No. 126675

IN THE SUPREME COURT OF ILLINOIS

MANCINI LAW GROUP, P.C.,	)	Appeal from the Appellate
	)	Court, First District
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	No. 1-19-1131
	)	
	)	
SCHAUMBURG POLICE DEPARTMENT,	)	
	)	
	)	
Defendant-Appellee.	)	

Appeal from Circuit Court of Cook County, 1st Judicial District
17 CH 13881
Judge Franklin U. Valderrama, Presiding

BRIEF OF PLAINTIFF-APPELLANT

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POINTS AND AUTHORITIES

I. NATURE OF THE ACTION

This is a Freedom of Information Act case seeking the release of names and addresses from traffic accident reports that Schaumburg Police Department previously produced to a third-party reseller. This Court has previously held that voluntary unrestricted disclosure of information to one party waives any exemptions when requested by a different person.

II. ISSUES PRESENTED

Did SPD waive the right to withhold names and addresses on traffic accident reports where SPD previously produced the entirely unredacted reports to a third-party reseller without restriction?

III. STANDARD OF REVIEW

Where a case is decided through summary judgment, this Court's review is *de novo*. *Pielet v. Pielet*, 2012 IL 112064, ¶ 30.

IV. JURISDICTION

This Court granted Mancini Law Group's timely filed petition for leave to appeal. Jurisdiction is proper under Rule 315.

V. STATUTES INVOLVED

This case involves the following provisions of the Illinois Freedom of Information Act:

> Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 and 8.5 of this Act.

5 ILCS 140/3(a).

> All records in the custody or possession of a public body are presumed to be open to inspection of copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.

5 ILCS 140/1.2.

VI. STATEMENT OF FACTS

A. The FOIA request and denial

On July 13, 2017, Mancini Law Group requested all traffic accident reports for all motor vehicle accidents occurring within the Village of Schaumburg between June 30, 2017, and July 13, 2017. C12-13. On August 7, 2017, Schaumburg Police Department stated that substantial redactions were made pursuant to FOIA Sections 7(1)(b) and 7(1)(c). C14-15. SPD's redactions included home addresses, home phone numbers, driver's license numbers, dates of birth, policy numbers and license plates numbers. *Id*.

B. SPD's disclosure to LexisNexis

SPD provides LexisNexis with all of the accident reports that it receives. C171 at ln. 16-22; C230. As part of its business LexisNexis provides a solution to automate, maintain electronically, and disseminate crash reports. *Id.* These reports, numbering in the thousands, are provided to LexisNexis without any redactions at all. C183 at line 20-24, C172 at ln. 15-C173 at ln. 13. Nor are there any restrictions in the agreement between SPD and LexisNexis. C185 at ln. 4-11; C230-236. LexisNexis is free to sell unredacted reports. *Id.* Even if the agreement with LexisNexis is terminated LexisNexis can still distribute the crash reports in its possession. C182-183. While LexisNexis in part acts as a contracted vendor for the State of Illinois, it also independently acts as a third-party reseller of traffic accident reports. C172 at ln. 6-8, C181 at ln. 18-21; 231. The agreement states that even if SPD's contract with LexisNexis is terminated LexisNexis can still distribute the crash reports in its possession. C183. As recently as January 3, 2018, LexisNexis was used to purchase a completely unredacted SPD traffic accident report.

C52-53 at ¶¶ 4-8; C44-45. LexisNexis charges people $13.00 for each report and sends $5.00 of the $13.00 to SPD. *Id*.

In short, SPD contracted "with LexisNexis to allow it to sell the unredacted accident reports to the public, without restrictions or privacy protections." *Mancini,* 2020 IL App (1st) 191131-U, ¶ 32 (Hyman, dissenting).

C. Circuit and appellate court proceedings

Before the Circuit Court, the parties litigated both SPD's exemption claims and whether SPD waived those claims. C46-51. Following cross-motions for summary judgment, the Circuit Court ruled that the exemptions applied and that SPD did not waive the exemptions by disclosing the records to a third party. *Id.* It stated that SPD is statutorily mandated to disclose the records to LexisNexis. *Id.* The Circuit Court did not cite a statute or state what statute requires SPD to disclose the records to LexisNexis.

On appeal, Plaintiff only pursued the issue of whether SPD waived the right to withhold names and addresses on traffic accident reports where SPD previously produced the entirely unredacted reports to a third-party reseller without restriction. *Mancini,* 2020 IL App (1st) 191131-U, ¶ 2. The majority held that there was insufficient evidence to rule that waiver occurred. *Id.* at ¶ 25.

Justice Hyman noted, however, that questions of fact remain. *Mancini,* 2020 IL App (1st) 191131-U, ¶ 42 (Hyman, dissenting). The majority quoted the deposition testimony of Jennifer Brack, SPD's corporate representative, and her testimony "that she 'believe[s] [LexisNexis] ha[s] their own safeguards in place of who can purchase a report,' and, to obtain a report through LexisNexis, 'her understanding' was that the requesting party would need to know specific information about the report, including the date of the accident, the location of the accident, and the accident report number." *Id.* In short, the

majority rested its decision on nothing but Brack's "belief." *Id.* Brack's belief found zero support in any contract or agreement between LexisNexis and SPD, or any other document for that matter. Based on this alone, "a material question of fact remains." *Id.* at ¶ 43.

In any event, Michael Camarata, an attorney at Mancini's office, "submitted an affidavit asserting he purchased an unredacted version of one of SPD's accident reports from LexisNexis." *Id.* at ¶ 44. There is a discrepancy between Brack's "beliefs" and "Camarata's first-hand experience." *Id.* In other words, at a minimum, there is "a genuine issue of material fact as to whether LexisNexis sells unredacted reports to the public." *Id.*

VII. LEGAL STANDARDS

A. The Freedom of Information Act and the principles that apply to its interpretation

The General Assembly has made clear that the purpose of FOIA is to facilitate transparency and allow the public to participate meaningfully in decisions that affect them. "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1. The General Assembly specifically acknowledged that "[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id*. As a result, "[t]he General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a

fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." *Id*.

When determining whether information may be kept from the public, courts must interpret the FOIA statute in light of these transparency objectives. "Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." *Id*. Therefore, FOIA provisions "shall be construed in accordance with this principle." *Id*.

Accordingly, this requires courts to apply a "liberal construction" in favor of disclosure. *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 405-411 (2009); *Kalven v. City of Chicago*. 2014 IL App (lst) 121846, ¶ 19. "Based upon the legislature's clear expression of public policy and intent set forth in section 1 of the FOIA that the purpose of that Act is to provide the public with easy access to government information, this court has held that the FOIA is to be accorded 'liberal construction to achieve this goal.' Accordingly, we have, on several occasions held that the exceptions to disclosure set forth in the FOIA are to be read narrowly so as not to defeat the FOIA's intended purpose." *S. Illinoisan v. Illinois Dep't of Pub. Health,* 218 Ill. 2d 390, 416 (2006).

As explained in a case ordering the disclosure of federal grand jury subpoenas issued to former governor Blagojevich by federal prosecutors:

> We are not surprised that governmental entities, including the United States Attorney generally prefer not to reveal their activities to the public. If this were not a truism, no FOIA would be needed. Our legislature enacted the FOIA in recognition that (1) blanket government

> secrecy does not serve the public interest and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the sunshine of public scrutiny is the best antidote to public corruption, and Illinois courts are duty-bound to enforce that policy.

Better Gov't Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 818 (2008).

B. Waiver of FOIA exemptions

This Court has held that voluntary disclosure in one situation precludes later claims that records are exempt from release to someone else. *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 413 (1997). This Court explained that "selective disclosure by the government 'is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government the FOIA was intended to obviate.'" *Id*. (quoting and citing *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)). If records can be disclosed to one party, there is "no valid basis" to withhold them from another. *Id; see also Watkins v. Customs and Border Protection*, 643 F.3d 1189, 1197 (9th Cir. 2011) (concluding statutorily required, but "no-strings-attached disclosure" to aggrieved trademark owner "voids any claim to confidentiality and constitutes a waiver of Exemption 4").

VIII. ARGUMENT

SPD may not produce unredacted copies of traffic accident reports to LexisNexis and withhold them from Mancini. This Court, in part relying on reasoning from federal FOIA decisions, has held that voluntary disclosure in one situation precludes later claims that records are exempt from release to someone else. *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 413 (1997) (citing *Cooper v. United States Department of the Navy,*

594 F.2d 484, 485–86 (5th Cir.1979); *State of North Dakota ex rel. Olson v. Andrus,* 581 F.2d 177, 182 (8th Cir.1978)).

Three key facts have remained true throughout this litigation: (1) nothing required SPD to provide LexisNexis with the reports at all, (2) nothing required SPD to provide LexisNexis with the reports free of restrictions, and (3) there are no restrictions in the agreement between SPD and LexisNexis as to what LexisNexis can provide to people from these reports. It has been correctly noted that SPD has mandatory reporting requirements under the Vehicle Code. C270. Yet, nothing requires that SPD produce the records to a third-party business as part of complying with those requirements. SPD concedes it could choose to provide them directly to the State with no middleman.[1] Not only did SPD choose to produce the records to LexisNexis, but it chose to do so without any restrictions on what LexisNexis may do with those records once it has them. C185 at ln. 4-11; C230-236. The agreement states that even if the agreement is terminated, LexisNexis is still free to sell all of the crash reports already in its possession. C182-183.

Once LexisNexis has the reports, it sells them to people for $13.00 while sending $5.00 to SPD. C52-53 at ¶¶ 4-8; C44-45. By statute, if SPD was providing these reports directly to people, it typically would not be allowed to charge more than $5.00 per report. 625 ILCS 5/11-416. In other words, SPD's arrangement with LexisNexis circumvents the $5.00 statutory cap on charges per report. As Justice Hyman correctly noted, SPD went much further than merely complying with its reporting requirements: it contracted "with LexisNexis to allow it to sell the unredacted reports to the public, without restrictions or

[1] Illinois Courts, First District Appellate Court Oral Argument Audio – 2020, *available at* https://multimedia.illinois.gov/court/AppellateCourt/Audio/2020/1st/081920_1-19-1131.mp3 (at 28:42-28:50).

privacy protections." *Mancini Law Grp., P.C. v. Schaumburg Police Dep't,* 2020 IL App (1st) 191131-U, ¶ 32 (Hyman, dissenting). By letting LexisNexis sell unredacted reports to the public, SPD waived the right to deny FOIA requests for the same reports. *Lieber,* 176 Ill. 2d at 413.

As this Court has stated, where Illinois FOIA and federal FOIA are similar, Illinois courts may look to the federal statute for guidance. *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 55. The nearly identical case, *Watkins*, proves compelling. 643 F. 3d 1189 (9th Cir. 2011). In *Watkins*, an attorney filed FOIA requests for "Notices of Seizure" sent by Customs and Border Protection to trademark owners. *Id.* CBP is required by statute to produce the notices to trademark owners. *Id.* However, CBP imposed no restrictions on the trademark owners' use of the notices so the owner could "freely disseminate the Notice to his attorneys, business affiliates, trade organizations, the importer's competitors, or the media ***." *Id*. The court found that "[t]his no-strings-attached disclosure *** voids any claim to confidentiality and constitutes a waiver" of the exemption." *Id.*

Almost exactly as in *Watkins*, SPD was statutorily required to produce reports to the State and of its own accord decided to use LexisNexis to perform that function. "But SPD placed no restrictions on LexisNexis's distribution of unredacted accident reports, though it could have, and LexisNexis distributed the unredacted reports to customers willing to pay for them. As in *Watkins*, this "no-strings attached" disclosure waived the exemption." *Mancini,* 2020 IL App (1st) 191131-U, ¶ 38 (Hyman, dissenting).

The majority did not address *Watkins* or the facts of this case. It held instead that the provision of unredacted accident reports to LexisNexis was not voluntary and instead

only occurred as "mandatory" compliance with the reporting requirement under the Vehicle Code. *Mancini*, 2020 IL App (1st) 191131-U, ¶¶ 19-20. As explained, however, the reality is that there was nothing mandatory about the relationship with LexisNexis at all. SPD did not have to contract with LexisNexis in the first place. If it chose to contract with LexisNexis it could have easily placed restrictions on what may be done with the reports. And SPD chose not to place any restrictions on LexisNexis' ability to resell the reports. In actuality, SPD contracted with LexisNexis to do two different things: (1) it opted to use LexisNexis as a middleman to comply with the mandatory reporting requirements of the Illinois Vehicle Code, and (2) it contracted with LexisNexis to allow it to sell the reports. *Mancini,* 2020 IL App (1st) 191131-U, ¶ 34 (Hyman, dissenting).

Put differently, "the flaw in the majority's reasoning is its refusal to appreciate that SPD separately contracted with LexisNexis to also permit the company to market those unredacted reports to the public for a profit, and that voluntary act constitutes waiver, as in *Lieber*." *Id.* As Justice Hyman observed, "neither SPD nor the majority cite a single case or authority that says a governmental entity can both withhold unredacted records under FOIA, while, at the same time, let a non-governmental, third-party vendor sell the unredacted records to the public." *Id.* There are no restrictions on to whom LexisNexis may sell the reports. *Id.* at ¶ 35.

IX. CONCLUSION

For these reasons, the Appellate Court should be reversed. This Court should rule that SPD waived the right to withhold the requested records and that the records must be immediately released. In the alternative, at a minimum, the order granting summary judgment for SPD should be reversed and the case should be remanded to the Circuit Court to resolve the material question of fact.

Dated: March 3, 2021

RESPECTFULLY SUBMITTED,

/s/ Joshua Hart Burday

_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 9 pages.

Dated: March 3, 2021

/s/ Joshua Hart Burday

APPENDIX

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

MANCINI LAW GROUP, P.C., Plaintiff, v. SCHAUMBURG POLICE DEPARTMENT, Defendant.	Case No. 2017 CH 13881 Calendar 03 Honorable Franklin U. Valderrama

MEMORANDUM OPINION AND ORDER

This matter comes to be heard on Plaintiff, Mancini Law Group, P.C.'s Motion for Partial Summary Judgment and Defendant, the Schaumburg Police Department's Cross-Motion for Summary Judgment. For the reasons that follow, Plaintiff's motion is denied and Defendant's cross-motion is granted.

BACKGROUND

On July 13, 2017, Plaintiff, Mancini Law Group ("Mancini"), submitted a request, pursuant to the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1 *et seq.*, to the Village of Schaumburg (the "Village") through its police department seeking copies of "any and all traffic accident reports for motor vehicle accidents occurring in Schaumburg between 6/30/17 and 7/13/17." The request acknowledged that the Village could redact the driver's license number, license plate, and date of birth of the parties involved.

The Village responded to the FOIA request on August 7, 2017, granting in part and denying in part the request. The Village informed Mancini that private information is exempt from disclosure pursuant to Section 7(1)(b) of FOIA. As such, the home addresses, home phone numbers, driver's license numbers, and license plate numbers were redacted from the requested records. The names of the persons involved in accidents, both drivers or witnesses, however, were not redacted. The Village also redacted dates of birth and insurance policy numbers from the requested records pursuant to Section 7(1)(c) of FOIA.

On October 17, 2017, Mancini filed a one-count complaint (the "Complaint") against Defendant, the Schaumburg Police Department (the "Department"), alleging that the Department willfully and intentionally failed to produce un-redacted copies of the requested records in violation of FOIA. Mancini seeks, among other things, a declaration that the Department violated FOIA.

The Department filed an Answer denying the material allegations of the Complaint, as well as an Affirmative Defense that the Department properly the redacted home addresses, personal telephone numbers, license plate numbers, and driver's license numbers of individuals on the accident reports pursuant to 5 ILCS 140/7(1)(b) and 140/7(1)(c).

Mancini, in turn filed a motion for partial summary judgment and the Department filed a cross-motion for summary judgment. These fully briefed motions are before the Court.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted when "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 the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016); *Safeway Ins. Co. v. Hister*, 304 Ill. App. 3d 687, 691 (1st Dist. 1999). That is, summary judgment is appropriate when there is no dispute as to any material fact but only as to the legal effect of the facts. *Dockery v. Ortiz*, 185 Ill. App. 3d 296, 304 (2d Dist. 1989). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Id.* The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. *Medow v. Flavin*, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment under the applicable law. *Pielet v. Pielet*, 407 Ill. App. 3d 474, 490 (2d Dist. 2010). In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion for summary judgment and liberally construe all evidentiary material submitted in opposition. *Kolakowski v. Voris,* 83 Ill. 2d 388 (1980).

In order to prevail on a motion for summary judgment in a FOIA case, the public body has the burden of showing that its search was adequate and that any withheld documents fall within a FOIA exemption. *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 996 (1st Dist. 2007). "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.

Where cross-motions for summary judgment are filed, the parties acknowledge that only a question of law is at issue and invite the court to decide the issues based on the record. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010). However, even where parties file cross-motions for summary judgment, the court is not obligated to grant summary judgment. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 949 (2d Dist. 2009). It is possible that neither party alleged facts, even if undisputed, that were sufficient to warrant judgment as a matter of law. *Id.* It is also possible that, despite the parties' invitation to the court to decide the issues as questions of law, a genuine issue of material fact may remain. *Id.*

DISCUSSION

Mancini argues that it is entitled to partial summary judgment[1] because there is no genuine issue of material fact that the Department failed to produce all non-exempt records. In a FOIA case, notes Mancini, the party bearing the burden of proof is the public body, in this case, the Department. The Department, asserts Mancini, must come forward with clear and convincing evidence that it has produced all non-exempt records. Mancini maintains that the Department has not satisfied its burden.[2]

The Department counters that Mancini's motion for partial summary judgment should be denied, and that its own motion for summary judgment should be granted because there is no genuine issue of material fact that the Village properly redacted personal information from the responsive records pursuant to Sections 7(1)(b) and 7(1)(c) of FOIA.[3]

Section 7(1)(b), asserts the Department, applies in this case as that section provides that private information is exempt under FOIA unless disclosure is required under another FOIA provision, state or federal law or a court order. Nothing in FOIA, insists the Department, requires the release of an address in an accident report. Nor is there, according to the Department any state or federal law that requires accident reports or the personal information identified in the Village's response to be provided to Mancini. In fact, notes the Department, the Illinois Vehicle Code (the "Vehicle Code") expressly states that accident reports are confidential, citing 625 ILCS 5/11-412. Further, asserts the Department, courts interpreting the Vehicle Code have found that the Vehicle Code requires "drivers or the police to report accident to a governmental authority under certain circumstances," but it does not require disclosure of such reports to the public, citing *Pavone v. Law Offices of Anthony Mancini, Ltd.*, 205 F. Supp. 3d 961, 968 (N.D. Ill. 2016).

In addition, contends the Department, the Attorney General's Office has also issued Public Access Counselor opinions that confirm that home addresses, driver's license numbers, personal phone numbers, and license plate numbers of individuals can be redacted from traffic accident reports pursuant to Section 7(1)(b) of FOIA, citing Att'y Gen. PAC Req. Rev. Ltr. 34767, issued August 12, 2016, and Att'y Gen PAC Req. Rev. Ltr. 33047, issued May 4, 2015.

Section 7(1)(c), contends the Department, is also an inapplicable exemption in this case. Section 7(1)(c), notes the Department, exempts from disclosure "personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information," citing 140/7(1)(c). Not only is a birthdate personal information exempted by FOIA from disclosure, asserts the Department, there is no legitimate public interest for someone

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[1] Mancini entitles its motion as a motion for "partial" summary judgment and similarly refers to it as such in its reply/response to the Department. However, nowhere in Mancini's motion does it indicate what portion of its Complaint it seeks to "partially" move on. The Court construes the motion to exclude Mancini's request for a declaration that the Department willfully and intentionally violating FOIA.

[2] Mancini does not submit any exhibits in its opening motion.

[3] In support of its motion, the Department submits various Public Access Counselor opinions by the Illinois Attorney General.

to obtain an individual's date of birth. Similarly, argues the Department, insurance policy numbers are recognized as personal information under FOIA that can be redacted pursuant to Section 7(1)(c). In addition, notes the Department, the Illinois Attorney General's Office has determined that insurance policy numbers are part of a private contractual relationship between an individual and the insurance company and an individual's right to privacy in these personal details outweighs any legitimate public interest in obtaining the information, citing Att'y Gen. PAC Req. Rev. Ltr 33047 issued May 4, 2015, Att'y Gen. PAC Pre-Auth. 17547, issued June 7, 2010, and Att'y Gen. PAC Pre-Auth. 6236, issued March 22, 2010.

Mancini, in its reply, concedes that the Vehicle Code on its own does not affirmatively require disclosure of the traffic accident reports.[4] Rather, asserts Mancini, the Vehicle Code allows for the disclosure of the accident reports under FOIA, citing 625 ILCS 5/11-408(a). Had the General Assembly intended to prevent the disclosure of the accident reports, posits Mancini, it would have said so, as it did in the case of Illinois Department of Transportation ("IDOT") reports. Section 11-412, notes Mancini, explicitly states that reports of IDOT are exempt from disclosure under FOIA. As such, reasons Mancini, the Department may not redact information from the accident reports it is required to disclose.

Section 7(1)(d)(iv), argues Mancini, requires the disclosure of the traffic accident report. That section, notes Mancini, states that "traffic accident reports," "witnesses to traffic accidents," and "rescue reports" shall be provided. Section 7(1)(d)(iv)'s broad language, insists Mancini, requires the disclosure of traffic accident reports. Accepting the Department's interpretation that 7(b)(1) and 7(c)(1) allows for the redaction of nearly all information in traffic accident reports, reasons Mancini, would render the language in Section 7(1)(d)(iv) superfluous and meaningless, which is an impermissible interpretation of the statute.

Section 2.15 of FOIA, notes Mancini, actually supports his contention as it provides that "information that identifies the individual, including the name, age, address, and photographs, when available must be disclosed," citing 5 ILCS 140/2.15. This section, posits Mancini is consistent with FOIA's goal of transparency.

Further, according to Mancini, the Department's reliance on the Public Access Counselor's ("PAC") opinions for the proposition that it may redact information from traffic accident reports is misplaced because PAC opinions are not binding authority. Moreover, argues Mancini, the PAC opinions do not address the Vehicle Code, Section 7(1)(d)(iv), Section 2.15 or *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401 (1997) In other words, asserts Mancini, the PAC opinions do not address the law or controlling authority in this case. As to this point, Mancini insists that Illinois law requires the disclosure because voluntary disclosure in one situation precludes later claims that records are exempt from release to someone else, citing *Lieber.* For years, asserts Mancini, the Department has produced un-redacted copies of traffic accident reports to LexisNexis. LexisNexis, notes Mancini, is a third-party reseller that charges $13.00 for each report and remits $5.00 of that sum to the Department. Since the Department

[4] In support of its Reply, Mancini submits: (1) *Whitaker v. Appriss, Inc.*, No. 3-cv-826 (N.D. Ind. 2017), Ex. A; (2) a transcript of the Discovery Deposition of Jennifer Brack, August 16, 2018, Ex. B; and (3) a copy of "Law Enforcement Agency Agreement" with iyeTek LLC, Ex. C.

already discloses un-redacted traffic accident reports to a third-party, reasons Mancini, the Department must disclose un-redacted traffic accident reports to Mancini as well.

The Department replies that Mancini misinterprets the Vehicle Code. The Vehicle Code, according to the Department, does not only apply to IDOT reports, but instead, applies to all reports referenced in Section 11-412. Next, the Department contends that Mancini's arguments regarding waiver lack merit. *Lieber*, argues the Department, was decided in 1997 prior to various amendments to the FOIA statute in 2010. Second, asserts the Department, *Lieber* concerned Section 7(1)(c), not Section 7(1)(b), of FOIA. Lastly, contends the Department, Mancini, as the party asserting waiver, has the burden to establish waiver and failed to do so.

The Court turns to the relevant statute. Section I of FOIA sets forth the public policy of FOIA and provides:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.
>
> The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.
>
> *** *** ***
>
> Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expediently and efficiently as possible and adherence to the deadlines established in this Act.

5 ILCS 140/1 (West 2016).

The purpose of FOIA is "'to open governmental records to the light of public scrutiny.'" *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 13 (quoting *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65,* 128 Ill. 2d 373, 378 (1989)). Thus, under FOIA, "public records are presumed to be open and accessible." *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 405 (2009). Illinois courts have repeatedly emphasized the fundamental principle of public access to government records that animates FOIA. FOIA contemplates "full and complete disclosure of the affairs of government and recognizes that such disclosure is necessary to enable the people to fulfill their duties to monitor government." *Id.* Illinois's FOIA statute was modeled after the federal FOIA statute and case law interpreting the federal statute may guide Illinois courts' interpretation of the Illinois FOIA. *Hites v. Waubonsee Community College,* 2016 IL App (2d) 150836.

The FOIA process begins when an individual requests copies of public records from a public body. See 5 ILCS 140/3(c). Section 2 of FOIA defines "public records" as:

> All records, reports, forms, writings, letter, memoranda, books, papers, maps, photographs, microfilms, cards, 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 (West 2016).

Once a public body receives a FOIA request, it must search for and provide information responsive to the request within five business days unless an extension is requested. 5 ILCS 140/3 (West 2016). The public body must provide information responsive to the request unless the information is exempt under Section 7 of FOIA. 5 ILCS 140/7 (West 2016). Under Section 1.2 of FOIA, "any public body that asserts that a record is exempt from disclosure has the burden by clear and convincing evidence that it is exempt." 5 ILCS 140.1.2 (West 2016). Actions under FOIA arise when the public body fails to respond to the FOIA request or when the public body improperly asserts an exemption. 5 ILCS 140/11 (West 2016).

Section 11(a) of FOIA provides that a requesting party denied access to a public record may sue the public body that denied its request "for injunctive or declaratory relief." 5 ILCS 140/11(a) (West 2016). If "the court determines that that a public body willfully and intentionally failed to comply with FOIA, or otherwise acted in bad faith, the court shall impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each of occurrence." 5 ILCS 140/11(j) (West 2016).

As previously noted, courts are guided by the principle that under FOIA, public records are presumed to be open and accessible. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456, 462 (2003). The General Assembly, however, recognized that legitimate governmental interests and private interests could be harmed by the release of certain

types of information. Accordingly, the General Assembly, in an effort to balance between the right of the public to know and the need to keep information in confidence, established exemptions to the general rule of disclosure. These exemptions are contained in section 7 of FOIA. The exemptions at issue are 7(1)(b) and 7(1)(c).

Section 7(1) of FOIA states in pertinent part:

> [T]he following shall be exempt from inspection and copying:
>
> *** **** ****
>
> (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.
>
> (b) Private information, unless the disclosure is required by another provision of this Act, a State or federal law or a court order.
>
> (c) Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. "Unwarranted invasion of privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information…
>
> (d) 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:
>
> *** *** ***
>
> (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…

5 ILCS 140/7(1) (West 2016).

A public body must comply with a valid request for information unless one of the narrow statutory exemptions set forth in FOIA applies. *Watkins*, 2012 IL App (1st) 100632, ¶ 13 (citing *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (1st Dist. 2009)). "If the public body seeks to invoke one of the exemptions in section 7 as grounds for refusing disclosure, it is required to give written notice specifying the particular exemption claimed to authorize the denial." *Ill. Educ. Ass'n v. Ill. State Bd. of Educ.*, 204 Ill. 2d 456, 464 (2003) (quoting *Lieber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill. 2d 401, 408 (1997), and 5 ILCS 140/9(b) (West 2016)).

Thereafter, if the party seeking disclosure of information under FOIA challenges the public body's denial in circuit court, the public body has the burden of proving that the records in question fall within the exemption it has claimed. *Id.* (citing *Lieber*, 176 Ill. 2d at 408 and 5 ILCS 140/11 (West 2016)). "To meet this burden and to assist the court in making its determination, the agency must provide a *detailed* justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." *Id.* (emphasis in original) (quoting *Baudin v. City of Crystal Lake,* 192 Ill. App. 3d 530, 537 (2d Dist. 1989)); *accord Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1012 (1st Dist. 1994); *Carbondale Convention Center, Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 477 (5th Dist. 1993). "'If the public body's claims are conclusory, merely recite statutory standards, or are too vague or sweeping,' affidavits will not suffice to satisfy the public body's burden of proof." *Id.* (quoting *Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 469 (2003)).

Resolution of the issues presented by the parties requires an examination of FOIA and application of the rules of statutory construction. In construing FOIA, the Court is guided by familiar principles. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Wade v. City of N. Chicago Police Pension Bd.*, 226 Ill. 2d 485, 509-10 (2007). The best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. *Caveney v. Bower*, 207 Ill. 2d 82, 88 (2003). A court must examine the language of the statute as a whole, and consider each part or section in connection with every other part or section. *Grady v. Sikorski*, 349 Ill. App. 3d 774, 776-77 (1st Dist. 2004). Where possible, courts will adopt a construction that will give effect to every word, clause, and sentence. *In re Marriage of Murphy*, 203 Ill. 2d 212, 219 (2003). Courts strive to read statutes so as not to render any portion inoperative or superfluous. *Id.* Where the statutory language is clear and unambiguous, it is unnecessary to turn to other tools of construction. *Caveney*, 207 Ill. 2d at 88. Unless a different intention is manifested, a reviewing court must give the words of a statute their plain and ordinary meaning. *Estate of Heanue v. Edgcomb*, 355 Ill. App. 3d 645, 649 (2d Dist. 2005).

The Department argues that traffic accident reports may be redacted to remove any private information, citing 7(1)(b) and 7(1)(c). The Department, as the public body, has the burden of proving that the requested records fall within the exemptions it has asserted. The Court addresses each in turn.

EXEMPTION 7(1)(b)

The first exemption asserted by the Department is Section 7(1)(b). This exemption exempts information that is "[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 2016).

FOIA defines "private information" as:

> …[U]nique identifiers, including a person's social security number, driver's license number, employee identification, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

5 ILCS 140/2(c-5) (West 2016).

Mancini requested "any and all traffic accident reports for motor vehicle accidents occurring in Schaumburg between [June 30, 2017] and [July 13, 2017]." These reports contain the telephone numbers, home addresses, personal license plate numbers, and insurance policy numbers of those individuals involved in a traffic accident. Under Section 2(c)(5) of FOIA, home or personal telephone numbers, home addresses and personal license plates constitute "private information." 5 ILCS 140/2(c)(5). Therefore, unless the disclosure of "private information" is required by another FOIA provision, state or federal law, as indicated in Section 7(1)(b), that information is exempt.

Mancini maintains that Section 11-408 of the Vehicle Code and Section 7(1)(d)(iv) of FOIA require disclosure of the private information. Section 11-408 of the Illinois Vehicle Code, entitled "Police to report motor vehicle accident investigations," governs a law enforcement officer's duties to prepare a written report following motor vehicle accident investigations. Section 5/11-408 states, in pertinent part:

> (a) Every law enforcement officer who investigates a motor vehicle accident for which a report is required by this Article or who prepares a written report as a result of an investigation either at the time and scene of such motor vehicle accident or thereafter by interviewing participants or witnesses shall forward a written report of such motor vehicle accident to the Administrator on forms provided by the Administrator under Section 11-411 [625 ILCS 5/11-411] within 10 days after investigation of the motor vehicle accident, or within such other time as it is prescribed by the Administrator. Such written reports and the information contained in those reports required to be forwarded by law enforcement officers shall not be held confidential by the reporting law enforcement officer or agency. The Secretary of

> State may also disclose notations of accident involvement maintained on individual driving records…

625 ILCS 5/11-408 (West 2016).

A plain reading of 11-408 reveals that under this section, an officer investigating a traffic accident is required to file a detailed report with the Department of Transportation and the Secretary of State. Section 11-408 further provides that the traffic accident reports and the information contained therein shall not be held confidential by the reporting law enforcement officer or agency. This Court construes this language as prohibiting the officer or the law enforcement agency from refusing to provide the report or the information contained therein to the Department of Transportation or the Secretary of State on the basis of confidentiality. The Court does not read it as a requirement that traffic accident reports or the private information contained therein must be disclosed under FOIA. See *Pavone v. Law Offices of Anthony Mancini Ltd.*, 205 F. Supp. 3d 961 (N.D. Ill. 2016).

Section 11-412 of the Vehicle Code supports the Court's reasoning. Section 11-412 of the Illinois Vehicle Code governs the confidentiality of motor vehicle accident reports. Section 11-412 states in relevant part:

> (a) All required motor vehicle accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department and the Secretary of State …except that the Administrator or the Secretary of State or the Commission may disclose the identity of a person involved a motor vehicle accident when such identity is not otherwise known or when such person denies his presence at such motor vehicle accident and the Department shall disclose the identity of the insurance carrier, if any, upon demand. The Secretary of State may also disclose notations of accident involvement maintained of individual driving records.
>
> (b) Upon written request, the Department shall furnish copies of its written accident reports or any supplemental reports to federal, State, and local agencies that are engaged in highway safety research and studies and to any person or entity that has a contractual agreement with the Department or a federal, State, or local agency to complete a highway safety research and study for the Department or the federal, State, or local agency. Reports furnished to any agency, person, or entity other than the Secretary of State or the Illinois Commerce Commission may be used only for statistical or analytical purposes and shall be held confidential by that agency, person, or entity. *These reports shall be exempt from inspection and copying under the Freedom of Information Act* and shall not be used as evidence in any trial, civil or criminal, arising out of a motor vehicle accident… .

625 ILCS 11-412 (West 2016) (emphasis added).

Section 11-412 of the Vehicle Code expressly precludes from disclosure traffic accident reports. As such, the Court finds that the Vehicle Code does not mandate disclosure of either traffic accident reports or "private information" contained within those reports.

Mancini insists that traffic accident reports are not exempt, but also must be disclosed, citing Section 7(1)(d)(iv). The Department, on the other hand, maintains that Section 7(1)(d)(iv) does not mandate disclosure. Rather, reasons the Department, Section 7(1)(d)(iv) merely prevents a public body from relying on Section 7(1)(d)(iv) to withhold the identities of witnesses to accidents. The Court disagrees with the Department's interpretation.

Section 7(1)(d)(iv) expressly exempts:

> (d) 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:
>
> (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…

5 ILCS 140/7(1)(d)(iv) (West 2016) (emphasis added).

Under the plain language of Section 7(d)(1)(iv), neither the identity of witnesses to traffic accidents nor the traffic accident reports themselves are exempt from disclosure. FOIA's exemptions to disclosure are to be construed narrowly so as not to detract from the intended statutory purpose. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006). The Department's interpretation of Section 7(1)(d)(iv) expands the scope of the exemption in contravention to FOIA's stated purpose.

Further, the Court notes that the Department has not argued that the traffic accident reports are exempt under Section 7(1)(d)(iv). Rather, the Department's position is that it may redact private information from traffic accident reports. The Court agrees with this interpretation and finds that the Department has satisfied its burden, by clear and convincing evidence, that it may redact "private information" from the traffic accident reports. While the Court could end its analysis at this juncture, it will proceed to consider the Department's proffered Section 7(1)(c) exemption.

EXEMPTION 7(1)(c)

The Department argues that the Village properly redacted the dates of birth and policy account numbers pursuant to Section 7(1)(c).

Section 7(1)(c) expressly exempts:

> Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. 'Unwarranted invasion of personal privacy' means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

5 ILCS 140/7(1)(c) (West 2016).

Section 7(1)(c)'s exemption applies only to "unwarranted" invasions of personal privacy, not just any invasion of personal privacy. Mancini, in its reply, notes that in order to alleviate the Department's concerns, it does not object to the redaction of the driver's license numbers and birth dates from the traffic accident reports. Therefore, the only issue remaining is whether the Village's redaction of the insurance policy numbers constitutes a clearly unwarranted invasion of the personal privacy of those motorists involved in traffic accidents in Schaumburg during the relevant time period.

The Department argues that insurance policy numbers are personal information under FOIA that can be redacted pursuant to Section 7(1)(c). An insurance policy number, asserts the Department, can be attributed to a certain individual and therefore be classified as personal. The Department cites an Attorney General PAC opinion for the proposition that an insurance policy is part of a contractual relationship between an individual and an insurance company and the public has no legitimate interest in that information. Mancini counters that the Attorney General opinion is not binding on this court and, notwithstanding this, the PAC opinion involved a different FOIA exemption.

To determine whether disclosure would constitute an unwarranted invasion of personal privacy, courts consider: (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 information. *National Association of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010). Neither party addressed these factors in their respective briefs.

In applying these factors, the Court finds that disclosure of the insurance policy numbers would constitute an unwarranted invasion of privacy. Mancini's motion fails to articulate its

interest in the disclosure of the insurance policy numbers of motorists involved in traffic accidents. Thus, the public interest in the disclosure is negligible at best, and disclosure would not advance the core purpose of FOIA, "'to open governmental records to the light of public scrutiny.'" *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 13 (quoting *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65,* 128 Ill. 2d 373, 378 (1989)). On the other hand, the invasion of personal privacy is significant. "An individual's interest in personal privacy is not limited to his or her interest in keeping personal facts private." *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994). Rather, the privacy interest encompasses the individual's control of information concerning his or her person. *Id.* at 502.

Further, while the Court agrees with Mancini that the Public Access Opinion[5] is not binding on this Court, the Court agrees with the reasoning articulated by the Attorney General's Office, namely that an insurance policy is part of a contractual relationship between an individual and an insurance company, and the public has no legitimate interest in that information. Indeed, at no point in its brief does Mancini articulate any public interest relating to the disclosure of such private information. In sum, disclosure of an individual's insurance policy number would constitute an unwarranted invasion of the individual's personal privacy.

Last, the Court addresses Mancini's claim that since the Department has provided un-redacted copies of traffic accident reports to LexisNexis, it cannot refuse to provide these records to Mancini, citing *Lieber v. Bd. of Trustees of S. Illinois Univer.*, 176 Ill. 2d 401, 413 (1997). The Department counters that *Lieber* has been overruled by a subsequent amendment to FOIA and that in any event, *Lieber* involved Section 7(1)(b), not Section 7(1)(c).

At the outset, the Court notes that Mancini raises the issue of voluntary disclosure for the first time in its reply. In fact, Mancini not only raises it for the first time there, but also submits evidence in support of this new argument, to which the Department did not object nor address. The Court notes, generally, that arguments raised for the first time in a reply brief are discouraged and not considered. See, *e.g.* Ill. S. Ct. R. 341(h)(7) (eff. Nov. 11, 2017) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). While it is the Department's burden to establish that all applicable exemptions apply in this case, it is nevertheless still Mancini's burden on its own motion for summary judgment to raise what it views to be any relevant arguments as to why the Department cannot prove that it properly exempted the requested materials. As demonstrated in Mancini's opening motion for summary judgment, Mancini did not raise the issue of voluntary disclosure under *Lieber*:

---

[5] Pursuant to Section 9.5 of FOIA, any person "whose request to inspect or copy a public record is denied by a public body, except the General Assembly and committees, commissions, and agencies thereof, may file a request for review with the Public Access Counselor established in the Office of the Attorney General." 5 ILCS 140/9.5(a) (West 2016). Interestingly, while not mentioned by either party, Section 9.5 prohibits this option to any person who seeks to inspect or copy a public record for a commercial purpose as defined further in the statute. See 5 ILCS 140/9.5(b).

Nonetheless, any opinion issued by the Public Access Counselor is binding *only* upon the requestor and the public body, subject to administrative review pursuant to Section 11.5 of FOIA. 5 ILCS 140/9.5(f).

> It is undisputed that [the Department] is a public body and that Mancini made requests for records that were denied in whole or in part. As discussed above, [the Department] must prove, by clear and convincing evidence, that anything withheld is exempt from disclosure under the statute. Mancini will address [the Department's] evidence and arguments once they are provided *in response* to this motion.

Pl. Mot. Summ. Judg., p. 5. (emphasis added).

On this basis alone, the Court could choose not to consider Mancini's contentions regarding *Lieber* and voluntary disclosure. However, given the Department's acquiescence, the Court will address the substance of the argument.

The Court first examines *Lieber.* In *Lieber*, the plaintiff requested the names and addresses of individuals who had been accepted to attend Southern Illinois University, a public university. The university asserted that the information was exempt from disclosure because, among other reasons, it constituted personal information maintained with respect to students or other individuals receiving educational services from a public body. *Lieber*, 176 Ill. 2d at 406. The trial court granted the university's motion for summary judgment and the plaintiff appealed. The appellate court reversed, finding in part that the university had failed to meet its burden of showing that the requested information was exempt.

The Illinois Supreme Court affirmed. The court found that the names and addresses of the students constituted basic information that did not rise to the level of "personal information" considered "private" or "confidential" as intended by the legislature. *Id.* at 412. In addition, the court found that while the university insisted that the names and addresses of students were private and must be protected from disclosure, the university disclosed the same requested information to other groups. The court found that "the only reason the university has treated [the plaintiff] differently is that he is in direct competition with the university for what is apparently a dwindling freshmen housing market." *Id.* at 413.

The Court agrees with Mancini that the 2010 amendments to FOIA, specifically 5 ILCS 140(7), are not relevant to the issue before the Court.[6] Nor is the Court persuaded that this amendment overrules *Lieber*. The Court also finds the Department's contention that *Lieber* is inapplicable unpersuasive. The Department argues that the FOIA exemption in *Lieber* is distinguishable from the ones asserted here. However, Mancini does not cite *Lieber* for a specific FOIA exemption; rather, Mancini cites *Lieber* for the proposition that voluntary disclosure by a public body to one entity precludes the public body from denying the records to another.

However, the Court nonetheless still finds *Lieber* distinguishable from the instant action. In *Lieber*, the university *selectively* and voluntarily disclosed the disputed requested information

[6] Pursuant to Public Act 96-542, FOIA was amended in 2010 to provide that: "When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, *the public body may elect to redact* the information that is exempt. The public body shall make the remaining information available for inspection and copying." 5 ILCS 140(7)(1) (emphasis added). Other changes included the creation of the Public Access Counselor. *Id.*

to other third parties on a routine basis, while here, there is no evidence of the Department voluntarily or selectively releasing such information previously requested by Mancini to other third parties. Rather, any disclosure by the Village is to comply with Illinois law. Specifically, the Village is statutorily mandated to provide similar information, namely un-redacted accident reports, to Lexis Nexis to comply with the Vehicle Code's mandatory reporting requirements. See Pl. Mot. for Summ. Judg., Dep. of Jennifer Brack, Ex. B., 10:3-8, 21:11-24, 22:1-4. The Court finds that this disclosure to LexisNexis does not rise to the level of selective, voluntary disclosure articulated in *Lieber* and thus does not find any waiver of the asserted exemptions by the Village.

Accordingly, the Court finds that the Department has met its burden in establishing that there is no genuine issue of material fact that the Village properly redacted personal information from the responsive records pursuant to Sections 7(1)(b) and 7(1)(c) of FOIA. Accordingly, Mancini has not met its burden in establishing that the Department failed to produce all non-exempt records under FOIA.

CONCLUSION

For the foregoing reasons, Plaintiff, Mancini Law Group, P.C.'s Motion for Partial Summary Judgment is denied, and Defendant, the Schaumburg Police Department's Cross-Motion for Summary Judgment is granted.

ENTERED:

ENTERED
JUDGE FRANKLIN ULYSES VALDERRAMA-1968
APR 29 2019
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Franklin U. Valderrama, Judge Presiding

DATED: April 29, 2019

Notice of Appeal (10/17/18) CCG 0256 A

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY **DEPARTMENT,** CHANCERY **DIVISION/DISTRICT**

MANCINI LAW GROUP, P.C.

Plaintiff/ ◉ Appellant ○ Appellee

v.

SCHAUMBURG POLICE DEPARTMENT

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.: _____

Circuit Court No.: 2017 CH 13881

NOTICE OF APPEAL

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☑ Separate Appeal ☐ Cross Appeal

Appellant's Name: Mancini Law Group, P.C.

◉ Atty. No.: 41295
○ Pro Se 99500

Name: Joshua Burday - Loevy & Loevy

Address: 311 N. Aberdeen St., 3rd Fl.

City: Chicago

State: IL Zip: 60607

Telephone: (312) 243-5900

Primary Email: foia@loevy.com

Appellee's Name: Schaumburg Police Departm

◉ Atty. No.: 90446
○ Pro Se 99500

Name: Mallory Milluzzi

Address: 20 N. Wacker Drive, Ste. 1660

City: Chicago

State: IL Zip: 60606

Telephone: (312) 984-6429

Primary Email: mamilluzzi@ktjlaw.com

Notice of Appeal **(10/17/18) CCG 0256 B**

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 4/29/19

Name of judge who entered the judgment/order being appealed: Hon. Franklin U. Valderrama

Relief sought from Reviewing Court:

Plaintiff-Appellant appeals the circuit court's order denying Plaintiff's motion for partial summary judgment and granting Defendant-Appellee's cross-motion for summary judgment and asks that the Appellate Court reverse the decision and remand the case for further proceedings.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

Joshua Kurt Burday

To be signed by Appellant or
Appellant's Attorney

CERTIFICATE OF SERVICE

I, Joshua Burday, an attorney, hereby certify that on May 29, 2019, I caused the foregoing Notice of Appeal to be served on all counsel of record via electronic mail.

/s/ Joshua Hart Burday

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APPEAL TO THE APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT

COOK COUNTY, ILLINOIS

MANCINI LAW GROUP, P.C.

Plaintiff/Petitioner

Reviewing Court No: 1-19-1131
Circuit Court No: 2017CH013881
Trial Judge: FRANKLIN U. VALDERRAMA

v.

SCHAUMBURG POLICE DEPARTMENT

Defendant/Respondent

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APPEAL TO THE APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT

COOK COUNTY, ILLINOIS

MANCINI LAW GROUP, P.C.

Plaintiff/Petitioner

Reviewing Court No: 1-19-1131
Circuit Court No: 2017CH013881
Trial Judge: FRANKLIN U. VALDERRAMA

v.

SCHAUMBURG POLICE DEPARTMENT

Defendant/Respondent

E-FILED
Transaction ID: 1-19-1131
File Date: 7/31/2019 4:44 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

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2020 IL App (1st) 191131-U

FIRST DIVISION
October 19, 2020

No. 1-19-1131

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MANCINI LAW GROUP, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 17 CH 13881
	)	
SCHAUMBURG POLICE DEPARTMENT,	)	The Honorable
	)	Franklin U. Valderrama,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Griffin concurred in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held*: The judgment of the circuit court is affirmed. Defendant did not waive its right to produce redacted accident reports under FOIA by providing unredacted copies of those reports to a third-party vendor for the State of Illinois for the purposes of complying with its mandatory reporting obligations under the Vehicle Code.

¶ 2 Plaintiff, Mancini Law Group, P.C., appeals from the circuit court's entry of summary judgment in favor of defendant, Schaumburg Police Department. The circuit court found that there was no genuine issue of material fact as to whether defendant properly redacted information from the records it provided to plaintiff in response to plaintiff's request under the Freedom of

Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)), and that defendant did not waive its right to produce redacted accident reports to plaintiff after providing unredacted copies of the reports to LexisNexis, a third-party vendor for the State of Illinois. Plaintiff's sole argument on appeal is that defendant waived any right to withhold the unredacted accident report records because it earlier provided unredacted accident reports to LexisNexis. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff sent a FOIA request to defendant seeking "all traffic accident reports for all motor vehicle accidents occurring within the Village of Schaumburg" for a two-week period during 2017. Plaintiff requested that defendant redact personal information—including driver's license numbers, license plate numbers, and dates of birth—from the reports. Defendant granted in part and denied in part plaintiff's request. Defendant asserted that driver's license numbers, personal telephone numbers, home addresses, and license plate numbers were exempt from disclosure under section 7(1)(b) of FOIA (*id.* § 7(1)(b)), and dates of birth and insurance policy account numbers were exempt from disclosure under section 7(1)(c) (*id.* § 7(1)(c)). The names of the persons involved in the accident, both drivers and witnesses, were not redacted. Defendant produced redacted copies of the requested accident reports.

¶ 5 Plaintiff filed a complaint in the circuit court of Cook County, asserting that it had sought nonexempt public records and that defendant's redactions from the accident reports were willful and intentional violations of FOIA. Plaintiff sought declaratory and injunctive relief, civil penalties, and attorney fees. Defendant's motion to dismiss plaintiff's complaint was denied,[1] and the parties engaged in discovery.

[1]Defendant's motion to dismiss argued, in part, that defendant did not have the legal capacity to be sued because it was merely a division of the Village of Schaumburg. The circuit court disagreed and

¶ 6 The parties filed cross-motions for summary judgment, which were fully briefed. Plaintiff asserted, in relevant part, that the redacted information—including home addresses, home phone numbers, driver's license numbers, dates of birth, policy numbers, and license plate numbers—was not protected information under FOIA and that, even if the information was protected, defendant waived any exemptions to disclosure by providing unredacted versions of the accident reports pursuant to a contract with LexisNexis. Plaintiff further asserted that "for years, [defendant] has produced completely unredacted copies of traffic accident reports to LexisNexis," and that as recently as January 2018, "LexisNexis was used to purchase a completely unredacted *** traffic accident report." Defendant responded that it provides unredacted versions of the accident reports to LexisNexis, an approved third-party vendor for the State of Illinois, as part of defendant's mandatory reporting requirements under section 408 of the Illinois Vehicle Code (625 ILCS 5/11-408 (West 2016)).[2] After hearing oral argument, the circuit court entered a written order entering summary judgment in favor of defendant and against plaintiff, finding the redacted information was exempt under FOIA and that defendant's furnishing of unredacted accidents reports to LexisNexis did not waive any right to redact the reports because the disclosure to LexisNexis was required by statute. Plaintiff filed a timely notice of appeal.

¶ 7 II. ANALYSIS

¶ 8 On appeal, plaintiff does not argue that the redacted information is not exempt under sections 7(1)(b) or 7(1)(c). As noted above, in plaintiff's FOIA request, plaintiff requested that defendant redact the driver's license numbers, license plate numbers, and dates of birth from the

concluded that defendant is a "public body" for the purposes of FOIA. Defendant does not challenge the circuit court's conclusion on appeal.

[2] The State has a statutory duty to maintain the confidentiality of accident reports in its possession, subject to narrow exceptions. 625 ILCS 5/11-412 (West 2018); *Arnold v. Thurston*, 240 Ill. App. 3d 570, 573-74 (1992).

accident reports. *Supra* ¶ 4. In other words, plaintiff never sought that information. As such, the circuit court was left with deciding whether disclosure of a motorist's home address, home phone number, and insurance policy numbers, constitutes a clearly unwarranted invasion of the personal privacy of those motorists involved in a traffic accident and therefore eligible for an exemption. In its combined response to defendant's cross-motion for summary judgment and reply brief in support of its motion for summary judgment, plaintiff for the first time argued that defendant waived any right to redact information from the reports, thereby entitling plaintiff to the full, unredacted reports containing information that it never originally sought. On appeal, plaintiff's sole argument is that defendant waived its right to claim the names and addresses shown in the accident reports were exempt from disclosure because defendant, pursuant to a contract, provided unredacted accident reports, including names and addresses, to LexisNexis, which in turn sells the unredacted reports to the public, again presumably seeking the entire unredacted accident reports.

¶ 9 Plaintiff relies on our supreme court's decision in *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401 (1997) to argue that the voluntary disclosure of unredacted records in one situation precludes a later assertion that the previously unredacted information can be withheld as exempt from disclosure under FOIA. Plaintiff asks us to reverse the entry of summary judgment in favor of defendant.

¶ 10 Summary judgment is appropriate if the pleadings, depositions, affidavits, and other admissions on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016); *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. The purpose of summary judgment is not to try a question of fact, but rather to determine whether one exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). "When parties file cross-motions for summary judgment, they mutually agree that there are no

genuine issues of material fact and that only a question of law is involved." *Jones v. Municipal Employees' Annuity & Benefit Fund*, 2016 IL 119618, ¶ 26. We review a circuit court's ruling on summary judgment *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 11 Section 1 of FOIA provides, in part,

> "Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.
>
> The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.
>
> This Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information." 5 ILCS 140/1 (West 2016).

¶ 12 "All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." *Id.* § 1.2. FOIA is to be liberally construed while its exemptions are to be narrowly construed. *Rushton v. Department of Corrections*, 2019 IL 124552, ¶ 15 (citing *Southern Illinoisian v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006)).

¶ 13 Section 7(1) of FOIA provides:

> "When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying." 5 ILCS 140/7(1) (West 2016).

¶ 14 FOIA provides that certain information "shall be exempt from inspection and copying," such as "private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." *Id.* § 7(1)(b)). Also exempt from disclosure is

> "Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. 'Unwarranted invasion of personal privacy' means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public

duties of public employees and officials shall not be considered an invasion of personal privacy." *Id.* § 7(1)(c).

¶ 15 In *Lieber*, our supreme court considered whether Southern Illinois University properly denied a FOIA request made by the plaintiff that sought "information about housing inquiries from or on behalf of people who had been accepted as freshman, but who had not yet enrolled." 176 Ill. 2d at 410. Our supreme court found that the specific information sought by the plaintiff was not exempt under a FOIA exemption that applied "to 'other individuals receiving*** educational *** services,' as well as to 'students.' " *Id.* at 410-411 (citing 5 ILCS 140/7(1)(b)(i) (West 1994)). Additionally, the supreme court rejected the university's claim that the names and addresses of accepted students were private because the university "routinely makes available to other groups, including the local newspaper and religious organizations, lists containing the names and addresses of individuals who have been accepted by the University but who have not yet enrolled." *Id.* at 412-13. The court endorsed federal decisions holding that "voluntary disclosure in one situation can preclude later claims that records are exempt from release to someone else." *Id.* at 413 (citing *Cooper v. United States Department of the Navy*, 594 F.2d 484, 485-86 (5th Cir. 1979)). The court further agreed that "selective disclosure by the government 'is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government the FOIA was intended to obviate.' " *Id.* (quoting *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)). The court found that the principles outlined in *Cooper* and *Andrus* "should be applied here to bar the University from asserting an exemption" under FOIA. *Id.*

¶ 16 Here, plaintiff concedes that "LexisNexis is acting as a contractor for the State of Illinois and a conduit for [defendant] to fulfill its reporting requirements to the State." Section 11-408 of

the Vehicle Code requires the filing of motor vehicle accident reports with the Secretary of State and the Department of Transportation. 625 ILCS 5/11-408 (West 2016). Rather than defendant sending accident reports directly to the State, the State employs LexisNexis as its agent to receive and maintain accident reports. By doing so, we see no reason to find defendant's compliance with a statutory reporting requirement to be the equivalent of a "selective disclosure," or "preferred treatment" as discussed in *Lieber*.

¶ 17 Plaintiff relies on *Lieber* to argue waiver because defendant provides unredacted accident reports to LexisNexis, which, it contends, in turn sells the reports to the public for a profit. Plaintiff asserts that defendant did not establish that it is required to provide unredacted reports to LexisNexis to comply with its reporting obligations because defendant could manually provide the information directly to the State. This argument is unpersuasive where it is undisputed that the Vehicle Code requires defendant to send accident reports to the State and the State, in turn, directs that compliance is accomplished by the defendant sending the reports to the State's agent, LexisNexis.

¶ 18 There is also a contractual agreement between defendant and LexisNexis. Requests for defendant's accident reports are processed through LexisNexis for a $13 fee, with defendant receiving $5 from LexisNexis. Plaintiff argues that there are no restrictions in the agreement between defendant and LexisNexis on what LexisNexis may do with the unredacted accident reports it receives from defendant when it complies with the Vehicle Code reporting requirement. Plaintiff contends, therefore, that defendant should be barred from providing redacted versions to plaintiff because defendant voluntarily discloses the unredacted reports to LexisNexis while simultaneously withholding certain information from the general public unless the public pays a fee.

¶ 19 We find that, based on the record before us, defendant's provision of unredacted accident reports to LexisNexis occurs in compliance with the reporting requirement under the Vehicle Code. There is no other furnishing of records to LexisNexis other than under the mandatory reporting requirement. As such, defendant's conduct does not amount to a "selective disclosure" or "preferential treatment" as contemplated in *Lieber*. In *Lieber*, it was uncontested that the university "routinely makes available to other groups, including the local newspaper and religious organizations, lists containing the names and addresses of individuals who have been accepted by the University but who have not yet enrolled." *Lieber*, 176 Ill. 2d at 412-13. By voluntarily disclosing the names and addresses of those individuals to others, the university could not assert that the information it withheld from the plaintiff was confidential.

¶ 20 But here, the record clearly reflects that defendant provides the unredacted accident reports to LexisNexis for mandatory reporting purposes. Jennifer Brack, a corporate representative for defendant, testified that defendant had a contract with LexisNexis, "a contracted vendor for the [S]tate [of Illinois]," as part of defendant's obligation to provide all accident reports to the State, which plaintiff does not dispute. Defendant uses LexisNexis to upload unredacted copies of the accident reports to the State. Anyone that wants to obtain a copy of an accident report may request the report in person, by mail, or through the LexisNexis website link provided on defendant's website. Brack stated that "I believe [LexisNexis] ha[s] their own safeguards in place of who can purchase a report," and further stated that "the only parties that can receive [an accident report] through [LexisNexis] are those parties directly involved," such as the drivers or their insurers. Brack testified that it was her understanding that in order to obtain a report through LexisNexis, the requesting party would need to know specific information about the report, including the date of the accident, the location of the accident, and the accident report number. To complete a

purchase through LexisNexis, the requesting party was also required to provide a driver's license number that must match a driver's license number in the accident report. Brack explained that defendant would provide a unredacted copy of the accident report to those who were involved in the accident or their insurers, but that defendant would make redactions if the requesting party was not involved in the accident.

¶ 21 Plaintiff does not direct our attention to any facts in the record to contradict Brack's testimony, or that would call into question that defendant provides unredacted accident reports to LexisNexis to comply with its reporting obligations. Plaintiff's argument that defendant failed to demonstrate that it is required to provide the reports to LexisNexis to comply with its statutory obligations finds no support in the record. Brack testified that defendant could either upload the accident reports to LexisNexis, or that the State could manually enter all the accident report data itself. Plaintiff does not cite any evidence in the record, or to any other authority, to support its contention that defendant's statutorily mandated act of uploading the unredacted accident reports to a third-party State-approved vendor for transmission to the State is a public disclosure of the accident reports. Defendant is required to provide the State with the accident reports and there is nothing in the record to suggest that the availability of an alternative method—manual entry—undermines defendant's invocation of the exemptions claimed.

¶ 22 Plaintiff insists that LexisNexis acts as a third-party reseller of the accident reports. This argument is premised on plaintiff's theory that anyone can pay LexisNexis a $13 fee and obtain a copy of a unredacted accident report, and that defendant receives $5 from each accident report sold by LexisNexis. But plaintiff failed to present any admissible evidence to support its assertion that defendant's unredacted accident reports are available to the public for a fee payable to LexisNexis. Plaintiff's statement of facts directs us to an affidavit of Michael Camarata, an attorney at

plaintiff's office. Camarata's affidavit was filed during briefing on defendant's motion to dismiss and was referenced in plaintiff's reply in support of its motion for summary judgment. But plaintiff does not make any argument that (1) the circuit court failed to draw any reasonable inferences from Camarata's affidavit in plaintiff's favor, (2) the affidavit creates a genuine issue of material fact, or (3) Camarata's affidavit entitles plaintiff to summary judgment. These failures result in forfeiture of this argument. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited ***.]").

¶ 23 Forfeiture aside, Camarata's affidavit asserts that in January 2018, during the pendency of this case, he purchased an unredacted version of one of defendant's accident reports from LexisNexis. The accident report and a receipt for his fee were attached to his affidavit. Camarata's affidavit provides little factual insight into what information he provided to LexisNexis to purchase the accident report. As Brack testified, however, Camarata would have had to submit the names of the parties involved in the accident, the date and location of the accident, and the accident report number. The receipt for Camarata's purchase indicates that he provided that information. Furthermore, in a section entitled "Purpose of Use," Camarata listed "Legal." Brack testified that an attorney representing an individual involved in a reported accident would be able to obtain an unredacted copy of that accident report. Absent any indication in Camarata's affidavit as to whether he represented any party named in the accident report, the affidavit does not sufficiently support plaintiff's conclusion that LexisNexis acts as a third-party reseller of unredacted accident reports without limitation. The record before us demonstrates that defendant only provides LexisNexis with unredacted accident reports in order to comply with its mandatory reporting obligations, and that purchases of unredacted copies of those reports—either through defendant directly or through LexisNexis—are limited to those who provide specific information at the time

of the request and are entitled—either by way of being involved in the accident, representing someone involved in the accident, or an insurance company identified as insuring someone involved in accident—to the unredacted information therein.

¶ 24 The dissent distorts the state of the record to support its position. To be clear, if there was any admissible evidence that LexisNexis was selling unredacted accident reports, it was incumbent on plaintiff to submit that evidence. Plaintiff offered no credible evidence of LexisNexis's sale policies or practices regarding defendant's accident reports. The dissent repeatedly makes the unsupported assertion that LexisNexis is free to sell unredacted reports to the public (*infra* ¶¶ 32, 34-35, 38), despite Brack's unrebutted testimony that purchasers must demonstrate some connection to an underlying accident before they can purchase an unredacted report through LexisNexis (*supra* ¶ 20). Neither plaintiff nor the dissent identifies any actual evidence in the record showing that LexisNexis sells the reports to the public with no restrictions. And while defendant's contract with LexisNexis might be silent on whether there were restrictions on the distribution of the accident reports, the unrebutted testimony in the record shows that there were restrictions on who could purchase unredacted reports and these restrictions applied whether the request for a report was made to defendant or LexisNexis. If plaintiff wanted to establish an actual lack of restrictions or otherwise demonstrate a genuine issue of material fact—an issue plaintiff never raised or argued, and raised *sua sponte* by the dissent (*infra* ¶¶ 41-49)—it needed to present evidence of that in the circuit court and not rely on this court to fill that gap. It did not, and it is not the function of this court to advance arguments or to speculate on evidence that might have been presented to make plaintiff's case.

¶ 25 The evidence and arguments advanced in support of plaintiff's waiver argument are not supported by the record and do not demonstrate to our satisfaction that entry of summary judgment

in favor of defendant should be reversed. To be clear, we find that, based on the actual record before us, plaintiff has not presented sufficient facts to establish that defendant's conduct amounts to waiver under the rule articulated in *Lieber*. The dissent's assertion that we have "establishe[d] a new rule of law" (*infra* ¶ 52), and that we do "not follow the existing rule of law set forth in *Lieber*" (*infra* ¶ 53), is nothing more than a misreading of our holding. We find no error with the circuit court's entry of summary judgment in favor defendant and affirm the judgment of the circuit court.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.

¶ 29 JUSTICE HYMAN dissenting:

¶ 30 I dissent both on the merits and on the majority issuing this decision as an Order under Supreme Court Rule 23(b) (eff. Apr. 1, 2018). On the merits, the majority justifies its conclusion by ignoring material facts, including that the mandatory reporting requirements and the sale of the unredacted reports are interrelated. Making matters worse, the majority cites no authority for its position. On issuing this decision as a Rule 23 Order, the criteria set out in Rule 23(a) belie the majority's assessment. Moreover, the time has come for the Illinois Supreme Court to amend Rule 23(a) so a single panel member may designate a decision as precedential. This will contribute to the advancement, clarification, and evolution of the law in Illinois for the common benefit of the parties, their lawyers, the bench and bar, and, most of all, the people of the State of Illinois.

¶ 31 SPD Waived Denying FOIA Request

¶ 32 The Schaumburg Police Department contends it did not waive its right to withhold unredacted accident reports from a Freedom of Information Act request because LexisNexis, a

non-governmental, third-party vendor, was merely performing SPD's mandatory reporting requirements under section 408 of the Illinois Vehicle Code (625 ILCS 5/11-408 (West 2016)). But, as Mancini has shown, SPD went much further, contracting with LexisNexis to allow it to sell the unredacted accident reports to the public, without restrictions or privacy protections. According to Mancini, by authorizing LexisNexis to sell the unredacted accident reports to the public, SPD waived the right to deny the FOIA request at issue.

¶ 33 An analogous case, *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401 (1997), supports reversal. In *Lieber*, the Illinois Supreme Court held that Southern Illinois University must comply with a FOIA request when it disclosed the same information to other entities, including the local newspaper and religious organizations. *Lieber*, 176 Ill. 2d at 412-13. "Voluntary disclosure in one situation can preclude later claims that records are exempt from release to someone else." *Id*. at 413 (citing *Cooper v. United States Department of the Navy*, 594 F. 2d 484, 485-86 (5th Cir. 1979). Applying this principle, the court noted, "[p]referential treatment of persons or interest groups fosters precisely the distrust of government the FOIA was intended to obviate." *Id*. (citing *State of North Dakota ex rel. Olson v. Andrus*, 581 F. 2d 177, 182 (8th Cir. 1978).

¶ 34 Notwithstanding the majority's efforts to dissociate *Lieber* from its holding, *Lieber*'s factual differences do not diminish applying the decision and its reasoning here. The majority attempts to distinguish *Lieber* on the grounds that SPD does not act "voluntarily" in complying with the mandatory administrative function performed by LexisNexis. But the flaw in the majority's reasoning is its refusal to appreciate that SPD separately contracted with LexisNexis to also permit the company to market those unredacted reports to the public for a profit, and that voluntary act constitutes waiver, as in *Lieber*. Moreover, neither SPD nor the majority cite a single

case or authority that says a governmental entity can both withhold unredacted records under FOIA, while, at the same time, let a non-governmental, third-party vendor sell the unredacted records to the public.

¶ 35 The majority believes the analysis stops once LexisNexis satisfies SPD's statutory reporting requirement. Indeed, if that were the sole purpose of providing the unredacted reports to LexisNexis, I would be inclined to agree. But SPD's contract with LexisNexis violates the "selective disclosure," or "preferred treatment" discussed in *Lieber*. The contract, which is in the record, places no restrictions on LexisNexis's use of the unredacted reports or to whom LexisNexis may sell them. Also noteworthy, LexisNexis hands over part of its renumeration to SPD.

¶ 36 The Illinois FOIA Act is patterned after that federal statute and lawmakers intended that federal case law be used in interpreting the Act. *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007, 1012 (1994). Regarding statutorily mandated disclosure and waiver, the Ninth Circuit's decision in *Watkins v. United States Bureau of Customs and Border Protection*, 643 F. 3d 1189 (9th Cir. 2011), is instructive.

¶ 37 In *Watkins*, a copyright and trademarks attorney filed FOIA requests with the U.S. Bureau of Customs and Border Protection, seeking Notices of Seizure of Infringing Merchandise ("Notices of Seizure") sent by CBP to trademark owners after seizing counterfeit merchandise at a port. *Id*. at 1192. By statute, CBP must disclose the Notices of Seizure to the aggrieved trademark owner. See 19 U.S.C. § 1526(e)). But CBP imposed no restrictions on the trademark owner's use of the information in the Notice, so the owner could "freely disseminate the Notice to his [or her] attorneys, business affiliates, trade organizations, the importer's competitors, or the media ***." *Id*. The court found that "[t]his no-strings-attached disclosure *** voids any claim to confidentiality and constitutes a waiver" of the exemption. *Id*.

¶ 38 SPD had a statutorily imposed reporting requirement and used LexisNexis to perform that function. But SPD placed no restrictions on LexisNexis's distribution of unredacted accident reports, though it could have, and LexisNexis distributed the unredacted reports to customers willing to pay for them. As in *Watkins*, this "no-strings attached" disclosure waived the exemption.

¶ 39 Moreover, in claiming the right to refuse to release the same information under the FOIA request, SPD undermined the purpose of the FOIA, which is to "provide the public with easy access to government information." *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 417 (2006). See *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 994 (2007) ("The purpose of the FOIA is to open governmental records to the light of public scrutiny"). To achieve that goal, our supreme court has held that the Act shall be accorded a liberal construction and the exceptions to disclosure narrowly construed. *Southern Illinoisan*, 218 Ill. 2d at 416. Indeed, under the FOIA, public inspection and copying of public records is presumed. 5 ILCS 140/1.2 (West 2016).

¶ 40 The majority's holding opens a pungent loophole. It lets government entities avoid their responsibilities regarding public records under the FOIA while giving a freehand in marketing and selling unredacted public records to non-government, for-profit third-party vendors.

¶ 41 Disputed Questions of Fact

¶ 42 According to the majority, the record "clearly" reflects that SPD provides unredacted accident reports to LexisNexis for mandatory reporting purposes. The majority quotes the deposition testimony of Jennifer Brack, that she "believe[s] [LexisNexis] ha[s] their own safeguards in place of who can purchase a report," and, to obtain a report through LexisNexis, "her understanding" was that the requesting party would need to know specific information about the report, including the date of the accident, the location of the accident, and the accident report

number. According to the majority, Brack's testimony shows that purchasers "must demonstrate some connection to an underlying accident before they can purchase an unredacted report through LexisNexis." But Brack's "belief" and her "understanding" is not evidence of LexisNexis's policies about who can purchase an accident report from LexisNexis. Indeed, SPD's website, of which we can take judicial notice (*Kopnick v. JL Woode Management Co*., 2017 IL App (1st) 152054, ¶ 26) directs users who want to purchase a traffic accident report to the LexisNexis website. LexisNexis describes itself as "Your go-to source for nationwide access" and its website states that not only involved parties, but "commercial account holders" can purchase crash reports. Presumably, this would include third parties, including insurance companies, but a "commercial account holder" could also be a newspaper, a private investigator, a lawyer, or any other number of private individuals.

¶ 43 Without more evidence beyond Brack's beliefs about LexisNexis's practices and policies, a material question of fact remains—whether the company sells unredacted reports to its customers.

¶ 44 The majority contends Mancini does not direct the court's attention to any facts in the record to contradict Brack's testimony, or that would call into question that SPD provides unredacted accident reports to LexisNexis to comply with its reporting obligations. Not so. As the majority notes, Michael Camarata, an attorney at Mancini's office, submitted an affidavit asserting he purchased an unredacted version of one of SPD's accident reports from LexisNexis. The majority contends Camarata's affidavit does not state what information he provided to LexisNexis to purchase the accident report. The majority further notes that Brack testified Camarata would have had to submit the names of the parties involved in the accident, the date and location of the accident, and the accident report number. Yet, as noted, Brack testified as to what she believed

was LexisNexis's practices. Nothing in the record indicates that LexisNexis follows the procedures Brack "believed" to be in place. The discrepancy between what Brack believed to be LexisNexis's practices and Camarata's first-hand experience in obtaining a police report from LexisNexis created a genuine issue of material fact as to whether LexisNexis sells unredacted reports to the public.

¶ 45 Also, in disclosing unredacted accident reports to LexisNexis without restrictions (as provided in the contract with SPD), SPD fails to protect the privacy of individuals. As the majority says in footnote 2, "the State has a statutory duty to maintain the confidentiality of accident reports in its possession, subject to narrow exceptions. 625 ILCS 5/11-412 (West 2018); *Arnold v. Thurston*, 240 Ill. App. 3d 570, 573-74 (1992)." The contract between SPD and LexisNexis, which, as already noted is in the record, places no restriction on LexisNexis and provides none of the privacy protections the FOIA envisions.

¶ 46 Cross-Motions for Summary Judgment

¶ 47 Where the parties file cross-motions for summary judgment, they invite the court to decide the issue as a matter of law. *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill.App.3d 335, 339 (2005). Nevertheless, the mere filing of cross-motions does not preclude a determination that triable questions of fact exist. *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). A reviewing court has the power to reverse a summary judgment order, including cross-motions for summary judgment, where the record indicates that a material question of fact exists. *Id.*

¶ 48 This court has held that the "waiver rule must not be mechanically applied whenever there is disclosure of information but, rather, requires consideration of the circumstances related to the disclosure, including the purpose and extent of the disclosure, as well as the confidentiality

surrounding the disclosure." *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 202 (2004). The record before us shows that material questions of fact exist as to LexisNexis's policies in providing accident reports to third parties and protecting the confidentiality of the subjects of those reports.

¶ 49 I would reverse the trial court order granting summary judgment for SPD and remand for further proceedings.

¶ 50 Designation as Non-precedential Order

¶ 51 Rule 23(a) allows for publication when a majority of the panel concludes that a decision either "establishes a new rule of law or modifies, explains or criticizes an existing rule of law" or when "the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court." Ill. S. Ct. Rule 23(a)(1)-(2) (eff. Apr. 1, 2018). This case should have been published as an opinion under Supreme Court Rule 23(a) (eff. Apr. 1, 2018) because it meets one of the Rule's criteria.

¶ 52 The majority establishes a new rule of law, satisfying a Rule 23(a) criterion for publication. Under the majority opinion, a government entity, like SPD, that is required to disclose information to the State, can release private information to a third party who sells it, yet deny access to the same information under a FOIA request. Neither the FOIA nor any prior Illinois court has so held, as evidenced by the lack of citations to authority in the majority opinion.

¶ 53 Moreover, the majority does not follow the existing rule of law set forth in *Lieber*—that "[v]oluntary disclosure in one situation can preclude later claims that records are exempt from release to someone else." *Lieber*, 176 Ill. 2d at 413. As noted, the majority attempts to distinguish *Lieber* by asserting that SPD was mandated to provide accident reports to the State but does not acknowledge SPD's voluntary act of separately contracting with LexisNexis to allow the company

to sell unredacted reports to the public for a profit. This conduct falls squarely under the holding in *Lieber*. A decision that conflicts with established precedent, at minimum, constitutes an attempt to modify existing law, and obligates publication.

¶ 54 I propose the Supreme Court consider amending Rules 23(a) in the same way it recently amended Rule 352. See Ill. S. Ct. Rule 352(a) (eff. July 1, 2018). Now Rule 352 requires oral argument at the request of one justice on the panel. Rule 23(a) should require publication as an opinion at the request of one justice on the panel.

¶ 55 I have written on this issue before. Ironically, I am forced to rely on an unpublished order to help explain my previous thoughts about unpublished orders. I consider it contrary to the purpose of appellate review that a dissent rejecting the result or rationale can be relegated to precedential oblivion, as I explained in *Snow & Ice, Inc. v. MPR Management, Inc.*, 2017 IL App (1st) 151706-U, ¶¶ 27-53 (Hyman, P.J., concurring in part and dissenting in part). Whatever persuasive value a dissent may have on future litigants and courts evaporates as an unpublished order.

¶ 56 There are no pragmatic impediments to amending Rule 23(a). Most likely, the presence of a dissent might split the panel on the question of publication. In the First District during 2018, dissents appeared in 15 of 331 opinions (4.5%) and 27 of 1162 Rule 23 orders (2.3%). While sometimes a dissenter prefers that the majority ruling remain unpublished, even if every unpublished order with a dissent had been published, the total number of published opinions would have increased just 8%. I do not perceive this slight number burdening either counsel or the courts when researching the proper disposition of a given argument. Nor would the addition of a few more Rule 23 orders without dissent have much impact on the number of opinions issued, considering that disagreements occur occasionally, although enough to necessitate a Rule change.

¶ 57 Alternatively, the court could eliminate unpublished opinions, as some states have done. See Brandon Harrison, *Extra! Extra! Arkansas's High Court Announced Two Changes That Will Affect Thousands of Attorneys*, 44 Ark. Law. 26, 26 (2009) (Arkansas Supreme Court Supreme Court does away with distinction between unpublished and published opinions, making all appellate rulings precedential). Or, like a majority of states, allow unpublished opinions to be cited as persuasive authority. See Sara J. Agne, *A People's History of The Citation of Memorandum Decisions in Arizona*, 51 Ariz. Atty 48 (2015) (noting that more than 30 states permit citation to unpublished decisions as persuasive authority). See also, *Out of Cite, Out of Mind: Navigating The Labyrinth That Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. Balt. L. Rev. 561 (2016) (classifying citations rules in 50 states and the District of Columbia). Yet another possibility, as noted, is allowing a dissenter to override the majority's choice of issuing a Rule 23 order. Any of these options would be preferable to a split decision dictating the result.

¶ 58 On precedent, Lord Mansfield famously observed, "The reason and spirit of cases make law; not the letter of particular precedents." *Fisher v Prince*, 3 Burr. 1362, 1364 (1762). But unless issued as a Rule 23(a) opinion, neither the reason nor the spirit of a case makes law in Illinois. At least, the say of a single panel member should be enough to preserve "the reason and spirit of cases."

No. 126675

IN THE SUPREME COURT OF ILLINOIS

MANCINI LAW GROUP, P.C.,	)	Appeal from the Appellate
	)	Court, First District
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	No. 1-19-1131
	)	
	)	
SCHAUMBURG POLICE DEPARTMENT,	)	
	)	
	)	
Defendant-Appellee.	)	

Appeal from Circuit Court of Cook County, 1st Judicial District
17 CH 13881
Judge Franklin U. Valderrama, Presiding

NOTICE OF FILING

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PLEASE TAKE NOTICE that on March 3, 2021, I electronically filed the foregoing Brief of Plaintiff-Appellant with the Clerk of the Illinois Supreme Court, in the above-entitled case, a copy of which is attached hereto and hereby served on you.

Dated: March 3, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is one of the attorneys for Plaintiff-Appellant and that he caused the foregoing Brief of Plaintiff-Appellant and Notice of Filing to be served on all counsel of record on March 3, 2021 by filing said documents electronically via Odyssey eFile and designating the following counsel for service at the email addresses listed below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Joshua Hart Burday