No. 127519

IN THE SUPREME COURT OF ILLINOIS

CHICAGO SUN-TIMES, Plaintiff-Appellee, -vs- COOK COUNTY HEALTH AND HOSPITALS SYSTEM, Defendant-Appellant.	)	Appeal from the Appellate Court, First District, No. 1-19-2551 There on appeal from the Circuit Court of Cook County, Illinois No. 18 CH 14507 The Honorable Eve M. Reilly, Presiding

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BRIEF OF PLAINTIFF-APPELLEE

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I. NATURE OF THE CASE

This is a Freedom of Information Act case involving records that are supposed to be created and sent to law enforcement when someone comes to the hospital with a gunshot wound. The only information at issue in this case, however, is the "year" field from those records, with all other information, including any personally identifying information, redacted. Chicago Sun-Times ("Sun-Times") sought these records to monitor whether a public hospital is complying with its statutory notification requirement. After hearing oral argument on cross-motions for summary judgment, the Circuit Court held that years standing alone are exempt from disclosure pursuant to FOIA Section 7(1)(b), which applies to certain "unique identifiers." Sun-Times appealed, and the Appellate Court reversed the Circuit Court holding that the years of medical treatment are not individually identifying information and that HIPAA permits the years to be produced when the records are de-identified.

II. ISSUES PRESENTED

1. Does FOIA Section 7(1)(b) prohibit the release of a year from a public record where year alone cannot be used to identify any person?

2. Does HIPAA prohibit the release of a year from a public record when the record has been de-identified and where HIPAA expressly states that the year field from a de-identified record is not individually identifiable information under HIPAA?

III. 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.

> 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. Subject to this requirement, the following shall be exempt from inspection and copying:

5 ILCS 140/7(1).

> 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).

> “Private information” means unique identifiers, including a person's social security number, driver's license number, employee identification number, 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).

> Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. Denial shall be in writing as provided in Section 9 of this Act. Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request. A public body that fails to respond to a request within the requisite periods in this Section but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies. A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g).

5 ILCS 140/3(d).

This case also involves the following Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule:

> A covered entity may determine that health information is not individually identifiable health information only if:…The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:…All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older.

45 C.F.R. § 164.514(b)(2)(i)(C).

IV. STATEMENT OF FACTS

On September 10, 2018, Sun-Times requested the following records related to the reporting of "walk-in" gunshot victims:

> (1) Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statute (20 ILCS 2630/3.2). (2) Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 through the present day who were not been accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statute (20 ILCS 2630/3.2).

C22. On October 26, 2018, Cook County Health and Hospital Services ("CCHHS") responded by providing policies. *Id.* In response to the second request, CCHHS claimed that the records are exempt under Sections 2(c-5) and 7(1)(a) of the FOIA because they contain personally identifiable information. C22-23. CCHHS did not redact personally identifiable information, but instead withheld the records in full. *Id*.

On November 21, 2018, Sun-Times filed suit in Cook County Circuit Court, asking the Circuit Court to order CCHHS to produce the records after redacting exempt

information. C8. The parties briefed cross-motions for summary judgment. C71-110. On November 15, 2019, the Circuit Court granted CCHHS's motion for summary judgment. C113. The Circuit Court ruled that absent Sun-Times providing affirmative case law otherwise, the "year" field from the records was exempt from disclosure under FOIA Section 7(1)(b). R36-37.

Sun-Times appealed. A-81. On June 30, 2021, the Appellate Court reversed and held that HIPAA does not prohibit CCHHS from releasing de-identified records, that the years of medical treatment are not individually identifying information, and that CCHHS was required to produce the year field under FOIA. A-7-9 ¶¶ 20, 22, 24 ("It strains credulity to imagine that any specific patient could be identified merely by the year they were admitted, and the year law enforcement was notified of their admission.").

V. LEGAL STANDARDS

Both the General Assembly and this Court have long supported the critical role of transparency in a democracy. *See, e.g.,* 5 ILCS 140/1; *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 410-11 (2009). 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*.

Every public record is presumed by law to be open to the public, and so a public record may only be withheld if a specific statutory exemption applies and is proven by clear and convincing evidence. 5 ILCS 140/1.2; *Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 463 (2003) ("when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in section 7 of the Act applies"). If records contain both exempt and non-exempt material, the exempt material may be redacted but the remainder must be released. 5 ILCS 140/7(1).

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." 5 ILCS 140/1. Therefore, FOIA provisions "shall be construed in accordance with this principle." *Id*.

Time and again, this Court has held that FOIA exists to "open governmental records to the light of public scrutiny," which governs the interpretation of the statute in favor of disclosure. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 24; *Stern*, 233 Ill. 2d at 405; *S. Illinoisan v. Ill. Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006); *Ill. Educ. Ass'n*, 204 Ill. 2d at 462-63; *Lieber v. Bd. of Tr. of S. Ill. Univ*., 176 Ill. 2d 401, 407 (1997); *Bowie v. Evanston Consol. Cmty. Sch. Dist. No. 65*, 128 Ill. 2d 373, 378 (1989). This requires all FOIA exemptions to be "narrowly construed." *See id.* (all). "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*, 218 Ill. 2d at 416.

VI. ARGUMENT

There is a statutory requirement for CCHHS to notify law enforcement when there is a walk-in patient with a gunshot wound, if they are unaccompanied by a law enforcement officer. 20 ILCS 2630/3.2. To monitor CCHHS's compliance with this requirement, Sun-Times requested the dates of when a gunshot wound victim walked in for treatment and the dates of when CCHHS notified law enforcement. Thus, while CCHHS does not actually rely on any valid exemptions that contain a public interest component, by way of general context, the year field from these records is useful to Sun-Times and the public and release of this information is consistent with the purpose of FOIA. *See* Def. Br. at 16-17.

This Court should affirm the Appellate Court's decision. CCHHS has provided no support, let alone clear and convincing evidence, for its claim that any individuals could actually be identified, as required by Section 7(1)(b), from merely the year of the incident. Nor does HIPAA (a law intended to protect patient privacy) prohibit disclosure because the privacy rule expressly states that years are not subject to HIPAA's confidentiality provisions. Finally, the Court should reject CCHHS's untimely assertion of FOIA's undue burden provision under Section 3(g), as well as its remaining irrelevant and red herring arguments.

A. Years of medical treatment are not exempt under Section 7(1)(b).

Section 7(1)(b) of FOIA does not exempt years standing alone because they are not a "unique identifier." Section 7(1)(b) exempts "private information," which FOIA defines in Section 2(c-5):

> "Private information" ***means unique identifiers***, including a person's social security number, driver's license number, employee identification number, 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) (emphasis added). Especially under a narrow construction that favors disclosure, years of medical treatment are not "unique identifiers." 5 ILCS 140/2(c-5); *see also Stern*, 233 Ill. 2d at 405-11; 5 ILCS 140/1.2 ("All records in the custody or possession of a public body are ***presumed*** to be open to inspection or copying.") (emphasis added).

First, CCHHS has not proven that producing a year could lead to the identification of an individual, as required for it to be a "unique identifier." "It is well settled that the primary objective of this court when construing the meaning of a statute is to ascertain

and give effect to the intent of the General Assembly," which "begins with the plain language of the statute, which is the most reliable indication of the legislature's objectives in enacting a particular law." *S. Illinoisan*, 218 Ill. 2d at 415. The plain language of Section 2(c-5) states that only "unique identifiers" are exempt private information. 5 ILCS 140/2(c-5), 7(1)(b). It serves no purpose to withhold records under a privacy exemption when no person can be identified.

Sun-Times requested the dates of admissions and notifications to law enforcement for walk-in gunshot wound victims. The Appellate Court correctly determined that no person can be identified by the year of this medical treatment alone, and that while the year of a patient's hospital admission may be found in a patient's medical record, it, standing alone, is not a "medical record." A-7-9. It is common sense that the year of admission for a specific injury is not private information where it is entirely divorced from any personally identifying information, and no purpose is served by withholding this non-identifying information.

It is the public body's burden to prove its exemption claims by clear and convincing evidence. 5 ILCS 140/1.2, 11(f). CCHHS has offered no such evidence, and its claim is facially implausible. *See* A-7-8 at ¶ 20 ("It strains credulity to imagine that any specific patient could be identified merely by the year they were admitted, and the year law enforcement was notified of their admission."). CCHHS admits that in 2017 Stroger Hospital treated over 1,100 gunshot wound victims.[1] *See* A-7 at ¶ 20. CCHHS has not explained, let alone proven, how any particular individual could be identified

[1] CCHHS, Gun Violence: A Public Health Crisis, *available at* https://cookcountyhealth.org/wp-content/uploads/Gun_Violence_OnePager_042719.pdf; CCHHS Gun Violence Fact Sheet 2018, *available at* https://www.cookcountyil.gov/news/cook-county-experts-address-public-health-implications-gun-violence.

from the year of treatment under these circumstances. Even if this case was a close call, which it is not, FOIA exemptions must be narrowly construed in favor of disclosure. *E.g., Lieber*, 176 Ill. 2d at 407; *Southern Illinoisan,* 218 Ill. 2d at 417, 424-427 (specifically noting the FOIA narrow-construction rule, then narrowly construing privacy provisions of the Cancer Registry Act). CCHHS failed to provide clear and convincing evidence that the years are "unique identifiers" under a narrow construction, let alone any construction of the phrase.

Moreover, CCHHS's position would lead to an absurd result, and this Court avoids such constructions. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12. CCHHS has identified no privacy or other purpose that would be served by disclosing the year that an unknown person was the subject of a walk-in gunshot wound. Indeed, CCHHS does not even assert the broader privacy exemption under Section 7(1)(c) that would theoretically apply to identifying information not specifically enumerated in Section 7(1)(b). And as discussed below, interpreting the years to be a "unique identifier" would also conflict with HIPAA—the nation's pre-eminent law on patient privacy—which does not consider years of treatment in a de-identified record to be "individually identifying information." *See Laskowski*, 2018 IL 121995, ¶ 12; 45 C.F.R. § 164.514(b)(2)(i)(C). Therefore, the Appellate Court correctly held that the year field in de-identified records is not a "unique identifier" and not exempt under Section 7(1)(b).

B. Producing de-identified years of medical treatment does not violate HIPAA.

CCHHS next claims that producing the years are not permitted under the HIPAA regulations. Def. Br. at 11-13 (citing 45 C.F.R. § 160.103, 164.502, 164.506(c)(1-5)).

But CCHHS misses that these limitations on "use" only apply to "individually identifiable information." 45 C.F.R. § 160.103. HIPAA itself affirmatively demonstrates that years alone from dates are not unique identifiers:

> A covered entity may determine that health information is not individually identifiable health information only if:…The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:…All elements of dates (***except year***) for dates ***directly related to an individual***, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older.

45 C.F.R. § 164.514(b)(2)(i)(C) (emphasis added). Health information that is properly de-identified under Section 164.514(b) is not individually identifiable health information. 45 C.F.R. § 164.502(d)(2). In other words, HIPAA itself explicitly states that the years from dates are not individual identifiers if other identifying information has been removed. And CCHHS admits that a "search report could be generated with de-identified information." C69. Thus, the limitations that CCHHS cites to do not apply to de-identified years of medical treatment, which is exactly what Sun-Times seeks here.

HIPAA requires the withholding of other elements of dates such as day and month (if "directly related to an individual"), but not year. Years are precisely what Sun-Times seeks and every source of authority as well as common sense indicates that years alone do not uniquely identify anyone and must be disclosed. Therefore, producing de-identified information, such as years, is permitted under HIPAA.

C. CCHHS forfeited and waived its new undue burden claim.

CCHHS now raises a new argument before this Court that complying with the request would be unduly burdensome under Section 3(g). Def. Br. at 16-17. But CCHHS forfeited its undue burden claim by failing to properly raise it before the Circuit

Court and the Appellate Court. CCHHS did not assert Section 3(g) as an affirmative defense. C24-25. CCHHS did not raise undue burden as an argument in the summary judgment and appellate briefing. C71, 97, A-67. Failure to raise arguments with the circuit court and appellate court results in a forfeiture of those arguments here. *Lazenby v. Mark's Const., Inc.*, 236 Ill. 2d 83, 92 (2010). Thus, this Court need not address the merits of CCHHS's burden claim because it failed to properly raise the issue below.

CCHHS claim of burden also fails on the merits, should this Court wish to address the issue despite it being forfeited, because CCHHS waived its burden argument by failing to respond within the deadline to the request and by failing to raise the argument before the Circuit Court and Appellate Court. FOIA Section 3(d) clearly states that "[a] public body that fails to respond to a request received may not treat the request as unduly burdensome under" Section 3(g). 5 ILCS 140/3(d). There is no dispute that CCHHS failed to respond to the request within the statutory deadline. C22. Therefore, like this Court's precedent prohibiting new arguments on appeal, the FOIA statute prohibits CCHHS from asserting undue burden now.

Finally, even if the Court indulged this untimely argument, there is no record on this issue. Thus, at most, the case would need to be remanded to develop the record on burden and public interest and for the Circuit Court to address this issue in the first instance. But again, there is no basis for this Court to address the issue, nor any basis for CCHHS even to have asserted it. *Lazenby*, 236 Ill. 2d at 92.

D. CCHHS will not have to create a new record.

Defendant makes baseless arguments and claims about Sun-Times' FOIA request. CCHHS claims that "the Sun-Times is not simply requesting two sets of data, but asking that the Hospital connect those two disparate sets of data" and that this will lead to

creating a new record. Def. Br. at 6, 15. But Sun-Times does not ask CCHHS to make this connection nor was this a pertinent issue for the lower courts to address. And even if it were, CCHHS provides no justification for why it could not create a dummy id to connect the two sets of data that many other public bodies employ when producing de-identified data.[2]

Additionally, CCHHS takes issue with the Appellate Court's conclusion that HIPAA permits the creation of information in response to a FOIA request. *See* Def. Br. at 14-15 (citing A-8 at ¶ 22). But that is not accurate. CCHHS argued below that HIPAA prohibited CCHHS from looking at patients' medical records when responding to a FOIA request. *See* A-8 at ¶ 22. The Appellate Court rejected that argument and held that HIPAA permits the use of protected health information to create de-identified records. *Id.* (citing 45 C.F.R. § 164.502(d)(1)). CCHHS would "create" a de-identified record by redacting the record, which is what FOIA requires. 5 ILCS 140/7(1). Even this Court recognized that public bodies may need to redact or scramble a record to remove identifying information and held that this process does not constitute creating a "new" record. *Bowie*, 128 Ill. 2d at 382. Therefore, CCHHS is attempting to distract this Court by attempting to raise alarm bells about standard FOIA redaction procedure.

E. Years are responsive to a request for "dates."

Similarly, CCHHS baselessly takes issue with Sun-Times seeking years when its original request sought the dates. Def. Br. at 6-7, 18-19. It is undisputed that Sun-Times requested the dates of admission and notification. C22. This obviously includes years as a component of dates, and CCHHS can easily redact the day and month, as HIPAA

[2] CCHHS suggests that it will have to provide the medical record number to Sun-Times in addition to the years. Def. Br. at 10. This is a red herring because Sun-Times clearly stated in its request that it is not seeking any identifying patient information. C22 at ¶ 7.

contemplates. *See* 5 ILCS 140/7(1); *Heinrich v. White*, 2012 IL App (2d) 110564 at ¶ 19 (holding that even if the only information that remained after redaction was useless to the requester, it still must be produced). Therefore, despite CCHHS constant highlighting of these facts, there is nothing material to the merits of this case about Sun-Times seeking the years in its request for dates.

VII. CONCLUSION

This Court should affirm the Appellate Court's reversal of the Circuit Court, and the year field from these records should be released.

Dated: May 6, 2022

RESPECTFULLY SUBMITTED,

/s/ Merrick J. Wayne

_____

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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 13 pages.

Dated: May 6, 2022

/s/ Merrick J. Wayne

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Please take notice that an electronic copy of Brief of Plaintiff-Appellee was submitted to the Supreme Court of the State of Illinois, Clerk's Office for filing on May 6, 2022.

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and states that on May 6, 2022, I caused a copy of the foregoing brief to be filed with the Illinois Supreme Court, by Odyssey eFileIL, and served upon the parties listed above electronically and via E-mail.

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