requester must first have the court that issued the injunction modify or vacate its order barring disclosure"). Hart and Burgess do not explain how the appellate court's directive that ISP disclose information covered by the

injunction does not order ISP to violate an existing court order, or why this Court's holding that a lawful court order takes precedence over the disclosure requirements of FOIA, *id*. at ¶ 66, does not apply. This Court explained that an injunction "must be obeyed," even if it is erroneous, "until it is modified or set aside or reversed by a higher court." *Id*. at ¶ 64. While Hart and Burgess might be correct that an appeal from the Peoria County Circuit Court that issued the injunction could result in the injunction's reversal, AE Br. 17, they are not excused from complying with this Court's prescribed path for seeking such reversal, just as ISP is not excused from complying with the injunction.

* * *

Under a plain reading of FOIA, ISP was precluded from releasing to Hart or Burgess the documents they sought. The appellate court erred in ordering their production and in ignoring this Court's jurisprudence regarding injunctions.

CONCLUSION

For these reasons, Defendant-Appellant Illinois State Police asks this Court to reverse the judgment of the appellate court in these consolidated appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 3, 2023, I electronically filed the foregoing **Reply Brief of Defendant-Appellant** with the Clerk of the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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