

No. 126675

In the
Supreme Court of Illinois

MANCINI LAW GROUP, P.C.,

Plaintiff-Appellant,

v.

SCHAUMBURG POLICE DEPARTMENT,

Defendant-Appellee.

Appeal from the Illinois Appellate Court of Illinois,
First Judicial District, No. 1-19-1131
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 17 CH 13881.
The Honorable **Franklin U. Valderrama**, Judge Presiding.

**BRIEF OF DEFENDANT-APPELLEE
SCHAUMBURG POLICE DEPARTMENT**

E-FILED
5/7/2021 10:04 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

LANCE C. MALINA
(lcmalina@ktjlaw.com)
MALLORY A. MILLUZZI
(mamilluzzi@ktjlaw.com)
KLEIN, THORPE & JENKINS, LTD.
20 North Wacker Drive
Suite 1660
Chicago, Illinois 60606
(312) 984-6462

Counsel for Defendant-Appellee

ORAL ARGUMENT REQUESTED



**TABLE OF CONTENTS AND
STATEMENT OF POINTS AND AUTHORITIES**

NATURE OF THE CASE	1
5 ILCS 140/1 <i>et seq.</i>	1
ISSUES PRESENTED BY APPELLANT FOR REVIEW	1
STATUTES NOT LISTED BY APPELLANT	1
5 ILCS 140/2(c-5).....	1
5 ILCS 140/7(1)(b)-(c)	2
625 ILCS 5/11-408	3
STATEMENT OF FACTS	3
5 ILCS 140/2(c-5), 7(1)(b)	4
625 ILCS 5/11-408	4
5 ILCS 140/1 <i>et seq.</i>	5
STANDARD OF REVIEW	6
<i>Dumke v. City of Chicago</i> , 2013 IL App (1st) 121668	6
ARGUMENT	6
<i>Lieber v. Board of Trustees of Southern Illinois University</i> , 176 Ill.2d 401 (1997)	6
<i>Chicago All. for Neighborhood Safety v. City of Chicago</i> , 348 Ill. App. 3d 188 (2004)	6
I. APPELLANT’S RELIANCE ON <i>LIEBER</i> IS INCORRECT, AS <i>LIEBER</i> DOES NOT APPLY TO THIS FACT SCENARIO.....	7
<i>Lieber v. Board of Trustees of Southern Illinois University</i> , 176 Ill.2d 401 (1997)	7

i.	<i>Lieber's Waiver Rule Was Overturned By The 2010 Amendments To FOIA</i>	8, 9, 11
	<i>Timpone v. Illinois Student Assistance Commission,</i> 2019 IL App (1 st) 181115	8
	<i>Kalven v. City of Chicago,</i> 2014 IL App (1st) 121846.....	8
	<i>People v. Hicks,</i> 119 Ill.2d 29 (1987)	8
	5 ILCS 140/2(c-5).....	9, 12
	5 ILCS 140/7(1)(b)	9
	<i>Timpone v. Illinois Student Assistance Commission,</i> 2019 IL App (1 st) 181115	9
	<i>Lieber v. Board of Trustees of Southern Illinois University,</i> 176 Ill.2d 401 (1997)	9
	<i>Hauser v. Tp. High School Dist. #113,</i> No. 11 CH 1157, 2012 WL 6053947 (Ill.Cir.Ct. Sep. 18, 2012).....	10
	<i>Watkins v. Customs and Border Protection,</i> 643 F. 3d 1189 (9th Cir. 2013)	11
	<i>Kelly v. Village of Kenilworth,</i> 2019 IL App (1st) 170780.....	11
	<i>Shehadeh v. Madigan,</i> 2013 IL App (4th) 120742	11
	<i>Mulligan v. Joliet Regional Port Dist.,</i> 123 Ill. 2d 303 (1988)	11
ii.	<i>Lieber Interpreted A Different FOIA Exemption, Which Had Different Standards For Disclosure</i>	11
	5 ILCS 140/2(c-5).....	12
	5 ILCS 140/7(1)(b)	12
	<i>Heinrich v. White.</i> 2012 IL App (2d) 110564.	12

iii.	Even If <i>Lieber</i> Still applies, Production To LexisNexis Is Distinguishable As It Is Part Of a Statutory Duty.....	12
	5 ILCS 140/7(1)(b)	12
	5 ILCS 140/7(1)(c).....	12
	<i>Chicago All. for Neighborhood Safety v. City of Chicago</i> , 348 Ill. App. 3d 188 (2004)	13, 14
	625 ILCS 5/11-408	13
	<i>People ex rel. Birkett v. City of Chicago</i> , 292 Ill.App.3d 745 (2d Dist. 1997).....	15
	<i>Watkins v. Customs and Border Protection</i> , 643 F. 3d 1189 (9th Cir. 2013)	14, 15, 16
	<i>Jud. Watch, Inc. v. U.S. Dep't of Def.</i> , 963 F. Supp. 2d 6 (D.D.C. 2013).....	16
	<i>Students Against Genocide v. Dep't of State</i> , 257 F.3d 828 (D.C.Cir.2001).....	16
	<i>Mabie v. United States Marshal's Serv.</i> , No. 18-CV-1276-JPG-RJD, 2019 WL 570924 (S.D. Ill. Feb. 12, 2019)	16
	<i>Bassiouni v. C.I.A.</i> , No. 02 C 4049, 2004 WL 1125919 (N.D. Ill. Mar. 31, 2004), <i>aff'd</i> , 392 F.3d 244 (7th Cir. 2004)	16
	<i>Rockford Police Benev. & Protective Ass'n, Unit No. 6 v. Morrissey</i> , 398 Ill. App. 3d 145 (2d Dist. 2010).....	16
	<i>Carter v. Meek</i> , 322 Ill.App.3d 266 (5th Dist. 2001).....	16
	<i>Lieber v. Board of Trustees of Southern Illinois University</i> , 176 Ill.2d 401 (1997)	16
	<i>American Federation of State, County & Municipal Employees v. County of Cook</i> , 136 Ill.2d 334 (1990)	16

CONCLUSION.....16

Nature of the Case

This matter involves the Appellant Mancini's challenge of the Schaumburg Police Department's ("SPD") partial denial of Appellant's Freedom of Information Act ("FOIA"), 5 ILCS 140/1 *et seq.*, request in which Appellant sought the release of home addresses from SPD traffic accident reports and where Appellee SPD denied the disclosure of home addresses from SPD traffic accident reports.

Issues Presented by Appellant For Review

1. Did Appellee SPD waive the right to withhold home address information in traffic accident reports under FOIA where SPD previously produced the entirely unredacted reports to a third-party, LexisNexis?

Statutes Not Listed by Appellant

In addition to the statutes provided by Appellant, the following provisions of the Illinois Freedom of Information Act are relevant to the instant appeal:

Sec. 2. Definitions. As used in this Act:

....

(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)

Sec. 7. Exemptions.

- 1) 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:

- (b) Private information, unless 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 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)(b)-(c)

Additionally, this case involves the following provisions of the Illinois Motor Vehicle Code:

11-408. Police to report motor vehicle accident investigations.

- (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 within 10 days after investigation of the motor vehicle accident, or within such other time as 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. However, the Administrator or the Secretary of State may require a supplemental written report from the reporting law enforcement officer.
- (b) The Department at its discretion may require a supplemental written report from the reporting law enforcement officer on a form supplied by the Department to be submitted directly to the Department. Such supplemental report may be used only for accident studies and statistical or analytical purposes under Section 11-412 or 11-414 of this Code.
- (c) The Department at its discretion may provide for in-depth investigations of accidents involving Department employees or other motor vehicle accidents by individuals or special investigation groups, including but not limited to police officers, photographers, engineers, doctors, mechanics, and as a

result of the investigation may require the submission of written reports, photographs, charts, sketches, graphs, or a combination of all. Such individual written reports, photographs, charts, sketches, or graphs may be used only for accident studies and statistical or analytical purposes under Section 11-412 or 11-414 of this Code.

- (d) On and after July 1, 1997, law enforcement officers who have reason to suspect that the motor vehicle accident was the result of a driver's loss of consciousness due to a medical condition, as defined by the Driver's License Medical Review Law of 1992, or the result of any medical condition that impaired the driver's ability to safely operate a motor vehicle shall notify the Secretary of this determination. The Secretary, in conjunction with the Driver's License Medical Advisory Board, shall determine by administrative rule the temporary conditions not required to be reported under the provisions of this Section. The Secretary shall, in conjunction with the Illinois State Police and representatives of local and county law enforcement agencies, promulgate any rules necessary and develop the procedures and documents that may be required to obtain written, electronic, or other agreed upon methods of notification to implement the provisions of this Section.
- (e) Law enforcement officers reporting under the provisions of subsection (d) of this Section shall enjoy the same immunities granted members of the Driver's License Medical Advisory Board under Section 6-910 of this Code.
- (f) All information furnished to the Secretary under subsection (d) of this Section shall be deemed confidential and for the privileged use of the Secretary in accordance with the provisions of subsection (j) of Section 2-123 of this Code.

625 ILCS 5/11-408

Statement of Facts

On July 13, 2017, Mancini Law Group (“Mancini” or “Appellant”) requested all traffic accident reports for all motor vehicle accidents occurring within the Village of Schaumburg between June 30, 2017 and July 13, 2017 under FOIA. C12-13. On August 7, 2017, SPD responded to Mancini’s request, providing it with copies of the requested records. C14-15. As indicated in SPD’s response letter, redactions were made to the accident reports pursuant to FOIA Sections 7(1)(b) and 7(1)(c). *Id.* SPD’s redactions included home addresses, home phone numbers, driver’s license numbers, dates of birth, policy numbers and license plates numbers. *Id.* Notably, SPD did not redact or withhold

the names of individuals involved in motor vehicle accidents. *Id.* In its Complaint, Mancini only challenged the redaction of home addresses and names, but since it is undisputed that SPD never redacted or withheld the names, the only private information at issue in this case are personal home addresses. C14, C35. Personal home addresses are exempt from disclosure under Section 7(1)(b) of FOIA and specifically included in the definition of “private information” in Section 2(c-5) of FOIA. C98, 5 ILCS 140/2(c-5), 7(1)(b).

SPD, through LexisNexis, provides individuals directly involved in accidents (drivers, attorneys for drivers and insurance companies) unredacted copies of accident reports. C170-171 at ln. 19-22, C230-236. LexisNexis receives accident reports from SPD as a verified third-party vendor for the State of Illinois in order to allow the Village to comply with the mandated reporting under the Illinois Vehicle Code, 625 ILCS 5/11-408. C210-211 at ln. 5-11. The crash reports are uploaded into approved software that is managed through both a contract between the Village and LexisNexis and additionally, LexisNexis has a contract with the State of Illinois. C170-171 at ln. 19-22, C210-211 at ln. 5-11, C230-236, C246-249. SPD’s agreement with LexisNexis requires compliance with FOIA. C213 at ln. 10-21, C230-236. The Village has monitored and restricted access to the accident reports to try and keep confidential information safe and the Village’s agreement with LexisNexis requires compliance with FOIA. C194-195 at ln. 23-6, C213 at ln. 10-21. SPD has instructed LexisNexis that only individuals who are involved in a traffic accident can obtain unredacted accident reports. C195. In order to use these accidents reports for their own purposes outside of the State’s mandated reporting, LexisNexis must pay for the reports or submit FOIA requests to SPD for accident reports which are subject to redactions. C211-213 at ln 15-21, C230-236.

Mancini filed this lawsuit pursuant to the Freedom of Information Act, 5 ILCS 140/1 *et seq.* (“FOIA”). C8-C11. SPD filed a Section 2-619 motion to dismiss in which SPD argued that it did not have the legal capacity to be sued and that it did not improperly deny access to records. C46-51. The Circuit Court denied the motion to dismiss, ruling that SPD is a public body under FOIA and that it has the legal capacity to be sued and determined the issue of FOIA was more appropriate for summary judgment after discovery. *Id.* The parties then filed cross-motions for summary judgment. C256-270. SPD took the position that it properly redacted information from the records pursuant to Sections 7(1)(b) and 7(1)(c) of FOIA. *Id.* Mancini took the position that the records were not exempt under Sections 7(1)(b) or 7(1)(c) of FOIA and that even if those exemptions applied, SPD waived them by producing the records entirely unredacted to a third party (LexisNexis). *Id.* The issue of waiver was raised for the first time in SPD’s response/reply brief and was not raised in its own Motion for Summary Judgment. C106-110, C145-146. The Circuit Court denied Mancini’s motion for summary judgment and granted SPD’s motion for summary judgment, ruling that SPD properly redacted home addresses and other information pursuant to Sections 7(1)(b) and 7(1)(c) of FOIA. *Id.* The Circuit Court also ruled that SPD did not waive the exemptions by disclosing the records to a third party, stating that SPD is statutorily mandated to disclose the records to LexisNexis. *Id.*

Mancini then appealed the Circuit Court’s ruling only to the issue of waiver to the Appellate Court, which affirmed the Circuit Court’s ruling in favor of SPD. *Mancini v. Schaumburg Police Dept.*, 2020 IL Ap 1st 191131-U, ¶25. Mancini now appeals the Circuit Court’s granting of SPD’s Motion for Summary Judgment to the Illinois Supreme Court. Again, Mancini does not challenge the circuit court’s ruling that Sections 7(1)(b)

and 7(1)(c) of FOIA applied. Rather, Mancini only appeals the circuit court's holding that SPD waived the right to redact the accident reports under the exemptions to FOIA by providing unredacted accident reports to LexisNexis.

Standard of Review

A circuit court's summary judgment decision is reviewed by this Court *de novo*. *E.g. Dumke v. City of Chicago*, 2013 IL App (1st) 121668, ¶ 11.

Argument

Appellant argues that SPD waived the right to withhold the addresses on the accident reports from Mancini because it produced the unredacted reports to LexisNexis. For the reasons stated herein, Appellant's argument is without merit. First, the waiver rule established by *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401 (1997) does not apply to this case, either under a recognition that the 2010 amendments of FOIA legislatively overturned *Lieber* or that it never applied to information redacted under Section 7(1)(b) of FOIA. Second, even if the waiver rule still lives on, Appellant has not met its burden to establish waiver. *Chicago All. for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 203 (2004). As noted by the Appellate Court, the Appellant had its opportunity to develop a record at the circuit court level and by filing its own motion for summary judgment, agreed that there was no issue of material fact. (¶24). Appellant now is trying to get a second bite at the apple to further develop a factual record after being denied relief by two courts. There are ample facts in the record to rule, as a matter of law, that SPD did not waive its right to redact the home address of individuals involved in traffic accidents within the Village.

I. APPELLANT'S RELIANCE ON *LIEBER* IS INCORRECT, AS *LIEBER* DOES NOT APPLY TO THIS FACT SCENARIO

In support of its waiver argument, Appellant misguidedly relies on the Illinois Supreme Court decision, *Lieber*. *Lieber* involved the question of whether the Freedom of Information Act required Southern Illinois University to provide the owner of an apartment building approved by the University for freshmen students with a list containing the names and addresses of individuals who had contacted the University about freshman housing. *Id.* at 403. The University withheld the records claiming that the information requested fell within one of former Section 7(1)(b)'s specific exemptions. *Id.* at 409. The Court held that the University was barred from asserting an exemption under Section 7(1)(b)(i) of FOIA, as the requested records had been disclosed to other third parties including campus ministries and the local newspaper. *Id.* at 413. Appellant argues that, as in *Lieber*, SPD is barred from asserting any exemptions under FOIA as the accident reports have been disclosed to another third party, LexisNexis.

Lieber is distinguishable from the instant case for several critical reasons. Notably, since the decision in *Lieber*, FOIA has been amended so as to overrule the waiver rule established in *Lieber* and relied on by the Appellant. Second, *Lieber* involved the interpretation of an entirely different section of FOIA and was not intended to apply to information exempt under the current Section 7(1)(b) of FOIA. Finally, even if the waiver rule still exists, the situation in which SPD has provided unredacted copies of information to LexisNexis is distinguishable so that the waiver rule does not apply.

i. ***Lieber's Waiver Rule Was Overturned By The 2010 Amendments To FOIA***

Lieber was decided in 1997, and involved statutory language no longer in effect, prior to the significant FOIA amendments enacted in 2010. As noted by the Illinois Appellate Court, “[i]t was decided in an era when privacy expectations were different.” *Timpone v. Illinois Student Assistance Commission*, 2019 IL App (1st) 181115, ¶35. In 2010, FOIA was amended to give public bodies the discretion to redact exempt information. *See* 5 ILCS 140/7. Public Act 96-542 specifically added the language:

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. (emphasis added)

The language giving public bodies the option to redact or not redact information was not present when *Lieber* was decided and was specifically added to FOIA in 2010; therefore, the Court must assume that the legislature intended to change the law. *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 15 (overruled on other grounds); citing *People v. Hicks*, 119 Ill.2d 29, 34 (1987) (an amendment to a statute creates a presumption that the amendment was intended to change the law). It is clear from the plain language of FOIA that the legislature intended to give a public body the discretion to assert exemptions and to make decisions regarding exemptions on a case by case basis. This interpretation has been advocated by the Illinois Attorney General’s Public Access Counselor (“PAC”), the state agency authorized to interpret and opine on FOIA issues. The PAC repeatedly asserts that different standards *should* apply for exemptions, such as when the requestor asks for their own information.

Additionally, the legislature further intended to overturn *Lieber* when it restructured the exemptions under FOIA. The legislature added a specific definition and exemption for “private information” to the list of exemptions under FOIA. *See Public Act 96-542*; 5 ILCS 140/2(c-5); 5 ILCS 140/7(1)(b). Section 2(c-5) of FOIA defines “private information” as

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). Section 7(1)(b) of FOIA then creates an exemption for such “private information. As the Court in *Lieber* found that home addresses were not exempt under the FOIA exemptions in place in 1997, it is clear that the legislature intended to overturn this ruling through Public Act 96-542 and the enactment of an exemption for “private information” which specifically includes home addresses. *See Public Act 96-542*; 5 ILCS 140/2(c-5); 5 ILCS 140/7(1)(b); and *Lieber*, 176 Ill.2d at 411-412; *see also Timpone v. Illinois Student Assistance Commission*, 2019 IL App (1st) 181115, ¶35 (*Lieber* was decided in an era when privacy expectations were different). Additionally, the legislature added an express waiver provision to Section 7(1)(c) of FOIA when it stated that personal information is exempt “unless the disclosure is consented to in writing by the individual subjects of the information.” 5 ILCS 140/7(1)(c). Given the addition of an express waiver to FOIA, it does not makes sense that *Lieber’s* waiver rule still applies because a rule permitting waiver by action of the public body would directly conflict with the statutory requirement of waiver by written consent of the individual subjects of the information.

Hauser v. Tp. High School Dist. #113, No. 11 CH 1157, 2012 WL 6053947 (Ill.Cir.Ct. Sep. 18, 2012).

In light of the specific statutory amendments to FOIA in 2010, it is no longer appropriate to look to or rely on the federal FOIA case law on waiver, as the Illinois FOIA statutory language no longer mirrors the federal FOIA statute. Illinois courts have explained that although the original Illinois FOIA was analogous to the federal FOIA, when FOIA was amended in 2010, it chose not to keep Illinois law consistent with federal FOIA, showing its intent to apply FOIA differently than federal law:

“[W]hen the State legislature passes a State statute based upon a Federal statute, the statute can presumably be interpreted in conformity with the decisions of the Federal courts rendered prior to the adoption of the statute. Further, it may be presumed that the legislature adopted the language it did with knowledge of the construction previously enunciated in the Federal courts. [Citations.] However, the converse of these principles of statutory construction is also true. Since it may be presumed that the legislature had knowledge of the Federal courts' construction of the Federal statute, the intent of the State legislature can be derived not only from the language actually adopted, but also from the language which was changed or not adopted. The fact that the State legislature specifically declined to adopt a certain section of the model Federal statute evidences an intent to achieve a result different from that announced by the decisions of the Federal courts.” *Rock River Times v. Rockford Pub. Sch. Dist. 205*, 2012 IL App (2d) 110879, ¶ 39, quoting *Laborer's International Union of North America, Local 1280 v. Illinois State Labor Relations Board*, 154 Ill.App.3d 1045, 1050 (1987).

As shown above, the Illinois statutory language specifically allows for public bodies to use its discretion when asserting exemptions. The Federal FOIA statute does not include the discretionary language at issue; nowhere does it say federal public bodies “may elect” to redact or withhold information. Therefore, it is not appropriate to rely on the *Watkins v. Customs and Border Protection*, 643 F. 3d 1189 (9th Cir. 2013) case or any other federal waiver case law as the Illinois legislature has clearly chosen to handle

redactions in a different manner than the federal law. *See Kelly v. Village of Kenilworth*, 2019 IL App (1st) 170780, ¶¶43-46, *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, ¶ 29 (observing that the Illinois FOIA is different from the federal version and is subject to a different interpretation).

Finding that waiver applies every time that a public body uses its statutory discretion to assert exemptions would frustrate the intent of FOIA as amended by Public Act 96-542. FOIA should not be interpreted as to result in an absurd result. *Mulligan v. Joliet Regional Port Dist.*, 123 Ill. 2d 303, 313 (1988). It does not follow that the legislature would give public bodies the discretion to assert an exemption if doing so would forever waive that exemption. Under Appellant's interpretation of the waiver rule, releasing an unredacted accident report to a victim of an accident now entitles the entire world to an unredacted copy of that accident report. If this Court finds that waiver does apply, then the Village would need to redact every accident report to avoid being forced to release private information and victims and insurance companies could never get copies of unredacted police reports. This interpretation of FOIA would indisputably produce an absurd result. For the reasons set forth, *Lieber's* holding on waiver has been overturned by subsequent amendments to FOIA.

ii. *Lieber* Interpreted A Different FOIA Exemption, Which Had Different Standards For Disclosure

Appellant's entire reliance on *Lieber* fails immediately once one examines the FOIA exemption at issue in *Lieber*, which required a balancing test. *Lieber* was analyzing

Section 7(1)(c) of FOIA, not Section 7(1)(b) of FOIA¹. *Id.* at 408-413. Section 7(1)(c) of FOIA requires a balancing test between the unwarranted invasion of privacy of the individual against the public benefit of disclosing the information. 5 ILCS 140/7(1)(c). The Court's analysis in *Lieber* focused on the fact that the invasion of personal privacy was not as severe since the information had already been disclosed and was in the public domain. *Id.* 408-413. In contrast, Section 7(1)(b) of FOIA lists specific information that is "private" and should be redacted. 5 ILCS 140/2(c-5); 7(1)(b). This distinction was highlighted in *Heinrich v. White*. 2012 IL App (2d) 110564. Further, as noted above, the language of FOIA has been amended to explicitly protect home addresses. As such, *Lieber* is not applicable because when analyzing Section 7(1)(b) of FOIA, SPD does not need to consider whether release will be an unwarranted invasion of personal privacy, because the legislature has already determined home addresses to be private information. As the waiver rule was only intended to be used as part of the balancing test, it is not appropriate to use it when Section 7(1)(b) of FOIA is asserted.

iii. Even If *Lieber* Still Applies, Production To LexisNexis Is Distinguishable As It Is Part Of A Statutory Duty

Lieber is clearly distinguishable from the instant case as LexisNexis is not receiving these reports through a FOIA request and thus is not getting preferential treatment from the Village when it receives unredacted reports. The courts emphasize that any waiver rule must not be mechanically applied whenever there is disclosure of information but, rather, require consideration of the circumstances related to the disclosure, including the purpose

¹ The section of FOIA analyzed in *Lieber* is referred to as Section 7(1)(b) but the language mirrors the current Section 7(1)(c). The addition of a definition and exemption for "private information" was added with Public Act 96-542 and renumbered the exemptions.

and extent of the disclosure, as well as the confidentiality surrounding the disclosure. *Chicago All. for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 202 (2004). Here, the facts establish that LexisNexis only receives the accident reports as a verified third-party vendor for the State of Illinois in order to allow SPD to comply with its mandated reporting to the State of Illinois under the Illinois Vehicle Code, 625 ILCS 5/11-408. LexisNexis did not receive these unredacted reports through a FOIA request but rather through the requirements of the Illinois Vehicle Code. Appellant's attempt to conflate SPD's mandatory statutory requirement is nothing more than a straw man argument. It does not matter that SPD can provide records to the State in some other manner or through some other provider; the issue being analyzed for waiver is the circumstances of the disclosure, including the purpose of the disclosure. *Chicago All. for Neighborhood Safety*, 348 Ill. App. 3d at 202; *Mancini*, 2020 IL App (1st) 191131-U, ¶21. It is undisputed that SPD provides LexisNexis with these accident reports for the sole reason of complying with the reporting requirements under the Vehicle Code and there is no other furnishing of unredacted records to LexisNexis other than the mandatory reporting requirement. *Mancini*, 2020 IL App (1st) 191131-U, ¶17. In fact, LexisNexis routinely submits FOIA requests for accident reports. When LexisNexis submits a FOIA request to SPD, it goes through the same process as everyone else and is subject to redactions and the exemptions under FOIA. LexisNexis cannot access its accident report database for its own use without paying. This shows that there is no "preferential treatment" or "selective disclosure" to LexisNexis.

Additionally, as found by the Appellate Court, Appellant did not meet its burden to establish that SPD gives LexisNexis preferential treatment by allegedly allowing it to have

free reign to sell unredacted reports to the public. *Chicago All. for Neighborhood*, 348 Ill. App. 3d at 203; *Mancini*, 2020 IL App (1st) 191131-U, ¶22. Appellant is incorrect in its allegation that LexisNexis has no restrictions on distributing the accident reports to the public; the Village has monitored and restricted access to the accident reports to try and keep confidential information safe and the Village's agreement with LexisNexis requires compliance with all laws, including FOIA. There was unrefuted testimony by SPD employee Brack that SPD directed LexisNexis to impose safeguards to access to the accident reports so that only those individuals involved in an accident can purchase an unredacted report. These safeguards include requiring specific information about the report including the date of the accident, the location of the accident and the accident report number. These additional steps imposed are therefore, drastically different than the "no strings attached" theory cited in the *Watkins* case relied on by the Appellant and different than the fact scenario in *Lieber*, where the documents were disclosed to the newspapers and part of the public domain. The accident reports provided to LexisNexis are not in the public domain, but are managed on a server and only accessible to limited individuals subject to privacy agreements. As pointed out by the Appellate Court, there is no admissible evidence in the record refuting or contradicting Ms. Brack's testimony and most of the arguments within Appellant's Brief have been waived by the Appellant. *Mancini*, 2020 IL App (1st) 191131-U, ¶22. The only evidence asserted by the Appellant is the Affidavit of Camarata, which does not dispute the LexisNexis safeguards as stated by Brack, as he provided no evidence as to the information provided to obtain the reports. *Id.* Further, as pointed out by the Appellate Court, the argument that LexisNexis is free to sell unredacted reports to the public is unsupported by any actual evidence. *Id.* As it was

Appellant's burden to provide this evidence and not SPD's, Appellant's argument of waiver must fail.

Finally, any reliance on federal case law, such as the Ninth Circuit decision in *Watkins* is inapplicable to this case. Not only are federal court decisions not binding upon state courts but the *Watkins* decision is a sharp departure from federal waiver case law, including the waiver case law relied on in *Lieber. People ex rel. Birkett v. City of Chicago*, 292 Ill.App.3d 745, 754 (2d Dist. 1997). In *Watkins*, the Ninth Circuit introduced a new waiver theory that does not make practical sense, as it essentially requires public bodies to enter into non-disclosure agreements with all FOIA requestors. *Watkins*, 643 F.3d 1189, 1198 (9th Cir. 2013). The *Watkins* court stated that a public body waives its right to assert an exemption any time it discloses to a third party confidential information covered by a FOIA exemption, without limiting the third party's ability to further disseminate the information. *Id.* A practical approach of this theory means that public bodies could never give requestors their own information without entering into a contract or agreement prohibiting further dissemination. At least one other federal circuit has found *Watkins* inapplicable, and instead has emphasized that waiver only applies under the public domain doctrine, which holds that the enforcement of an otherwise applicable exemption is only pointless when the withheld information is "truly public," where the information has entered and remains in the public domain and that the lack of a public body's direction to another party not to further disseminate the information is immaterial. *Jud. Watch, Inc. v. U.S. Dep't of Def.*, 963 F. Supp. 2d 6, 15 (D.D.C. 2013), *citing Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C.Cir.2001). Illinois federal courts have adopted this public domain doctrine and not the more stringent *Watkins* test. *See Mabie v. United*

States Marshal's Serv., No. 18-CV-1276-JPG-RJD, 2019 WL 570924, at *3 (S.D. Ill. Feb. 12, 2019) (applying public domain doctrine); *Bassiouni v. C.I.A.*, No. 02 C 4049, 2004 WL 1125919, at *5 (N.D. Ill. Mar. 31, 2004), *aff'd*, 392 F.3d 244 (7th Cir. 2004). Also, as discussed above, Illinois courts have repeatedly noted that the Illinois version of the FOIA is different from the federal version and therefore, federal case law in this area should be given little to no weight. *Supra*, p. 10-11; *Rockford Police Benev. & Protective Ass'n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145, 153 (2d Dist. 2010), (citing *Carter v. Meek*, 322 Ill.App.3d 266, 269 (5th Dist. 2001), *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401 (1997), and *American Federation of State, County & Municipal Employees v. County of Cook*, 136 Ill.2d 334 (1990), to support proposition that the Illinois FOIA differs from, and is interpreted differently than, the federal FOIA).

Based on the foregoing, Appellant did not meet its burden of proving waiver, as the only admissible evidence in the record clearly shows that production of accident reports to LexisNexis was pursuant to the State of Illinois' mandatory reporting requirements under the Illinois Vehicle Code and that SPD had restricted LexisNexis' further dissemination of these records through its contract and further privacy controls.

CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the Circuit Court and Appellate Court.

Respectfully submitted,

/s/ Mallory A. Milluzzi

Mallory A. Milluzzi, One of the Attorneys
for Appellee

Lance C. Malina
Mallory A. Milluzzi
KLEIN, THORPE and JENKINS, Ltd.
20 North Wacker Drive, #1660
Chicago, Illinois 60606
(312) 984-6400

CERTIFICATE OF COMPLIANCE

I, Mallory A. Milluzzi, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix pages containing 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 16 pages.

/s/ Mallory A. Milluzzi

Mallory A. Milluzzi

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

MANCINI LAW GROUP, P.C.,)	
)	
<i>Plaintiff-Appellant,</i>)	
)	
v.)	No. 126675
)	
SCHAUMBURG POLICE DEPARTMENT,)	
)	
<i>Defendant-Appellee.</i>)	

The undersigned, being first duly sworn, deposes and states that on May 7, 2021, there was electronically filed and served upon the Clerk of the above court the Brief of Defendant-Appellee. On May 7, 2021, service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Joshua Burday
 Matthew Topic
 Merrick Wayne
 LOEVY & LOEVY
 foia@loevy.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Mallory A. Milluzzi

Mallory A. Milluzzi

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.

/s/ Mallory A. Milluzzi

Mallory A. Milluzzi