No. 127519

In the
Supreme Court of Illinois

CHICAGO SUN-TIMES,

Plaintiff-Appellee,

v.

COOK COUNTY HEALTH AND HOSPITALS SYSTEM,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 19-2551.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
No. 18-CH-14507.

DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

As explained in our opening brief, the judgment of the appellate court should be reversed for three reasons. First, the records the Sun-Times requests here are medical records, which are categorically exempt from disclosure under 5 ILCS 140/2(c-5) and 5 ILCS 140/7(1)(b). Hospital Br. at 7-11.[1] Second, HIPAA prevents disclosure of the requested records because identification of those records for production would require a prohibited use of "protected health information." *Id.* at 11-15. Third, production of the records the Sun-Times requests would pose an undue burden on the Hospital, as it would require review of literally thousands of patient records, over hundreds of hours, to ascertain information of little discernible public value. *Id.* at 17. The Sun-Times offers no response to the Hospital's arguments regarding HIPAA, forfeiting any response for purposes of this appeal, and its responses to the remaining argument are wholly unpersuasive.

I. Medical Records Are *Per Se* Exempt From Disclosure Under FOIA.

This entire appeal may be resolved on the basis of FOIA's plain language. Under FOIA, all "private information" is categorically exempt from disclosure, 5 ILCS 140/7(1)(b), and "medical records" are specifically defined as "private information" for this purpose, 5 ILCS 140/2(c-5). Because the information the Sun-Times seeks here is part of patients' medical records, it is

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[1] We cite our opening brief as "Hospital Br. ___," and the Sun-Times response brief as "Sun-Times Br. ____." We also cite to the Appendix of our opening brief as "A-__."

categorically exempt from disclosure under FOIA. Hospital Br. 3, A-35. And to the extent the appellate court grafted onto FOIA's plain language a requirement that information in a medical record is exempt from disclosure only if it *also* constitutes personally identifiable information under HIPAA, A-7 at ¶19, that construction of FOIA improperly grafts limiting language onto section 140/2(c-5). Such a limit would render the FOIA exemption for medical records superfluous of the restrictions in HIPAA. Hospital Br. 11.

In its response, the Sun-Times argues that a person's medical records constitute "private information" only if those records are *also* "unique identifiers." Sun-Times Br. 7-9. The Sun-Times offers no authority supporting this strained reading of section 140/2(c-5) – nor could it, because there is none. Under section 140/2(c-5), all "unique identifiers, including . . . medical records," constitute "private information" for purposes of FOIA. And as this court has repeatedly explained, "the word 'including' 'when followed by a listing of items, means that the preceding general term encompasses the listed items'" and that "'[t]he preceding general term is to be construed as a general description of the listed items and other similar items.'" *Julie Q. v. Dept. of Children & Family Services*, 2013 IL 113783, ¶27 (quoting *People v. Perry*, 224 Ill. 2d 312, 328 (2007)). In other words, *all* medical records are encompassed in the term "unique identifiers," which is to be construed as a general description of medical records and the other items listed in section 140/2(c-5). It is only when a plaintiff seeks production of a document not on that list that a court must

inquire whether that document can be considered a "unique identifier" – when the document appears on the list, the legislature has already made a conclusive determination on the subject and the court is bound by that conclusion.

Because this court's decision in *Julie Q.* conclusively disposes of the Sun-Times' reading of section 140/2(c-5), it is unnecessary to consider any of the Sun-Times' various arguments in support of that reading. Those arguments are also wholly unpersuasive. The Sun-Times begins by noting the presumption that records of a public body are open to inspection, Sun-Times Br. 7 (citing 5 ILCS 140/1.2), but that presumption cannot weigh in favor of production when, as here, it has been overcome by a clear legislative command that an entire category of documents, such as medical records, be exempted from production. Moreover, the Sun-Times forgets that FOIA's disclosure obligations are generally limited to "documentary materials *pertaining to the transaction of public business.*" 5 ILCS 140/2(c) (emphasis added); *see*, *e.g.*, *City of Danville v. Madigan*, 2019 IL App (4th) 170182 at ¶24 ("When a FOIA request is submitted to a public body and the requested record is possessed by the public body, the record is subject to disclosure only if it qualifies as a 'public record' that pertains to public business."). It does not, however, reach documents that pertain to "private affairs." *E.g.*, *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 31. And it should go without saying that

there are few private affairs more sensitive and deserving of protection than the record of an individual's medical treatment.

Next, the Sun-Times complains that exemption of medical records from disclosure "serves no purpose . . . when no person can be identified." Sun-Times Br. 8; *see id.* at 9 (declaring it "absurd" to exempt medical records from disclosure in such circumstances). But this is a complaint for the legislature, not the courts, which lack authority to amend or otherwise depart from the plain language of a legislative enactment. *E.g.*, *People v. Burge*, 2021 IL 125642, ¶20. Moreover, categorically exempting medical records from production is hardly absurd or purposeless; it makes eminent sense from a policy standpoint. It is beyond serious dispute that medical records will often contain some of the most private, personal, and sensitive information about an individual imaginable, such as information regarding a patient's mental health; diagnoses of, or predispositions toward, genetic and psychological diseases or disorders; history of sexual abuse; and reproductive health including sexually transmitted diseases, fertility treatments, and losses or terminations of pregnancies. By making the entirety of medical records – as opposed to discrete pieces of information found in those records – exempt from disclosure, the legislature recognized that an individual's legitimate privacy concerns are at their zenith when those records are at issue.

The legislature also recognized that FOIA litigation over redacting a medical record for production would result in repeated invasions of sensitive

privacy interests – litigation of such redactions would require those records be reviewed by the official of whom production is requested, then by the government attorney defending the redactions from any legal challenge, and then again by the judge considering the propriety of the redactions. On top of that, the risk of erroneous disclosure of information is significant, because the individuals whose medical records are at issue typically are not involved in, or even apprised of, the pendency of FOIA litigation concerning those records, leaving it to third parties whose privacy interests are not at stake to litigate on their behalf.[2] Finally, by making medical records categorically exempt from production, the legislature recognized that the mere fact that those records are in the possession of the government, rather than a private individual or institution, does not eliminate the strong personal privacy interests in those records. The plain and unambiguous language of section 2(c), limits "public records" to "all … documentary materials *pertaining to the transaction of public business* …" 5 ILCS 140/2(c) (emphasis added). Whether information is a "public record" is not determined by where, how, or by whom a record was created; rather, the question is whether that record was prepared by or used by one or more members of a public body in conducting the affairs of government. *See* 2011 PAC 15916. The records in question do not pertain to

[2] This case is illustrative, as there is no indication in the record that the individuals whose medical records the Sun-Times seeks to acquire (and presumably then publish) have ever been made aware that production of their records is being sought.

any public community interests, they do not pertain to the business or operations of the public hospital – they pertain solely to the admission and treatment of individual patients[3], patients who, by the critical nature of their injuries, had no choice but to seek care at this particular hospital. As a result, requiring a public hospital to analyze and disclose those records – redacted or otherwise – when they would be absolutely confidential if held by a private hospital, would effectively force patients to forego their privacy rights as a fee for using low-cost or free health services provided by a public hospital.

The Sun-Times' remaining arguments in support of its reading of section 140/2(c-5) are easily disposed of. The Sun-Times invokes the rule that FOIA exemptions must be narrowly construed, Sun-Times Br. 8, but what the Sun-Times proposes here is nothing so modest as a mere narrow construction of section 140/2(c-5). To the contrary, it is a request that this court simply disregard the legislature's clear instruction that *all* medical records be considered "unique identifiers" and, thus, "private information" absolutely exempt from disclosure. The Sun-Times next argues that section 140/2(c-5) does "not specifically enumerat[e]" an exemption for the specific information it seeks from patients' medical records, *id.* at 9, but that is irrelevant – by virtue of being in a medical record, that information is categorically exempt from disclosure, regardless of its nature. Finally, the Sun-Times makes the bizarre

[3] This is in contrast to when medical records are, for example, used in a prosecution. There, they are undisputedly public records as part of the prosecutorial file, but exempt from FOIA as medical records.

claim that exempting medical records from disclosure under FOIA would create a "conflict with HIPAA." *Id.* Not so – while Illinois may not abrogate HIPAA's protections of medical information, nothing prohibits Illinois from offering more stringent protections than HIPAA provides. To the contrary, the states are specifically *authorized* to enact "more stringent" protections of their residents' medical information. *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 924 (7th Cir. 2004).

Because section 140/2(c-5) categorically exempts "medical records" from disclosure, the only remaining question is whether the Sun-Times seeks disclosure of medical records here. On that subject, the Sun-Times offers only a cursory argument 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.'" Sun-Times Br. 8. This argument fundamentally misunderstands how FOIA disclosures work. As we have explained, it is well settled that FOIA does not require government entities to create documents or information responsive to a request, only to produce existing documents in their possession that contain the requested information. Hospital Br. 15 (collecting authority). Recognizing that fact, the Sun-Times expressly disavows any intention to make the Hospital create new records. Sun-Times Br. 11-12. But the only way the Hospital can disclose information "found in a patient's medical record," without creating a new record, is to *produce that medical record* – in other words, to produce the "*documents* that compose a medical patient's healthcare

history.'" BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). The mere fact that information might be redacted from those medical records prior to production does not change the fact that they are still medical records, and section 140/2(c-5) contains no exception allowing the production of "redacted" medical records. Because responding to the Sun-Times' FOIA request would require production of medical records categorically exempt from disclosure, the Hospital properly denied that request pursuant to section 140/2(c-5).

II. HIPAA Prohibits Using Personal Medical Information To Respond To The Sun-Times' FOIA Request.

While section 140/2(c-5) provides sufficient reason to uphold the denial of the Sun-Times' FOIA request, that request also had to be denied because identifying responsive documents would require a prohibited "use" of patients' personal health information. Under HIPAA, "a covered entity or business associate may not use *or* disclose protected health information, except as permitted or required [by HIPAA]." 45 C.F.R. §164.502 (emphasis added). "Use" is defined to include both the "examination" and the "analysis" of personally identifiable information by "an entity that maintains such information." 45 C.F.R. § 160.103. Any use of personally identifiable health information is prohibited unless specifically permitted by law. *See* 45 C.F.R. §164.502(a). Even assuming solely for sake of argument that someone could not identify an individual patient by merely the "year" of their treatment, the undisputed evidence makes clear that determining those years requires an extensive examination and analysis of patients' records to identify which

patients were admitted without law enforcement, and to further identify if and when law enforcement was notified. A-54 ¶4, A-79 ¶¶3, 4; A-55 ¶7; A-55 ¶8. 9, A-79 ¶5.

The impermissible use here would *first* occur when the Hospital would have to open the trauma registry, undisputedly a medical record containing individually identifiable information, and use it to identify all patients admitted for gunshot wounds. A-54 ¶4, A-79 ¶¶3, 4. The *second* impermissible use would occur when the Hospital would have to gather those patients medical record numbers ("MRNs"), also a medical record and undisputedly individually identifiable information, and use them to pull the corresponding treatment records. A-55 ¶7. The *third* impermissible use would occur when the Hospital would have to analyze each treatment record, again, undisputedly a medical record containing individually identifiable information, to identify whether law enforcement was absent at admission and if and when law enforcement was notified[4]. A-55 ¶8. 9, A-79 ¶5. If, and only if, there existed documents responsive to the request that recorded the year of notification, and the document could be redacted down to just the "year," complying with the Sun-Times' two-pronged request would necessitate using *and* disclosing the MRNs to make the "year" of notification from the treatment record correspond

[4] As the Hospital has repeatedly explained, this information may or may not exist at all, and does not exist in a searchable form. Even if the medical provider did make a notation of calling law enforcement, there is little guarantee that they would have recorded the year.

to the "year" of admission in the trauma registry. This would be the *fourth* type of impermissible use of a protected health information that the Hospital would have to undertake before producing the records to the Sun-Times. Because such examination is not specifically authorized by HIPAA or its implementing regulations, it is a "use" prohibited by HIPAA. Hospital Br. 14.

Tellingly, the Sun-Times never even acknowledges this argument, let alone disputes it. Instead, the Sun-Times offers a cursory argument that the years of treatment and notification can be *produced* under HIPAA, Sun-Times Br. 9-10, without ever addressing the Hospital's concerns about permissible *use* of a patient's medical records to identify the documents to be produced. While the Sun-Times concedes that the MRNs cannot be used or disclosed, Sun-Times' Br. 10, they mistakenly state that the Hospital "provides no justification for why it could not *create a dummy id* to connect the two sets of data" instead of the using MRN. This statement simply illustrates that the request was improper on its face. *See* Hospital's Br. 15, citing *Martinez v. Cook County State's Atty.'s Office*, 2018 IL App (1st) 163153. Sun-Times' Br. 12. The Hospital does not argue that the mere act of *disclosing* the "years" of treatment isolated from the rest of a medical record is categorically impermissible under HIPAA, or impermissible on the facts of this case.[5] The Hospital's point was

[5] Because this case does not squarely present for this court's consideration the question whether, and to what extent, HIPAA allows the disclosure of a patient's years of treatment, we ask that this court reserve consideration of that issue for a future case.

that *identifying* the documents responsive to the Sun-Times' request would require repeated examination and analysis of numerous patients' medical records. Hospital Br. 10, 13-14; A-54-55; R-15; C-78, 79, 101, 102. By failing to respond to the argument the Hospital actually raised, the Sun-Times has forfeited any response to that argument for purposes of appeal and may not attempt to rectify that failing at oral argument or on rehearing. *See* Ill. Sup. Ct. R 341(h)(7) ("Points not argued are forfeited and shall not be raised . . . in oral argument, or on petition for rehearing."). Strict enforcement of that forfeiture is particularly appropriate here given the serious prejudice the Hospital would suffer otherwise if forced to address at oral argument any arguments the Sun-Times failed to disclose in advance via its brief.

III. The Sun-Times' FOIA Request Is Unduly Burdensome.

The Sun-Times' FOIA request was also properly denied because the extensive review necessary first to identify medical records providing the years of admission of gunshot victims and then to redact the medical records in question would be unduly burdensome. Hospital Br. 16-20. The Sun-Times does not address this argument on the merits – it neither denies the extensive effort that would be necessary to produce responsive documents, nor that the production of documents redacted of all information other than a year would be of no public value – thus forfeiting any argument on either issue. *See* Ill. Sup. Ct. R 341(h)(7). Instead, the Sun-Times argues only that the Hospital forfeited any claim that production would be an undue burden. Sun-Times Br.

10-11.[6] This argument is without merit, as the Hospital asserted undue burden in the circuit court at the first possible moment, after the Sun-Times revised its FOIA request, which originally requested "dates," to a request for "years." C-99.[7] The issue was also raised in oral argument in the circuit court, R-18, 19, which did not address that argument only because it held that the records were exempt from production. *Id.* The Hospital raised this issue again in its response brief in the appellate court.

Perhaps recognizing that its forfeiture argument is without merit, the Sun-Times also claims that consideration of undue burden is inappropriate because "there is no record on this issue." Sun-Times Br. 11. That is demonstrably false – the Hospital offered evidence on this issue below, explaining that merely *identifying* responsive records would take over 333 hours. A-55 ¶6. Given that the Sun-Times is unable to offer any explanation how documents merely stating "years" is of any discernible public interest or value, it should go without saying that such an extensive expenditure of time is an undue burden warranting denial of the Sun-Times' request.

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[6] While the Sun-Times states that this argument is "forfeited and waived," Sun-Times Br. 10 (bolding omitted), it offers no explanation how the Hospital intentionally relinquished its undue burden argument. Accordingly, we address that issue no further in this reply.

[7] The Sun-Times's claim that this was not actually a change because a request for "dates . . . obviously includes years as a component," Sun-Times Br. 12, is nonsense. It is well settled that a "date" is "a *particular month, day, and year* at which some event happened or will happen." https://www.dictionary.com/browse/date (emphasis added).

CONCLUSION

This court should reverse the judgment of the appellate court and affirm the judgment of the circuit court.

Dated: June 10, 2022

Respectfully submitted,

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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.

/s/ Prathima Yeddanapudi
Prathima Yeddanapudi

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

CHICAGO SUN-TIMES, *Plaintiff-Appellee*, v. COOK COUNTY HEALTH AND HOSPITALS SYSTEM, *Defendant-Appellant*.	))))))))))	No. 127519

The undersigned, being first duly sworn, deposes and states that on June 10, 2022, there was electronically filed and served upon the Clerk of the above court the Appellant's Reply Brief. On June 10, 2022, service of the Appellant's Reply Brief will be accomplished by email and electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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

/s/ Prathima Yeddanapudi
Prathima Yeddanapudi

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/ Prathima Yeddanapudi
Prathima Yeddanapudi