

2023 IL App (1st) 220059-U

No. 1-22-0059

Filed November 2, 2023

Modified upon denial of rehearing April 18, 2024¹

Fourth Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DARRON BREWER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	19 CH 14931
)	
THE CITY OF CHICAGO,)	
THE CHICAGO POLICE DEPARTMENT,)	
EDDIE JOHNSON, Former Superintendent of)	
Police of the City of Chicago, and ANDREW)	
MARLAN, Freedom of Information Act Officer,)	Honorable
)	Raymond W. Mitchell
Defendants-Appellees.)	Judge, Presiding.

JUSTICE MARTIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Ocasio concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment reversed. The trial record is insufficient to establish by clear and convincing evidence that a FOIA exemption permitted redactions of requested records.

¹Pursuant to Illinois Supreme Court Rule 367(d) (eff. Nov. 1, 2017), the City filed an answer to the appellant's petition for rehearing upon our request.

¶ 2 Darron Brewer appeals the circuit court’s grant of summary judgment to the City of Chicago (City) in Brewer’s action brought pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2018)).²

¶ 3 Brewer is currently serving a 75-year prison sentence for his convictions for first degree murder and aggravated kidnapping. See *People v. Brewer*, 2016 IL App (1st) 133204-U. In November 2016, Brewer requested the Chicago Police Department (CPD) provide him with the arrest report, booking report, and property receipt related to the investigation that resulted in his conviction. In response, CPD provided Brewer with copies of the contents of a homicide investigation file related to Brewer’s case, with various redactions. CPD’s response included a letter stating that the redacted material was exempt from disclosure under various FOIA provisions, including exemptions for private information (5 ILCS 140/7(1)(b) (West 2018)), personal information (*id.* § 7(1)(c)), and records that would unavoidably disclose the identity of a confidential source (*id.* § 7(1)(d)(iv)). CPD’s response did not indicate which exemption applied to each specific redaction.

¶ 4 Nearly two years later, on September 27, 2018, Brewer submitted another request seeking “all the statements and records attributed to Benita Wallace without redactions.” Wallace was a witness who testified in Brewer’s criminal trial. Along with his request, Brewer attached a signed and notarized “Statement of Disclosure” from Wallace. In her statement, Wallace asserts that she was the primary user of a specified telephone number in 2009 and that she permits CPD to give Brewer all records in its file that contain her name, phone number, and personal information, without redactions.

²In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 5 On January 15, 2019, CPD responded by letter stating that it determined Brewer's September 2018 request was a repeated request for records it already provided in response to his 2016 request. The letter further stated that CPD considered Brewer's latest request as unduly burdensome and cited a FOIA provision that allows for the denial of repeated requests from the same person for the same records, which were either previously provided or properly denied, as unduly burdensome. See 5 ILCS 140/3(g) (West 2018).

¶ 6 Brewer replied, stating he was narrowing his request to Wallace's unredacted phone records and reiterated that Wallace had given her written consent. He enclosed a redacted copy of the records he was seeking—six pages that T-Mobile sent to CPD in response to a subpoena in 2009. The response indicates that the subpoena sought "Subscriber information w/Call Detail Records for the T-Mobile subscriber associated with MSISDN."³ The material following "MSISDN" is redacted. Throughout the six pages, redactions follow labels such as Billing Account Number, Billing Account Name, Date of Birth, Address, and Mobile Number. The final three pages show what appears to be data documenting communications involving the subscriber number for the dates of October 24, 2009, through October 27, 2009. The information listed in columns labelled MSISDN and Phone Number is redacted.

¶ 7 CPD responded that the records were properly redacted and denied any additional disclosure.

¶ 8 Brewer filed a complaint in the circuit court naming the City, CPD, former Superintendent of Police Eddie Johnson, and FOIA Officer Andrew Marlan as defendants.⁴ The complaint asserted that Wallace's written consent to disclosure entitled him to unredacted copies of the records he

³The City's brief states that MSISDN is the subscriber's cellular telephone number.

⁴CPD is a department of the City of Chicago. Johnson and Marlan were named solely in their capacities as employees of the City of Chicago. The defendants were appropriately treated as a single party, the City, in these proceedings.

requested and that CPD willfully and intentionally violated FOIA by withholding them. The complaint asked the court to order CPD to produce the unredacted records and impose a civil penalty. The City filed an answer admitting that it had corresponded with Brewer as he alleged. However, the City asserted as an affirmative defense that the information at issue is exempt from production under FOIA. The City did not indicate which specific exemptions it believed applied.

¶ 9 Brewer filed a motion to strike the City's answer and followed with a motion to amend his complaint to add a copy of a letter he sent to CPD in December 2018 as an exhibit. The record does not indicate whether a ruling was made on either motion. Brewer later filed a motion for judgment on the pleadings. The record shows no ruling on this motion.

¶ 10 Later, the City moved for summary judgment, asserting that Brewer's claim is moot since it provided Brewer with all records responsive to his requests and all redactions were proper. The City stated that it redacted private and personal information, and information identifying witnesses who provided information to the police, pursuant to FOIA's exemptions for each. However, the City did not specify which exemption or exemptions applied to the redacted phone records at issue. The City attached an affidavit from Andrew Marlan, an employee who handled Brewer's 2018 request. Marlan attested that the homicide investigation file indicated Wallace was a juvenile at the time of the events under investigation. Since he had never received a request from an inmate seeking records associated with a juvenile witness before, Marlan consulted his CPD supervisor and the City Law Department. Marlan was directed to deny Brewer's request because "they felt uneasy about the validity of [Wallace's] signature." After Brewer narrowed his request to Wallace's unredacted phone records, Marlan was directed by CPD's counsel to deny the request because counsel "did not trust the signature." Marlan added that the phone account at issue was not in Wallace's name, but that of a parent.

¶ 11 Brewer filed a response opposing the City’s motion, reiterating his position that Wallace’s written consent entitled him to the phone records.

¶ 12 The circuit court granted the City’s motion, entering a written order prepared by the City’s counsel. The order contained a finding that “CPD complied with its FOIA obligations because [Brewer] was provided with documents responsive to his FOIA request subject to redactions permitted under the FOIA statute.” The order did not specify which FOIA exemption permitted redactions of the phone records. Brewer filed a timely notice of appeal.

¶ 13 On appeal, Brewer first argues that his 2018 request cannot be deemed unduly burdensome since the City failed to comply with FOIA’s requirement to respond within five business days of receipt of his request or a proper extension for the time to respond. See 5 ILCS 140/3(d)-(f) (West 2018). Indeed, the statute bars a public body from treating a request as unduly burdensome if it fails to respond within five days or request a proper extension. *Id.* However, Brewer failed to assert this argument before the trial court. Arguments not raised in the trial court may not be raised for the first time on appeal. *Seifert v. Sneckenberg Thompson & Brody, LLP*, 2022 IL App (1st) 200966, ¶ 43. Though, even if the argument had been raised, it would not resolve the issue in this case or result in the relief Brewer seeks. The City’s untimeliness would only require it to produce the requested records: it would not prohibit the City from redacting material as permitted by FOIA.

¶ 14 Accordingly, we address Brewer’s claim that the circuit court erred in granting the City’s motion for summary judgment. Summary judgment motions permit the trial court to determine whether any genuine issue of material fact exists in the action, and if not, to provide an expedient means of resolution. *Greenburg v. Orthosport, Inc.*, 282 Ill. App. 3d 830, 832 (1996). “ ‘Although summary judgment is to be encouraged as an expeditious manner of disposing of a lawsuit, it is a drastic measure and should be allowed only where the right of the moving party is clear and free

from doubt.’ ” *Scollard v. Williams*, 2023 IL App (1st) 220464, ¶ 17 (quoting *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶ 19). We review the trial court’s grant of summary judgment *de novo*. *Id.*

¶ 15 To begin, we observe that Brewer’s 2018 request for an unredacted copy of phone records previously provided to him in redacted form can only be denied as a repeated request if the redactions were proper. FOIA contemplates that repeated requests shall be deemed unduly burdensome when seeking “the same records that are unchanged or identical to records previously provided or *properly* denied.” (Emphasis added.) 5 ILCS 140/3(g) (West 2018). An unredacted version of a document is not identical to a redacted version. But, if the redactions were proper, a repeated request would yield an identically redacted response. Thus, our analysis turns to whether the redactions were proper.

¶ 16 FOIA provides that “[w]hen a request is made to inspect or copy a public record that contains information that is exempt from disclosure ***, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt.” 5 ILCS 140/7(1) (West 2018). “Private information” is among the information exempted from disclosure. *Id.* § 140/7(1)(b). FOIA defines “private information” to mean “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.” 5 ILCS 140/2(c-5) (West 2018). FOIA also exempts “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy ***.” 5 ILCS 140/7(1)(c) (West 2018). The statute further explains that “ ‘[u]nwarranted 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." *Id.* Personal information may be disclosed, however, if "consented to in writing by the individual subjects of the information." *Id.*

¶ 17 When a public body asserts that a record is exempt from disclosure, it bears the burden of proving by clear and convincing evidence that the record is exempt. *Mancini Law Group, P.C. v. Schaumburg Police Department*, 2021 IL 126675, ¶ 16 (citing 5 ILCS 140/1 (West 2016)). In the City's motion for summary judgment, it asserted that the redactions in its prior response to Brewer's 2016 request were made pursuant to FOIA exemptions for private information, personal information, and information identifying witnesses who provided information to the police. These assertions, however, were broad and conclusory, speaking in terms of the entirety of the investigation file it produced. The supporting affidavit from Andrew Marlan does not indicate with specificity how any FOIA exemption applied either. Marlan merely indicated that Wallace was a juvenile witness in the homicide investigation, the account was in her parent's name, and the City doubted the legitimacy of the signature. Thus, the City made no showing that any exemption applies to the redacted information on the six pages of T-Mobile phone records.

¶ 18 The City's appellate brief states "[t]he records Brewer seeks consist entirely of 'home or personal telephone numbers,' namely Wallace's phone number and all the phone numbers she dialed during the relevant period." The record before us, however, does not establish this. The City submitted no evidence and the court made no findings that would support such a conclusion.

¶ 19 Rather, the record before us presents genuine issues of material fact regarding the redacted information that prevents a finding that the City is entitled to judgment as a matter of law. Without a showing by clear and convincing evidence, which may include an *in camera* inspection of the unredacted records, we cannot conclude if a FOIA exemption applies to permit the redaction or

whether an unredacted copy should be provided to Brewer based on Wallace's consent to disclosure of her personal information.

¶ 20 For these reasons, we find a genuine issue of material fact exists and the City's right to judgment is not clear and free from doubt. Accordingly, we reverse the judgment of the circuit court and remand this matter for further proceedings consistent with this order.

¶ 21 Reversed and remanded.