

NOTICE  
Decision filed 06/03/24. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2024 IL App (5th) 180483-U

NO. 5-18-0483

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

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NATHANAEL HARSY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Perry County.
	)	
v.	)	No. 17-MR-6
	)	
PERRY COUNTY SHERIFF’S OFFICE,	)	Honorable
	)	Thomas B. Cannady,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE BOIE delivered the judgment of the court.  
Justices Welch and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the judgment of the circuit court where the circuit court’s finding that the defendant did not act willfully or intentionally was not against the manifest weight of the evidence and the dismissal of the plaintiff’s complaint as moot was not in error.

¶ 2 On January 23, 2017, Nathanael Harsy filed a four count complaint in the circuit court of Perry County pursuant to the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)). Harsy sought an injunction from the circuit court commanding the defendant, the Perry County Sheriff’s Office (PCSO), to disclose disputed records; provide an explanation for redacted documents; provide an explanation for omissions and removal of pages not provided to Harsy; and an order awarding the *pro se* Harsy reimbursements for the overcharging of copying fees. Harsy’s complaint also requested that the circuit court order the defendant to pay \$2500 for

each occurrence that it willfully and intentionally failed to comply with FOIA or made FOIA responses in bad faith pursuant to section 11(j) of FOIA (*id.* § 11(j)).

¶ 3 On February 26, 2018, the circuit court dismissed Harsy’s complaint with prejudice, and further denied Harsy’s request to impose any statutory penalties, grant injunctive relief, or award attorney fees and/or costs. On March 28, 2018, Harsy filed a motion to reconsider, rehear, modify, and vacate the circuit court’s order of February 26, 2018, dismissing Harsy’s claims and Harsy’s motion for the defendant to provide an index of the records to which access has been denied, which was denied by the circuit court on September 10, 2018. This appeal followed. For the reasons below, we affirm the judgment of the circuit court.

¶ 4 I. BACKGROUND

¶ 5 On December 11, 2016, Harsy sent a FOIA request to the defendant requesting “a printed transcript of all conversations between the PCSO police officers and police dispatch” on 23 separate dates in November and December 2016. On December 14, 2016, Sheriff Steve Bareis of Perry County sent Harsy an email acknowledging the receipt of Harsy’s FOIA request and informing Harsy that the requested information would take some time to compile. In lieu of sending Harsy a document specifically identifying the statutory basis for any redactions that would be made, Sheriff Bareis’s email also included his office’s standardized policy listing the types of information that could be redacted from the documents produced pursuant to FOIA, and the 14 different reasons for exemptions from producing the documents. Sheriff Bareis sent another email to Harsy on December 14, 2016, informing Harsy that he had “printed all the logs per [Harsy’s] request,” that the total cost of producing the record was \$106.20, and that the records would be available for pick up on December 20, 2016.

¶ 6 On December 16, 2016, Sheriff Bareis sent another email to Harsy updating the total cost of Harsy’s December 11, 2016, FOIA request to \$119.20. The additional \$13 was for “materials.”

Sheriff Bareis's email further stated that if Harsy failed to pick up the documents on December 20, 2016, then a bill would be sent to him for the expenses indicated. Harsy responded to Sheriff Bareis's December 16, 2016, email, and pointed out mistakes in the defendant's FOIA policy, including, pursuant to section 3(d) of FOIA (*id.* § 3(d)), that FOIA responses are to be made within five business days, whereas the defendant's FOIA policy stated that the defendant would respond to all FOIA requests within seven working days of the request. Sheriff Bareis responded to Harsy's email on December 16, 2016, stating, "[f]ive business days. Weekends do not count to this five days."

¶ 7 At a hearing on October 12, 2017, counsel for the defendant stated that in response to Harsy's December 11, 2016, FOIA request, Sheriff Bareis had accessed the dispatch logs; set parameters for a search; searched the documents; and then made those documents available to Harsy with redactions. Those documents included communications between dispatch with Perry County deputies and communications between dispatch and ambulance personnel. According to Sheriff Bareis's sworn affidavit notarized on May 18, 2017, Harsy received more records than he asked for because "[w]hen I initially compiled these records to respond to [Harsy's] requests, I mistakenly included conversations between dispatch and ambulance personnel in addition to conversations between police and police dispatch." Sheriff Bareis charged Harsy 10 cents per page for Harsy's copy and 10 cents per page for the copy retained by Sheriff Bareis, after the first 50 copies, which were free. Sheriff Bareis also charged Harsy for markers that had to be purchased and used to make redactions.

¶ 8 According to Harsy's complaint, on December 21, 2016, Harsy picked up the documents from his December 11, 2016, FOIA request from the defendant, and dropped off another FOIA request to the defendant requesting "a printed transcript of all conversations between the [PCSO] police officers and police dispatch" on 18 additional dates during the months of August, October,

and December 2016. On December 22, 2016, Sheriff Bareis emailed Harsy advising him that his December 21, 2016, FOIA request would be completed by December 30, 2016. In response to Harsy's December 21, 2016, FOIA request, Sheriff Bareis repeated the process used to answer Harsy's December 11, 2016, FOIA request as stated above.

¶ 9 On January 2, 2017, Harsy picked up the documents from his December 21, 2016, FOIA request from the defendant. According to Harsy's complaint, at this time, Harsy informed the defendant that pages were missing and that he wanted explanations for the redactions that were made on the documents produced in response to his December 11, 2016, FOIA request. The defendant allegedly informed Harsy that it had to make redactions for privacy reasons. Harsy told the defendant that he understood this, but that he wanted explanations for the redactions. According to Harsy, a female staff member of the PCSO responded that she "did not know because this was everything." On January 11, 2017, Harsy emailed Sheriff Bareis informing him that when Harsy picked up his December 11 and 21, 2016, FOIA requests, the defendant had failed to include any explanation for the redactions that were made therein, which is required by law, and requested that he be able to pick up a document containing the explanations regarding the redactions from the defendant. Sheriff Bareis replied to Harsy's email on January 11, 2017, indicating that Harsy was previously given a copy of the defendant's policy with exemptions and citations to the legal basis contained therein.

¶ 10 On January 23, 2017, Harsy filed a four-count complaint under FOIA (5 ILCS 140/1 *et seq.* (West 2016)), seeking an injunction from the circuit court commanding the defendant to disclose disputed records; an explanation for the redactions made within the documents; an explanation for the omissions and removal of pages not provided to Harsy; and an order awarding Harsy reimbursements for the alleged overcharging of copying fees. Harsy's complaint also requested that the circuit court order the defendant to pay \$2500 for each alleged occurrence that it willfully

and intentionally failed to comply with FOIA or made FOIA responses in bad faith pursuant to section 11(j) of FOIA (*id.* § 11(j)). Specifically, count 1 of Harsy's complaint sought an order from the circuit court for the disclosure of the missing records or the exemption basis for the nondisclosure of those records, and clear and convincing evidence for the redactions made to the records that were disclosed in response to Harsy's December 11 and 21, 2016, FOIA requests. Count 1 further sought "for each occurrence of willful and intentional violations in responding to plaintiff's FOIA request or responses that are otherwise in bad faith, a penalty of \$2500." Harsy alleged, *inter alia*, that:

"[T]he fact that plaintiff pointed out to [Sheriff Bareis] that his FOIA policy of 7 day[s] was incorrect and [Sheriff Bareis] corrected this policy by always responding to plaintiff's requests within 5 days shows that [Sheriff Bareis] knew that any reliance on the policy he provided to plaintiff was a reliance on policies that were based on laws that were 6 years old, the fact that plaintiff requested explanations for the redactions and omissions once in person and once via email to which he finally received an explanation from [Sheriff Bareis] to refer back to the policy already provided that is not legally accurate can only go to show that the [PCSO] response of 11,876 records from plaintiff's FOIA requests dated December 11, 2016 and December 21, 2016 that contained 6,720 redactions or omissions not supported by clear and convincing evidence were willfully and intentionally made, or made in bad faith."

Harsy contended that therefore, "these 6,720 redactions and omissions \*\*\* fit within the meaning of willful and intentional occurrences or bad faith occurrences pursuant to section 140/11(j) that each require [the defendant] to pay a civil penalty of \$2,500 which comes to a total of \$16,800,000."

¶ 11 Harsy does not challenge the circuit court’s findings regarding the dismissal of counts 2 and 4, and as such, we will bypass any summary of those allegations. Count 3 of Harsy’s complaint sought reimbursement from the defendant for the costs of being overcharged for copies. Harsy alleged that in response to his December 11 and 21, 2016, FOIA requests, the defendant purportedly provided Harsy with a total of 1624 pages of information that contained a total of 11,876 records and charged him for 1524 pages of information, plus the cost of materials. However, according to Harsy, he only obtained less than half of these pages, as he was provided with 788 pages of information, and was required to pay \$170.40, which comes out to over 21.6 cents per page, in violation of section 6(b) of FOIA (*id.* § 6(b)), which states, “[t]he fee for black and white, letter or legal sized copies shall not exceed 15 cents per page.” As such, Harsy argued that the maximum chargeable amount for 788 pages at 15 cents a page would be \$118.20, which meant that the defendant had overcharged Harsy by \$52.20 for copies, and therefore, “[t]his amounts to 788 occurrences of willful and intentional violations of FOIA or 788 occurrences of [the defendant] responding to a FOIA request in bad faith.” Accordingly, pursuant to section 11(j) of FOIA (*id.* § 11(j)), Harsy sought a penalty of \$2500 for each of the 788 occurrences of willful and intentional violations in responding to Harsy’s FOIA requests or responses that were otherwise in bad faith, totaling \$1,970,000.

¶ 12 On March 22, 2017, the defendant filed a motion to dismiss Harsy’s complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2016)). After leave of court was granted, on July 13, 2017, the defendant filed an amended motion to dismiss Harsy’s complaint, along with an accompanying memorandum in support thereof, arguing, *inter alia*, that counts 1 and 3 of Harsy’s complaint should be dismissed pursuant to sections 2-619(a)(9) and 2-619(c) of the Code (*id.* § 2-619(a)(9), (c)). The memorandum stated that after Harsy filed suit, a new set of documents responsive to Harsy’s December 11 and 21,

2016, FOIA requests were sent to Harsy in an effort to alleviate the concerns raised in his suit. The memorandum explained that when the second set of documents were compiled, Sheriff Bareis realized that Harsy was seeking only the communications between dispatch and police officers, not communications with ambulance personnel. Therefore, Sheriff Bareis did not include ambulance communications in the second set of documents, which resulted in fewer pages being copied. According to the defendant, only those redactions specifically authorized by FOIA were made, and the documents were re-sent to Harsy.

¶ 13 Attached to the defendant's amended motion as an exhibit was the affidavit of Martin Beltz, the FOIA officer for Perry County, which stated that on March 30, 2017, after the exempted information was redacted, Beltz sent Harsy the second set of records, response letters indicating the specific reasons for the redactions that were made, and two refund checks. The affidavit further indicated that Beltz received confirmation from the United States Post Office that the package was delivered to Harsy on April 1, 2017. A post office receipt and confirmation of delivery were attached to Beltz's affidavit as an exhibit. The affidavit further explained:

“Along with the correspondence and redacted records, I sent [Harsy] two refund checks in the amounts of \$28.70 and \$89.70. These refunds were calculated as follows: [Harsy] was initially charged \$119.20 for the records requested in his December 11, 2016, request. When the requested police dispatch communications were re-compiled and sent to him (without ambulance communications), a total of 345 pages were produced. Since the first 50 pages are free, [Harsy] was charged for only 295 pages at ten cents a page or \$29.50. [Harsy] was, therefore, refunded \$89.70 which is the difference between the \$119.20 he was originally charged and \$29.50. In conjunction with his request of December 21, 2016, [Harsy] was initially charged \$51.20. When the requested police dispatch communications were re-compiled (without ambulance communications), a total of 275 pages were

produced. Since the first 50 pages are free, [Harsy] was charged for only 225 pages or \$22.50. [Harsy] was refunded \$28.70 which is the difference between the \$51.20 he was originally charged and \$22.50.”

Also attached to the defendant’s amended motion as an exhibit was the affidavit of Judy Valentine, a dispatcher with the PCSO. The affidavit explained, in response to Harsy’s argument that records were deleted before they were printed, that often times, the dispatchers do not include a note on the dispatch logs because the entry of the specific dispatch code fully explains the communication and a supplemental note is not necessary.

¶ 14 Accordingly, the defendant argued that the claims raised should be dismissed as moot because the defendant had provided Harsy with all of the records that he had requested along with a letter explaining the exemptions authorizing the redactions from the records produced, and that Harsy had been refunded for all amounts that he claimed to have been overcharged. The defendant’s amended motion to dismiss further argued that Sheriff Bareis had not willfully or intentionally violated FOIA, and therefore, Harsy’s request for civil penalties should be denied.

¶ 15 On August 1, 2017, Harsy filed a response to the defendant’s amended motion to dismiss, arguing, in relevant part, that in response to Harsy’s FOIA requests, the defendant had provided Harsy with 788 pages of documents at 21.6 cents a page, which is over the allowable limit of 15 cents per page; the reason for exemptions on any given record failed to be supported by clear and convincing evidence; and, the format of the supplemental documents had been changed in an effort to hide missing pages. Additionally, Harsy alleged that the second set of records were not satisfactory because more redactions had been made; the format of the records had been changed; thousands of records had been removed; and the page numbers of the records had been removed. Harsy further stated that the new tender of documents was not acceptable, nor were the refund



checks. As such, Harsy argued that the defendant's request for dismissal of Harsy's complaint should be denied.

¶ 16 On August 24, 2017, the defendant filed a reply in support of its amended motion to dismiss, arguing, *inter alia*, that because Sheriff Bareis had supplemented his original responses, provided Harsy with letters explaining the applicable exemptions for all redactions or withheld records, and refunded amounts that Harsy was overcharged, the action was moot and should be dismissed pursuant to section 2-619(c) of the Code. The defendant further argued that Harsy was merely speculating that the defendant was hiding something or had redacted more than it claimed that the defendant had provided to Harsy "exactly what he asked for," and that the "[p]laintiff's speculation regarding a conspiracy to hide information is unavailing and does not defeat the defendant's motion based on mootness." Additionally, in response to Harsy's argument that the reason for exemptions on any given record failed to be supported by clear and convincing evidence, the defendant argued that the supplemental response letters fully complied with FOIA and mooted Harsy's claims, in that they specified the exemptions that authorized all redactions and/or records withheld and the reasons for the denials. "Nothing more is required in a FOIA response letter." The defendant further stated that it would "gladly provide the [circuit] court with both clean and redacted copies of all documents provided to plaintiff, for an *in camera* inspection, in order to show 'by clear and convincing evidence' that all redactions were entirely justified." Accordingly, the defendant argued that Harsy's complaint should be dismissed.

¶ 17 A hearing on the defendant's amended motion to dismiss was held on October 12, 2017. Counsel for the defense argued that, with respect to Harsy's December 11 and 21, 2016, FOIA requests, which were for transcripts for certain dates between the PCSO and dispatch, "[t]here are no true transcripts and I think the County probably could have denied his request based on that

fact alone but they attempted to provide him documents and they provided him dispatch logs for the dates he requested.” Counsel further argued that:

“This was never an issue of the [defendant] attempting to withhold documents or attempting willfully and intentionally doing anything to prevent [Harsy] from having the information, which is the standard under the Act for penalties. In fact, he was provided with everything he wanted and in fact the [defendant] bent over backwards to provide him documents that frankly he might not have been entitled to in the first place. So everything was completed and he was provided everything he requested in his lawsuit \*\*\*. Harsy has maintained that he hasn’t received all the documents. I don’t know what we can do other than to tell him he does have all the documents.”

After the circuit court heard argument on the matter, the parties agreed to have the circuit court conduct an *in camera* inspection of copies of the following documents: (1) the unredacted documents that were sent to Harsy *before* suit was filed; (2) the redacted documents that were sent to Harsy *before* suit was filed; (3) the unredacted documents that were sent to Harsy *after* suit was filed; and (4) the redacted documents that were sent to Harsy *after* suit was filed. The parties agreed, prior to the circuit court’s *in camera* inspection, that all facts relevant to the motion to dismiss were before the circuit court.

¶ 18 On February 26, 2018, the circuit court granted the defendant’s amended motion to dismiss. The circuit court dismissed Harsy’s complaint with prejudice, and further denied Harsy’s request to impose any statutory penalties, grant injunctive relief, or award attorney fees and/or costs. Specifically, with respect to count 1, the circuit court stated:

“1. The Defendant has moved to dismiss Count I of the complaint pursuant to 735 ILCS 5/2-619. As to Count I of the complaint, the court finds that Sheriff Bareis did not willfully or intentionally violate the Freedom of Information Act when he responded to

plaintiff's FOIA requests of 12/11/16 and 12/2[1]/16, which are the subject of Count I. The court finds that despite not having 'transcripts' of dispatch communications as requested, Sheriff Bareis provided plaintiff with dispatch logs for the requested dates and a list of potential exemptions. The court also finds that plaintiff has been provided with response letters which fully set forth the reasons for the redactions made, including a detailed factual basis for the application of any exemption claimed. Further, \*\*\* the court finds there is not a material and genuine disputed question of fact raised as to Count I of plaintiff's complaint; as such, Count I of Harsy's complaint is dismissed with prejudice."

With respect to count 3, the circuit court stated:

"3. Defendant has moved to dismiss Count III pursuant to 735 ILCS 5/2-619. As to Count III of the complaint, the court finds that Sheriff Bareis promptly issued refunds to Harsy for all claimed overcharges. The court does not find the conduct of Sheriff Bareis to be willful and intentional. Further, \*\*\* the court finds there is not a material and genuine disputed question of fact raised as to Count III of plaintiff's complaint; as such, Count III of plaintiff's complaint is dismissed with prejudice."

¶ 19 On March 28, 2018, Harsy filed a motion to reconsider, rehear, modify, and vacate the circuit court's order of February 26, 2018, dismissing Harsy's claims (motion to reconsider), arguing, in relevant part, that Harsy raised material issues of fact in regard to whether the defendant acted in bad faith in violation of section 11(j) of FOIA (5 ILCS 140/11(j) (West 2016)). Harsy further argued that the circuit court should vacate its order, reconsider Harsy's complaint in its entirety in light of the bad faith standard, and provide Harsy with a ruling as to whether the defendant acted in bad faith in counts 1 and 3 of Harsy's complaint, which would entitle Harsy to statutory penalties. Harsy's motion to reconsider further requested that the circuit court modify its

order to include an order requiring the defendant to provide Harsy with an index of the records to which access had been denied, pursuant to section 11(e) of FOIA (*id.* § 11(e)). Harsy argued:

“The [c]ourt finds further support in denying plaintiff’s claim by fact that the Sheriff’s Office provided plaintiff with response letters when the [c]ourt incorrectly claims in the Order that the Sheriff’s Office ‘fully set forth the reasons for redactions made, providing a detailed factual basis for the application of any exemptions claimed.’ This is incorrect in that the reason for redactions is not provided for each redaction made. Plaintiff was provided with thousands of records and generalized list for possible redactions of the thousands of records. FOIA requires strict compliance and information that is not redacted needs to be presented to the requestor. Pursuant to 5 ILCS 140/11(e) on a motion of the plaintiff, prior to or after *in camera* inspection, the court shall order the public body to provide an index of the records to which access has been denied.”

Harsy requested that the circuit court allow for a rehearing on count 1 of Harsy’s complaint after Harsy received an index of the records withheld by the defendant.

¶ 20 On April 23, 2018, the defendant filed a response in opposition to Harsy’s motion to reconsider, arguing, in relevant part, that:

“Plaintiff incorrectly conflates the obligations of a public body to respond to a FOIA request with the litigation procedures that are available under Section 11 of FOIA. Under Section 11(e), in the course of litigation, a plaintiff may bring a motion asking the court to order the creation of an index of redactions. Section 11(e) is not applicable to FOIA response letters, however, and the Sheriff had no duty to create an index in response to Plaintiff’s FOIA requests.”

The defendant further argued that Harsy’s request for an index was not a proper motion under section 2-1203(a) of the Code (735 ILCS 5/2-1203(a) (West 2016)), which permits a party, 30

days after the entry of a judgment, to file a motion for rehearing, retrial, modification of judgment, to vacate the judgment or for other relief. The defendant argued that the “other relief” that can be sought pursuant to section 2-1203(a) must be similar in nature to the other types of relief available under section 2-1203(a), and that Harsy’s request for an index pursuant to section 11(e) of FOIA was not similar in nature to a motion seeking rehearing, retrial, modification, or vacation of judgment. According to the defendant, Harsy’s request for an index was “similar in nature to a discovery motion which must be filed before dismissal. Therefore, Plaintiff’s motion seeking an index of redactions is not the type of motion that is permitted under Section 2-1203(a).”

¶ 21 The defendant additionally argued that Harsy’s request for an index was untimely requested. The defendant argued that section 11(e) of FOIA permits a plaintiff to request an index of redactions before or after an *in camera* review, but that section 11(e) did not permit a plaintiff to request an index after the case had been dismissed, arguing, “[t]his matter had been pending for over a year when the court granted the defendant’s motion to dismiss. Plaintiff had ample time before the matter was dismissed to file a motion requesting an index and never did so. Therefore, Plaintiff’s untimely motion for an index should be denied.” The defendant further argued that because the defendant had demonstrated that all redactions were authorized by FOIA, no further relief was warranted, and that the requested index would be an undue burden upon the defendant.

¶ 22 On September 10, 2018, the circuit court denied Harsy’s motion to reconsider, stating, in relevant part, that Harsy’s motion merely repeated arguments previously made to the circuit court and did not present any additional arguments or material issues of fact. The circuit court’s order further stated, with respect to Harsy’s request for an index of redactions, that “such request for relief is not permitted pursuant to 735 ILCS 5/2-1203(a) and/or was untimely requested contrary to 5 ILCS 140/11(e).” This appeal followed.

¶ 23

## II. ANALYSIS

¶ 24 Harsy appeals from the trial court's orders, entered on February 26, 2018, and September 10, 2018, granting the defendant's amended motion to dismiss plaintiff's complaint filed on July 13, 2017, and denying Harsy's request for an index. Harsy states that the circuit court erred in dismissing his complaint, arguing that (1) he raised a material question of fact in count I of his complaint where he alleged that the defendant's conduct amounted to willful and intentional violation of FOIA and/or minimally bad faith adherence to FOIA when responding to Harsy's FOIA requests; (2) the circuit court erred in finding that the response letters provided by the defendant after Harsy filed his complaint, and the later provided documents and records, were inadequate responses to Harsy's initial requests; (3) the circuit court erred in failing to find a genuine and material issue of fact existed as to whether or not the defendant willfully and intentionally violated FOIA and/or acted in bad faith in respect to the monies that Harsy was charged for copies; and (4) the circuit court erred in failing to order an index of redactions after an *in camera* inspection pursuant to section 11(e) of FOIA (5 ILCS 140/11(e) (West 2016)).

¶ 25

### A. Dismissal of Count I

¶ 26 On appeal, Harsy contends that the trial court erred by granting the defendant's section 2-619 motion to dismiss because the initial answer to Harsy's FOIA request failed to address several of his requests and failed to reference a specific legal reason for the partial denial of the request, thus violating FOIA. Harsy claims that he was never provided the records requested in his FOIA requests on December 11, 2016, and December 21, 2016, nor the reasons for redactions. Harsy additionally contends that the trial court erred by failing to determine whether the defendant acted in bad faith in responding to his FOIA requests. Harsy is requesting that this court issue an injunction commanding the PCSO to disclose the disputed records and provide an explanation as to why the documents were redacted and to explain any omissions or removal of pages. Further,

Harsy is requesting that this court enter an order awarding the reimbursement of copying fees, and awarding sanctions for each instance of willful and intentional failure to comply with FOIA or responses in bad faith.

¶ 27 Here, the defendant requested the dismissal of counts 1, 2, and 3 of Harsy's complaint pursuant to section 2-619(a)(9) of the Code, which provides for an affirmative matter that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2016). We review the trial court's grant of a section 2-619 motion to dismiss *de novo*. *Barner v. Fairburn*, 2019 IL App (3d) 180742, ¶ 10. A reviewing court considers the pleading and any supporting documents found on the record, interpreting everything in the light most favorable to the nonmoving party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). Courts may consider affidavits when ruling on motions to dismiss. 735 ILCS 5/2-619(c) (West 2016).

¶ 28 The defendant argued in the trial court, and now on appeal, that the defendant had tendered to Harsy all documents that he is entitled to, and thus the case was properly dismissed as moot. See *Yu v. International Business Machines Corp.*, 314 Ill. App. 3d 892, 897-98 (2000). The defendant argues, alternatively, that the counts were properly dismissed as the FOIA requests sought documents that did not exist, and thus, Sheriff Bareis was under no obligation to provide any records in response. Further, the defendant argues that the circuit court's denial of a statutory remedy for the defendant's alleged willful and intentional failure to comply with FOIA when responding to Harsy's December FOIA requests was not against the manifest weight of the evidence.

¶ 29 On December 11, 2016, Harsy requested, pursuant to FOIA, that the PCSO provide a "printed transcript of all conversations between the [PCSO] police officers and police dispatch" for certain dates. On December 21, 2016, Harsy requested the same for another range of dates. The defendant initially provided Harsy with what he describes as "8,225 separate records." After suit

was filed, the defendant provided another set of records which included, “3,684 records.” Sheriff Bareis explained, in a notarized affidavit, that the reason there were less records in his second disclosure was because, after a more careful reading of the FOIA requests, he realized that Harsy was requesting only police officer communication, and thus, he omitted nonresponsive communication from the provided dispatch logs.

¶ 30 We reject the defendant’s argument that Sheriff Bareis had no obligation to provide records at all in response to the December 11, 2016, and December 21, 2016, FOIA requests because “transcripts did not exist.” We acknowledge that the nonexistence of requested documents is a cognizable affirmative defense to a complaint grounded in FOIA. *Bocock v. Will County Sheriff*, 2018 IL App (3d) 170330, ¶ 52. Further, it is clear that FOIA does not “create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body” (5 ILCS 140/1 (West 2016)). Here, however, the language used by Harsy to describe the public records sought was reasonably clear. See *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427, ¶ 33 (“A request to inspect or copy must reasonably identify a public record and not general data, information, or statistics.”).

¶ 31 In response to Harsy’s request for transcripts of conversations between police officers and police dispatch, the defendant provided the radio logging reports showing the communication logged by dispatch between the PCSO’s police officers and dispatch. While these entries may not meet a strict definition of transcripts of conversations, they are the records which are kept by Sheriff Bareis’s department that show communication of the type requested. Where the defendant never denied the existence of transcripts nor argued this point in the lower court, and Harsy does not claim on appeal that the radio logging reports were not the requested documentation that was



the subject of his FOIA request, we cannot find that the defendant was under no obligation to respond to Harsy's FOIA request.

¶ 32 We do find, however, that the case was properly dismissed as moot. A claim is moot when no actual controversy exists, or events occur which make it impossible for a court to grant effectual relief. *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 782 (1999). Where an individual has received what he sought, his action should be dismissed as moot. *Id.* The mootness doctrine is applied to FOIA claims once the requested records have been produced. *Roxana Community Unit School District No. 1 v. Environmental Protection Agency*, 2013 IL App (4th) 120825, ¶ 42. This court usually reviews *de novo* whether a case is moot. *People ex rel. Rahn v. Vohra*, 2017 IL App (2d) 160953, ¶ 27. Whether an exemption applies under FOIA is a matter of statutory construction, which as a question of law is reviewed *de novo*. *Garlick v. Naperville Township*, 2017 IL App (2d) 170025, ¶ 44. Where the circuit court conducts an evidentiary hearing (like the *in camera* inspection here), however, we review whether the circuit court's factual findings were against the manifest weight of the evidence, while still reviewing questions of law *de novo*. *Hites v. Waubensee Community College*, 2016 IL App (2d) 150836, ¶ 32.

¶ 33 The circuit court performed an *in camera* inspection of the documents in question and considered the parties' pleadings; affidavits; redacted and unredacted documents sent to Harsy before and after suit was filed; letters and correspondence between Harsy and the FOIA officer; and made its determination as to whether the redacted records were exempt from disclosure, and whether the defendant violated FOIA willfully and intentionally or in bad faith. Accordingly, we will review under the manifest weight of the evidence standard the circuit court's factual findings in its dismissal order, and we will review *de novo* the circuit court's legal determinations.

¶ 34 A public body must comply with a FOIA request unless an exemption applies. *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463 (2003). To sustain its

burden to prove an exemption applies, a public body must provide a detailed explanation justifying its exemption claim, specifically addressing the requested documents in a manner allowing for adequate adversarial testing. *Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838, ¶ 12. Whether an exemption applies is a matter of statutory construction that this court reviews *de novo*. *Lucas v. Prisoner Review Board*, 2013 IL App (2d) 110698, ¶ 15.

¶ 35 The defendant asserted that the information it redacted was properly exempted under sections 7(1)(a), 7(1)(b), 7(1)(c), 7(1)(d)(iv), 7(1)(d-5), and 7(1)(k)<sup>1</sup> (5 ILCS 140/7(1)(a), (1)(b), (1)(c), (1)(d)(iv), (1)(d-5) (West 2016)). The parties agreed, prior to the circuit court's *in camera* inspection, that all facts relevant to the motion to dismiss were before the circuit court. The defendant provided the unredacted documents to the trial court, which viewed them *in camera* and determined that the claimed exemptions applied.

¶ 36 Harsy argues on appeal that the circuit court erred in ruling that the response letters and documents provided after Harsy filed suit were adequate support for the reasons for the redactions and the circuit court erred in ruling that the altered documents and records were an adequate replacement for the original records at issue. In support, Harsy argues that the documents redacted information that had not been previously redacted and altered the format from the original disclosure. Harsy does not explain how the alteration of the format affects the responsive nature of the documents, and we do not find, after review of the documents, that it does. As to the additional redactions and deletions, Sheriff Bareis explained by affidavit on May 18, 2017, that when the documents were printed a second time, he realized that he had initially provided

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<sup>1</sup>While the letter provided by the defendant cited section 7(1)(k) (5 ILCS 140/7(1)(k) (West 2016)), a section relating to architects' plans and construction documents where disclosure would compromise security, the language after the citation was relating to section (1)(nn) (5 ILCS 140/7(1)(nn) (West 2004)) of a prior version of the statute which indicated "Law enforcement officer identification information or driver identification information compiled by a local law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code."

documents that were not responsive to Harsy's initial request for conversations between the PCSO police officers and police dispatch. As such, Sheriff Bareis recompiled the documents to include communication between his police officers and dispatch only, resulting in fewer records. While Sheriff Bareis described the further redactions as filtering for ambulance communication, our review indicates that they also filtered out other calls that were not between PCSO police officers and dispatch, which were also not responsive to Harsy's FOIA request.

¶ 37 Further, Harsy actually received the records in both responses prior to and after the suit was filed. Thus, there is no dispute regarding the records to which Harsy draws this court's attention in his brief, as they were either provided initially, or provided in a supplemental response. Harsy has not identified additional documents which he believes were withheld by the defendant that should have been provided in response to his FOIA request, and this court cannot discern any from our review of the record on appeal.

¶ 38 Regarding the defendant's redactions, it has the burden of proving an exemption with detailed specificity which applies only upon review in the circuit court, and not in the initial denial letter, as urged by Harsy. See *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 770 (2009). If the party seeking disclosure of information under FOIA challenges the public body's denial in the circuit court, the public body has the burden of proving that the records in question fall within the exemption it has claimed. *Illinois Education Ass'n*, 204 Ill. 2d at 464.

¶ 39 We have reviewed the redactions and claimed exemptions *de novo* and find that the defendant met its burden of proving that the claimed exemptions applied to the redacted or deleted information documented in the record on appeal and provided to Harsy. Under the express limitation of FOIA, Harsy is entitled to no more than he has received. Thus, the circuit court did not err in determining that the exemptions cited in the response letters applied to uphold nondisclosure under FOIA. We therefore find this issue moot, as there is no other relief we could

grant to plaintiff if we were to rule in his favor where he has already received all documents that he is entitled to receive in response to his requests.

¶ 40 Harsy further argues that the circuit court erred in failing to determine whether or not the defendant acted in bad faith. Despite our finding that Harsy's request for an injunction is moot, we must also address Harsy's request for the imposition of civil penalties. See *Roxana Community Unit School District No. 1*, 2013 IL App (4th) 120825, ¶ 42 (finding request for civil penalty survives moot FOIA claim). Section 11(j) of FOIA states in relevant part: "If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence." 5 ILCS 140/11(j) (West 2016). To obtain civil penalties pursuant to section 11(j), Harsy must demonstrate that the public body (1) failed to comply with FOIA, and (2) did so willfully, intentionally, and in bad faith. *Williams v. Bruscato*, 2021 IL App (2d) 190971, ¶ 14. Although FOIA does not define "bad faith," the court in *Williams* defined it as failing to comply with FOIA "deliberately, by design, and with a dishonest purpose." *Id.* ¶ 15. Accordingly, based upon the plain meanings of the statute's terminology, to warrant the imposition of a civil penalty under section 11(j) of FOIA, the public body must not only have intentionally failed to comply with FOIA but must have done so deliberately, by design, and with a dishonest purpose. *Id.* A trial court's finding that a public body willfully, intentionally, and in bad faith failed to comply with FOIA is reviewed under the manifest weight of the evidence standard, regardless of whether the underlying facts are disputed. *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 48.

¶ 41 In this case, the circuit court's dismissal order, entered on February 26, 2018, clearly stated: "As to Count I of the complaint, the court find that Sheriff Bareis did not willfully or intentionally

violate the Freedom of Information Act when he responded to plaintiff's FOIA requests of 12/11/16 and 12/2[1]/16, which are the subject of Count I."

¶ 42 Harsy, as evidence of the defendant's willful and intentional, or bad faith response to Harsy's FOIA requests, argues (1) that Sheriff Bareis's office used untrained FOIA staff in handling plaintiff's FOIA requests; (2) that Sheriff Bareis knew that the FOIA policy was outdated but told Harsy to rely on it as justification for the exemptions made; (3) that Sheriff Bareis demanded that Harsy pick up the records from Sheriff Bareis's office instead of mailing them; (4) that Sheriff Bareis kept a copy of the documents without informing Harsy and charged him for Sheriff Bareis's copy; (5) lack of adequate FOIA signage at Sheriff Bareis's office; (6) the defendant's failure to correct issues prior to the filing of a lawsuit; (7) the defendant's failure to provide a letter explaining the reasoning for the FOIA redactions and how to appeal a FOIA decision until two months after suit was filed; and (8) that after Harsy filed his complaint, Sheriff Bareis's office provided another set of responsive documents with new redactions and an altered format.

¶ 43 Where the circuit court specifically stated that it did not find that the defendant had willfully or intentionally violated FOIA, it necessarily follows that it could not have found that the defendant failed to comply with FOIA deliberately, by design, and with a dishonest purpose. We have thoroughly reviewed the record on appeal in this matter and, based on our review of the record, we find that the circuit court's factual findings were not against the manifest weight of the evidence. Thus, Harsy was not entitled to sanctions pursuant to section 11(j) of FOIA.

¶ 44 **B. Dismissal of Count III**

¶ 45 Next, Harsy argues that count 3 of his complaint was brought based on the defendant's actions committed prior to Harsy filing suit, and as such, Harsy argues that he raised an issue of genuine material fact as to whether or not the defendant willfully and intentionally violated FOIA

and/or adhered to FOIA in bad faith with respect to the 788 instances Harsy was charged for copies, and therefore, count 3 of Harsy's complaint should be reinstated. The defendant argues that Harsy's claim that he was overcharged is also moot. We agree.

¶ 46 The defendant calculated the number of pages disclosed after the suit was filed, minus 50 pages, and then multiplied the number of pages by 10 cents per page. Harsy was issued a refund for the difference between the amounts that he was charged initially and the amount that was due according to the second calculation. Harsy admits in his brief that the defendant issued refunds once the lawsuit was filed. Thus, count 3 is moot as to refunds for overcharged copying fees.

¶ 47 Harsy also argues that the overcharging of copying fees was evidence of bad faith adherence to FOIA. The circuit court found that the defendant promptly issued refunds to Harsy for all claimed overcharges and did not find the conduct of the defendant to be willful and intentional. For the same reasons stated above, a finding of bad faith by the trial court would not have been appropriate here. We have thoroughly reviewed the record on appeal in this matter and, based on our review of the record, we find that the circuit court's factual findings were not against the manifest weight of the evidence and there was no evidence of willful and intentional violation of FOIA, or bad faith on the part of the defendant. Thus, Harsy was not entitled to sanctions pursuant to section 11(j) of FOIA.

¶ 48 C. Index

¶ 49 Finally, Harsy argues that his request for an index of redactions should have been granted because the language of FOIA indicates that an index may be requested before *or* after an *in camera* inspection, and that it was requested at the only time allowable. As such, Harsy argues that the circuit court erred in ruling that such a request for relief is not permitted pursuant to section 2-1203(a) of the Code (735 ILCS 5/2-1203(a) (West 2016)) and/or was untimely requested contrary to section 11(a) of FOIA (5 ILCS 140/11(a) (West 2016)).

¶ 50 Harsy requested an index pursuant to section 11(e) of FOIA in a motion to reconsider the circuit court's order of dismissal filed on March 28, 2018. That section provides that, "prior to or after *in camera* inspection, the court shall order the public body to provide an index of the records to which access has been denied." 5 ILCS 140/11(e) (eff. July 28, 2016). An indexing order concerns procedural details of the case before a court. *Goodrich Corp. v. Clark*, 361 Ill. App. 3d 1033, 1040 (2005). The index is designed to balance an individual's right to disclosure of documents pursuant to FOIA's underlying purpose of opening government conduct to scrutiny by an informed, active citizenry, with the agency's right to withhold documents that fall within FOIA's clearly delineated exceptions to the general rule of disclosure. *Dole v. City of Chicago*, 2017 IL App (1st) 150032-U, ¶ 59.

¶ 51 While the statute permits a request for an index either before or after an *in camera* review, here, Harsy failed to request an index prior to the circuit court's *in camera* inspection, and further agreed that the circuit court had before it all facts relevant to rule on the motion to dismiss. If Harsy believed that an index was required for that ruling, Harsy should have requested the index prior to submitting the matter to the circuit court. While we acknowledge that an index may be useful for purposes of preparing arguments for a motion to reconsider or on appeal, especially where our review is *de novo* regarding redactions or deletions of records in response to a FOIA request, Harsy did not argue that the lack of an index affected his ability to fashion arguments on appeal, nor was such argument made before the trial court.

¶ 52 We find the necessity of an index to be moot where this court has determined that the defendant proved that the redacted and deleted material, which can be discerned from the record, was properly withheld pursuant to the exemptions claimed by the defendant. Additionally, where the defendant failed to argue in the circuit court that there were responsive documents that were

deleted and could not be properly reviewed by the circuit court without an index being provided by the defendant, this court is unable to review the propriety of those deletions.

¶ 53

### III. CONCLUSION

¶ 54 For the foregoing reasons, we affirm the circuit court's February 26, 2018, order granting the defendant's amended motion to dismiss Harsy's complaint because Harsy's claims were moot where the defendant supplemented its original responses, provided Harsy with letters explaining the applicable exemptions for all redactions or withheld records, and refunded amounts that Harsy was overcharged for copies. We further find that the circuit court's finding that the actions of the defendant in responding to Harsy's FOIA requests did not demonstrate willful, intentional, or bad faith compliance on the part of the defendant was not against the manifest weight of the evidence. Additionally, we affirm the circuit court's September 10, 2018, order denying Harsy's request for an index where a specific index is now moot. Accordingly, we affirm the judgment of the circuit court of Perry County.

¶ 55 Affirmed.