NOTICE
Decision filed 05/07/24. 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) 230247-U

NO. 5-23-0247

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).

ROBIN W. HICKMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Bond County.
	)	
v.	)	No. 22-CH-1
	)	
DORA J. MANN,	)	Honorable
	)	Ronald J. Foster,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Moore and McHaney concurred in the judgment.

ORDER

¶ 1 *Held*: Where the uncontradicted evidence showed that no documents responsive to plaintiff's Freedom of Information Act requests existed, no reversible procedural error occurred, and plaintiff's incorrectly naming the compliance officer rather than the sheriff's department itself was a misnomer, the circuit court properly dismissed plaintiff's FOIA complaint.

¶ 2 Plaintiff, Robin W. Hickman, sued defendant, Dora J. Mann, pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2020)). He sought a declaratory judgment, an order requiring defendant to turn over certain documents, and civil penalties. Defendant, the Bond County State's Attorney, moved to dismiss. The motion was supported by an affidavit stating that no documents responsive to plaintiff's requests were within her possession but attaching certain documents from the Bond County Treasurer's office. The court granted the motion. Plaintiff appeals, contending that additional documents did exist, that a finding that all documents

responsive to his request had been produced did not moot his request for sanctions, and asserting various procedural infirmities in the proceedings. We affirm.

¶ 3 BACKGROUND

¶ 4 On December 19, 2021, plaintiff sent a FOIA request to the Bond County Sheriff's Office. Plaintiff sought "[a]ll policies and rules enacting [*sic*] and in regard to § 5/103-2.1 of the Illinois Code of Criminal Procedure at and upon Bond County Sheriff's Office and its employees." Defendant, who was also the designated FOIA compliance officer for the sheriff's department, responded that the request was "granted," but that no such documents existed at that agency.

¶ 5 On January 9, 2022, plaintiff sent another FOIA request to the sheriff's department seeking "a copy of a reasonably current list of all types or categories of records under its control. Such shall be reasonably detailed." In response, defendant stated that the request was unduly burdensome because it would require manually searching voluminous documents. Defendant asked that plaintiff provide a timeframe.

¶ 6 Plaintiff also sent a FOIA request to the Bond County State's Attorney's office, requesting "all records of funds, receipt, obligation and use of such funds and all payroll records of this office within the last twelve (12) months or since January 1 of 2021, whichever is longest and copy of such." In response, defendant again stated that the request was "granted," but that no such documents existed at her agency.

¶ 7 Plaintiff thereafter sued defendant, seeking a declaratory judgment that she violated the FOIA, an injunction requiring her to produce the requested documents, and statutory penalties. Defendant did not initially appear, and, on July 15, 2022, plaintiff moved for a default judgment. On July 26, 2022, defendant requested an extension of time to answer or otherwise plead, asserting

that she had been occupied with "urgent and emergency matters." The court granted the motion, finding that she had established good cause.

¶ 8 On August 16, 2022, defendant moved to dismiss the complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2020)). The motion was supported by the affidavit of Mary A. Essenpreis who had served as the sheriff's administrative assistant for 14 years. Essenpreis averred that her duties included maintaining the sheriff's department's records complying with FOIA requests. She also stated that, after receiving plaintiff's first FOIA request, she thoroughly reviewed documents maintained by the department and concluded that no documents responsive to the request existed.

¶ 9 Essenpreis also assisted with the response to plaintiff's second request. Again, after conducting a thorough review, she concluded that it was not the sheriff's practice to create or maintain a list of all of the documents under his control, and thus no such list existed.

¶ 10 With respect to the third request, the only one directed to the state's attorney's office, defendant reiterated that her office did not maintain financial records, and that any such documents were under the control of the county treasurer. However, to satisfy plaintiff's request, she attached the requested records from the treasurer's office.

¶ 11 On August 30, 2022, the case was called for hearing, and plaintiff failed to appear. His motion for default was denied as moot. He was given 30 days to respond to the motion to dismiss. Plaintiff filed a response and, following a hearing, the court granted the motion to dismiss. Plaintiff filed a motion to reconsider the dismissal, which the court denied. Plaintiff timely appealed.

¶ 12 ANALYSIS

¶ 13 Plaintiff contends that the circuit court erred by dismissing his complaint. We disagree.

¶ 14 The Illinois FOIA provides that "[e]ach public body shall make available to any person for inspection or copying all public records." 5 ILCS 140/3(a) (West 2020). The " 'purpose of the FOIA is to open governmental records to the light of public scrutiny.' " *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415-16 (2006) (quoting *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989)). Accordingly, under the FOIA, " 'public records are presumed to be open and accessible.' " *Id.* (quoting *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997)).

¶ 15 "Any person denied access to inspect or copy any public record by a public body may file suit for injunctive or declaratory relief." 5 ILCS 140/11(a) (West 2020). In such an action, the court reviews *de novo* whether the records are subject to disclosure. *Id.* § 11(f). If the court finds that a public body "willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith," the court shall also impose civil penalties of not less than $2500 nor more than $5000 for each occurrence. *Id.* § 11(j).

¶ 16 Section 2-619(a)(9) permits involuntary dismissal of a complaint that "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2020). In reviewing a section 2-619 dismissal, we consider the pleading and any supporting documents interpreted in the light most favorable to the nonmoving party. *Walker v. Bruscato*, 2019 IL App (2d) 170775, ¶ 47.

¶ 17 The FOIA does not compel public bodies to turn over information that they do not normally retain. *Barner v. Fairburn*, 2019 IL App (3d) 180742, ¶ 12. Nor does it require the creation of a new record. *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427, ¶¶ 35-37. The nonexistence of the requested documents is an affirmative defense to a complaint based on the FOIA. *Walker*, 2019 IL App (2d) 170775, ¶ 47.

¶ 18 Here, with regard to plaintiff's first two requests directed to the sheriff's department, Essenpreis's affidavit established that the department did not maintain any documents responsive to the request. As to the third request, directed to the state's attorney's office, defendant represented that her office did not maintain such records but attached documents obtained from the county treasurer's office. Thus, the undisputed evidence established that no additional documents responsive to plaintiff's requests existed.

¶ 19 Plaintiff insists that documents related to his first request must exist because "§ 5/103-2.1 is binding upon Bond County Sheriff's Office." Section 103-2.1 of the Code of Criminal Procedure of 1963 is entitled "When statements by accused may be used." 725 ILCS 5/103-2.1 (West 2020). It contains requirements for recording custodial interrogations in certain situations. See *id*. It does not require any agency to promulgate a written policy for compliance. The mere facts that the statute exists and applies to the sheriff's department do not prove that the department enacted "policies and rules" for compliance.

¶ 20 Plaintiff further contends that such documents must exist because he sent a similar request to the Clinton County sheriff's department and received a response. That a sheriff's department in a different county has chosen to enact a written policy does not prove that Bond County has also done so.

¶ 21 In his reply brief, plaintiff argues, for the first time, that section 103-2.1 requires the preservation of certain recordings of interrogations. He also cites various administrative regulations providing that the Illinois Law Enforcement Training Standards Board is to provide training and standards for conducting homicide investigations. These arguments are forfeited. Points not argued in an initial brief "are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020).

¶ 22 In any event, plaintiff has not requested any recordings of interrogations. He requested only "policies and rules." Thus, whether the department was required to preserve recordings of interrogations has no bearing on whether it maintained written policies and rules. Further, we fail to see the relevance of the Illinois Law Enforcement Training Standards Board's obligation to provide training in conducting homicide investigations to whether the Bond County Sheriff's Department maintained a written policy governing compliance with section 103-2.1. Plaintiff is free to request records from the training board if he wishes.

¶ 23 Plaintiff argues that documents responsive to his second request must exist because FOIA specifically requires agencies to maintain a list of "reasonably current list of all types or categories of records under its control." 5 ILCS 140/5 (West 2020). However, as defendant points out, even though FOIA directs public bodies to maintain such a list, the failure to do so is not actionable under the statute. *Walker*, 2019 IL App (2d) 170775, ¶¶ 43-47. Regardless of plaintiff's speculation, the undisputed evidence was that such a list did not exist.

¶ 24 Plaintiff further contends that defendant should be estopped from asserting that the list of records did not exist because the initial response stated that compliance would be too burdensome. Defendant responds that the responses are consistent because the original response meant that it would be too burdensome to compile a list that did not exist. Semantics aside, FOIA provides that the circuit court decides *de novo* whether records must be disclosed. Accordingly, new or different answers in a summary judgment motion are not waived merely because they were not asserted in the initial response. *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶ 26.

¶ 25 Plaintiff further contends that the court should have struck Essenpreis's affidavit because she is not the designated FOIA compliance officer. Defendant responds that the statute permits a

compliance officer to designate others to fulfill their duties. Specifically, section 3.5(a) of FOIA states as follows:

> "(a) Each public body shall designate one or more officials or employees to act as its Freedom of Information officer or officers. Except in instances when records are furnished immediately, Freedom of Information officers, or their designees, shall receive requests submitted to the public body under this Act, ensure that the public body responds to requests in a timely fashion, and issue responses under this Act. Freedom of Information officers shall develop a list of documents or categories of records that the public body shall immediately disclose upon request." 5 ILCS 140/3.5(a) (West 2020).

¶ 26 The statute's plain language thus allows "Freedom of Information officers, or their designees" to perform the required duties. This is logical given that the compliance officer need not be personally familiar with the records in question. Here, defendant was not part of the sheriff's office and would not be expected to be familiar with the sheriff's department's records. Essenpreis, on the other hand, averred that she had been the sheriff's administrative assistant for 14 years and that her duties included maintaining the department's records.

¶ 27 Accepting plaintiff's position that only the designated compliance officer can attest that a given record does not exist would lead to absurd results. See *People v. Brown*, 2020 IL 124100, ¶ 30 (courts avoid construing a statute leading to an absurd result, if possible). Given that a FOIA request must be evaluated as of the time the request was made, a compliance officer who was not personally responsible for keeping the records in question would never be able to prove that the records did not exist at the time of the request.

¶ 28 Plaintiff further contends that the court erred in not striking defendant's motion as untimely. However, Illinois Supreme Court Rule 183 provides that the court, for good cause, "may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time." Ill. S. Ct. R. 183 (eff. Feb. 16, 2011). Absent an abuse of discretion, the decision of the circuit court on this issue will not be disturbed. *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 354 (2007).

¶ 29 Here, after the 30-day period to answer the complaint, and after plaintiff had moved for a default judgment, defendant sought leave to file a motion to dismiss, alleging that she was busy with "urgent and emergency matters." The court granted the motion. As plaintiff points to no evidence that defendant was not busy with urgent and emergency matters during this time, we cannot say that the court abused its discretion.

¶ 30 In any event, plaintiff cannot show that he was prejudiced by the court's decision. The court found that no additional records responsive to plaintiff's requests exist, and he has not convinced us otherwise. The court could not, by default, order defendant to produce records that do not exist. See *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶¶ 35-37 (FOIA does not require an agency to create a new record).

¶ 31 Plaintiff also contends that he may be awarded sanctions even if all of the existing documents were eventually produced. Generally, the purpose of sanctions is to coerce compliance, not to punish the dilatory party. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998) (discussing discovery sanctions). Plaintiff sent his initial request to the Bond County Sheriff's Department on January 9, 2022. By November 2022, he had received all the responsive documents in existence. The court found that most of the requested documents never existed. Defendant voluntarily produced the budgetary documents that were in the possession of the county treasurer.

Plaintiff points to no evidence that defendant willfully withheld records that were subject to disclosure.

¶ 32 We note briefly defendant's alternative argument for affirmance: that plaintiff sued the wrong party. Citing *Korner v. Madigan*, 2016 IL App (1st) 153366, ¶ 11, she contends that the public body to whom a request is directed is the appropriate defendant in a lawsuit alleging a FOIA violation and that a suit against the individual FOIA officer is inappropriate. In his reply brief, plaintiff responds that defendant forfeited this issue by failing to raise it in the trial court.

¶ 33 We find that this is a case of misnomer rather than plaintiff naming the wrong party. Section 2-401(b) of the Code of Civil Procedure provides:

> "(b) Misnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time, before or after judgment, on motion, upon any terms and proof that the court requires." 735 ILCS 5/2-401(b) (West 2020).

¶ 34 This section prevents a party from forcing the dismissal of a case due to a mistake in the name of a party. *U.S. Bank National Ass'n v. Johnston*, 2016 IL App (2d) 150128, ¶¶ 40-41. However, there is a difference between misnomer and mistaken identity: the former occurs when a plaintiff files an action against the correct party under an incorrect name; the latter occurs when a plaintiff names the wrong party. *Id.* The effect of misnomer is that the court acquires personal jurisdiction over the party who is called by an incorrect name but receives notice of the lawsuit. *Id.* Whether a case involves a misnomer or mistaken identity "depends on the intent of the parties, but a plaintiff's subjective intent is not controlling in the face of objective manifestations indicating an intent to sue another." (Internal quotation marks omitted.) *Pennymac Corp. v. Jenkins*, 2018 IL App (1st) 171191, ¶ 25.

¶ 35 Here, defendant, in addition to serving as the county state's attorney, was the FOIA compliance officer for both agencies. Moreover, as the state's attorney, she was responsible for representing the sheriff's department in litigation. Because its attorney was served, the sheriff's department had actual notice of the litigation. Based on the complaint's allegations and the relief sought, plaintiff clearly intended to sue the agencies from whom the records were sought but mistakenly named defendant, the FOIA officer. Defendant clearly understood this as well. She filed a motion to dismiss on behalf of both agencies and supported it with the affidavit of Essenpreis, who was the records custodian for the sheriff's department.

¶ 36 Finally, plaintiff contends that the circuit court erred in denying his motion to reconsider. According to plaintiff, on November 17, 2022, he sent another FOIA request to defendant, this time seeking her budget for the year 2022. In response, defendant provided the requested budget. Plaintiff claims that defendant's fulfillment of his later FOIA request demonstrates that she failed to fully comply with his earlier request.

¶ 37 This argument lacks merit for two reasons. First, plaintiff's first FOIA request did not ask for the state's attorney's budget. Rather, he sought "records of funds, receipt, obligation and use of such funds and all payroll records of this office within the last twelve (12) months or since January of 2021, whichever is longest." Thus, the request sought a record of funds actually received and used since January of 2021. The FOIA request of November 17, 2022, by contrast, asked for the agency's budget for 2022. The November 17, 2022, FOIA request sought a different record, and therefore, defendant's response does not demonstrate that she violated FOIA by not turning over the budget in response to the earlier request. But even if plaintiff's earlier request could be construed as having sought defendant's budget, he has since received it, and therefore, the claim is moot. See *Turner v. Joliet Police Department*, 2019 IL App (3d) 170819, ¶¶ 12-13.

¶ 38 CONCLUSION

¶ 39 For the reasons stated, we affirm the circuit court's judgment.

¶ 40 Affirmed.