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.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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AND POINTS & AUTHORITIES

NATURE OF THE CASE

Plaintiff Chicago Sun-Times filed suit against the Cook County Health & Hospitals System (the "Hospital") claiming that the Hospital violated FOIA when it denied the Sun-Times' request for records of gunshot victims admitted to the Hospital unaccompanied by law enforcement. The circuit court granted judgment for the Hospital, holding that the information in question was contained within private medical records exempt from disclosure. The appellate court reversed, concluding that the Sun-Times' request did not violate HIPAA or other applicable privacy laws because the information requested was not itself a medical record. All questions presented are raised on the pleadings.

ISSUES PRESENTED

1. Whether medical records are per se exempt from disclosure under FOIA as private information.

2. Whether HIPAA prohibits using personal medical information to respond to the Sun-Times' FOIA request.

3. Whether the Sun-Times' FOIA request is unduly burdensome.

JURISDICTION

The Circuit Court of Cook County entered a final judgment order granting the Hospital's cross-motion for summary judgment and denying Sun-Times motion for partial summary judgment on November 15, 2019. The Sun-Times filed its notice of appeal from that judgment on December 16, 2019. The appellate court had jurisdiction over that appeal under Supreme Court Rule 303.

On June 30, 2021, the First District issued its opinion and order reversing the circuit court's order and remanding for further proceedings. On August 3, 2021, the Hospital timely petitioned for leave to appeal. This court granted that petition on September 29, 2021. This court has jurisdiction under Supreme Court Rule 315.

STATUTES INVOLVED

This appeal concerns the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.*), specifically: 5 ILCS 140/1, 5 ILCS 140/2, and 5 ILCS 140/7(1)(a)-(b). This appeal also involves the Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.500-534, specifically Section 164.502. The full text of the aforementioned statutes are included in the Appendix.

STATEMENT OF FACTS

On September 10, 2018, the Sun-Times submitted a FOIA request to the Hospital requesting the following information:

> 1. Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statute (20 ILCS 2630/3.2).
>
> 2. Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds though CCHHS between Jan. 1, 2015 through the present day who were not been [sic] accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that enforcement officials were notified of the patients' admission as required by state statue [sic] (20 ILCS 2630.3.2).

A-36 ¶¶1,2.

On October 26, 2018, Deborah Fortier, the Hospital's FOIA Officer, produced the Hospital's records responsive to the Sun-Times' request for policy records. A-35 ¶1, C-10 ¶8. These records are not at issue and are not subject to the instant lawsuit. C-47 ¶8. Fortier declined the Sun-Times' request for patient time and date information, for three reasons. A-35 ¶2. First, no responsive records existed. A-35 ¶2. Second, such records would be exempt from production under 5 ILCS 140/7(1)(a), which exempts from production records that federal or State law or their implementing regulations prohibit from disclosure, because state and federal privacy laws, including but not limited to HIPAA, prohibit searching for and disclosing the requested information. A-35 ¶2. Third, such records would be exempt from production under 5 ILCS 140/7(1)(b), which exempts "private information" from production, because "medical records" constitute private information under 5 ILCS 140/2(c-5). A-35 ¶2.

On November 21, 2018, the Sun-Times filed a complaint for injunctive and declaratory relief in circuit court, alleging that the Hospital violated FOIA with respect to its response to the Sun-Times' September 10, 2018 request for records. C-8. The complaint re-asserted the Sun-Times' FOIA request for the "time/date" that patients with gunshot wounds were admitted to the Hospital and the "time/date" that law enforcement was notified of the same. C-9 ¶7.

The parties filed cross-motions for summary judgment. A-16, A-57. The Hospital argued that the information requested was contained within medical

records and thus were *per se* exempt from FOIA as private information. A-22. The Hospital further argued that it was prevented from searching for the information requested because doing so was not a proper use of protected health information under HIPAA. A-23. Through the affidavits of Fortier and Trauma Coordinator Justin Mis, the Hospital explained why compiling the requested information was prohibited by HIPAA and unduly burdensome, even if limited to years. A-47, A-49, A-79. The Hospital keeps a record of all admissions to the emergency unit, a medical record called a trauma registry. A-54 ¶4. The Hospital would have to run a report to isolate all instances of gunshot wound patients from that trauma registry. A-79 ¶¶3, 4. The trauma registry does not indicate whether the gunshot wound victim was accompanied by law enforcement. A-55 ¶8, A-79 ¶4. Each entry to the trauma registry is issued a unique Medical Record Number ("MRN"). A-55 ¶7. Using the MRN, the Hospital would then have to pull the actual chart that documented the medical care given for each incident. *Id.* It is undisputed that the MRN (as well as the patients' names, birthdates, and other unique identifiers) that would connect the two records is uniquely identifying information prohibited from disclosure by both HIPAA and FOIA. After pulling the chart, the Hospital would have to analyze each chart and read the notes of the medical provider to determine if they recorded whether the patient arrived unaccompanied by law enforcement, if law enforcement was subsequently notified, and when. A-55 ¶¶8, 9. None of this information is independently recorded by the Hospital and

none of this information exists in searchable form. *Id.* The information requested must be determined by a Hospital employee through analysis of every record of every patient admitted for a gunshot wound. A-55 ¶8. 9, A-79 ¶5. As the medical providers are not required to make note of the requested information, it may not even exist. A-55 ¶9, C-110 ¶6. Therefore, the Hospital's reviewer would have to make a judgment about whether the record is actually responsive or not. A-55 ¶¶5,9. Justin Mis estimated that at least 333 hours would be needed to search for the requested records. A-55 ¶6.

In response, the Sun-Times abandoned its request for the "time/date" information sought in its FOIA request, arguing instead that the Hospital should supply only the "years" of the unaccompanied gunshot wound patient admissions and law enforcement notifications of the same. A-63.

On November 15, 2019, the circuit court granted the Hospital's motion for summary judgment, ruling that medical records were wholly exempt from production under FOIA whether under the original or amended request, and did not address the issue of undue burden. A-14.

The Sun-Times appealed[1], A-81, arguing that the "years" were not personally identifiable information, and that the Hospital should be ordered to produce documents with all information redacted except for these "years." Sun-Times' Br. 4. The Hospital responded re-iterating the exemption

[1] We cite the appellee brief below as "Sun-Times Br.___" and the appellant brief as "Hospital Br.___."

arguments from the trial court and arguing that the Sun-Times' request for "years" should not be reviewed by the appellate court because the Sun-Times did not amend the complaint to reflect this change in request and it was not raised until the response and cross-motion for summary judgment. Hospital Br. 5. On June 30, 2021, the appellate court reversed the trial court's decision and held that because HIPAA allowed the Hospital to create de-identified records, the Hospital was required to do so in order to comply with the FOIA request. A-8 ¶22. The appellate court did not address the Hospital's argument that accessing the records in order to answer a FOIA request was not itself an permitted use under HIPAA, nor did it address the Hospital's argument that searching for and compiling redacted records would be unduly burdensome. A-1-11.

ARGUMENT

In its FOIA request to the Hospital, the Sun-Times requested the production of records indicating the "time/date" patients were admitted for gunshot wounds without law enforcement accompaniment and the *corresponding* time and date that law enforcement was notified. A-36. It is important to note that the Sun-Times is not simply requesting two sets of data, but asking that the Hospital connect those two disparate sets of data. When the Hospital informed the Sun-Times that it possessed no such records, the Sun-Times responded not by narrowing its request or submitting a new FOIA request for documents in the Hospital's possession, but by filing suit in circuit court. C-8. It was not until the Sun-Times filed its response to the Hospital's

motion for summary judgment that the Sun-Times changed its request to documents indicating the "year" patients were admitted for gunshot wounds without law enforcement accompaniment, and the corresponding "years" that law enforcement was subsequently notified. A-62. In doing so, the Sun-Times conceded that they were not entitled to their original request for "time/dates." A-4, ¶9; A-5, ¶15. The circuit court granted summary judgment for the Hospital finding that the medical records requested were exempt from production under FOIA as private information, and as such the Hospital need not redact the records to produce a portion thereof. R-36. The Sun-Times appealed and the appellate court reversed, holding that because "HIPAA permits a covered entity to review medical records – protected health information – to 'create information' that is not individually identifiable health information," the Hospital is required to do so to comply with the request. A-8, ¶22. This court reviews these rulings de novo because they arise on summary judgment and involve questions of statutory interpretation. *Perry v. Dep't of Fin. & Prof'l Regulation*, 2018 IL 122349, ¶ 30.

This court should reverse the judgment of the appellate court and affirm the judgment of the circuit court for three reasons. First, FOIA is clear on its face that "medical records" are categorically exempt from disclosure, without regard to their contents. Second, HIPAA prohibits covered entities such as the Hospital from using private health information of their patients for any purpose not specifically authorized in HIPAA, and nothing in HIPAA

specifically authorizes disclosure of patient information pursuant to a FOIA request. Third, compliance with the Sun-Times' FOIA request, as that request was reformulated after the fact and during the pendency of litigation, would be unduly burdensome. We address these issues in turn.

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

It cannot be gainsaid that Illinois public policy strongly favors protecting the privacy rights of individuals with respect to their medical information. *Coy v. Washington County Hospital District*, 372 Ill. App. 3d 1077, 1082 (5th Dist. 2007). This policy is articulated and reflected in numerous Illinois statutes, which uniformly recognize that "[i]ndividuals have a right to and an expectation of privacy related to their medical information." *Id.* Both the Medical Patient Rights Act, 410 ILCS 50/3(d), and the Managed Care Reform and Patient Rights Act, 215 ILCS 134/5(a)(4), recognize that patients have a right to "privacy and confidentiality in health care." Additionally, the Hospital Licensing Act prohibits hospital employees and staff from disclosing patient health information to third parties. 210 ILCS 85/6.17(d). Finally, the Illinois Code of Civil Procedure creates an evidentiary privilege for communications between physicians and patients. 735 ILCS 5/8-802.

This strong public policy is reflected in the plain language of FOIA itself. FOIA makes a clear distinction between "public records," 5 ILCS 140/2(c), and "private information," 5 ILCS 140/2(c-5). "Public records" is defined to mean "all … documentary materials pertaining to the transaction of public business,"

5 ILCS 140/2(c), whereas "medical records" are specifically included as "private information," 5 ILCS 140/2(c-5), and are further expressly exempted from disclosure, 5 ILCS 140/7(1)(b). And unlike other private information, such as driver's license numbers and personal financial information, that may be redacted from a larger public record in which it is found, the *entirety* of a "medical record" – not merely certain discrete information found in such a record – is exempt from disclosure. 5 ILCS 140/2(c-5), 140/7(1)(b).

Because FOIA does not provide a specialized definition of "medical record," that term is presumed to carry its ordinary, commonplace meaning. *See Western Illinois University v. Illinois Educational Labor Rels. Board,* 2021 IL 126082, ¶ 80. The dictionary is strong evidence of that common meaning, *id.,* and the dictionary definition of "medical record" encompasses all "*documents* that compose a medical patients healthcare history," BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). This is further confirmed by considering the term "medical record" in the context in which it appears – had the legislature desired to exempt only certain private medical *information* from disclosure, it would have specified that information in the same way it did other discrete categories of information also exempted from disclosure. But having chosen to categorically exempt all "medical records" from disclosure, the legislature expressed a clear intent that such records be exempt from disclosure in their entirety, without regard to the specific information they contain.

Here, the only records in the Hospital's possession that might even potentially contain the information the Sun-Times seeks are medical records – namely, patients' trauma logs and treatment records – categorically exempt from disclosure under section 7(1)(b). These records relate solely to individual patients and their treatment by health care providers and do not involve the business of running the Hospital. As a result, the Hospital properly denied the Sun-Times' request for those records on that ground, and the judgment of the circuit court rejecting the Sun-Times' challenge to that decision should be affirmed.

In reaching a contrary conclusion, the appellate court declared that because the year a person is admitted to the Hospital "standing alone, is not a medical record," that information is not exempt from disclosure under section 7(1)(a) even when that information is "*found* in a patient's medical record," so long as that year "is entirely divorced from any personally identifying information." A-10, ¶25. This completely fails to address the fact that without some "personally identifiable information" there would be no way to connect the "years" of admission to the corresponding "years" of law enforcement notification, as requested by the Sun-Times. The "years" would never be standing alone because in order to fulfill the Sun-Times' request, the Hospital would have to connect the year of admission to the year of notification and cannot do so without using some form of personally identifiable information such as the Medical Record Number.

Further, the appellate court's opinion fundamentally misunderstands FOIA's categorical exemption for medical records, which does not apply only to discrete pieces of "personally identifying information" – a limitation that is conspicuously absent from section 7(1)(b) and that cannot be judicially read into that section. Rather, as the appellate court acknowledged, it applies to all "*documents* that compose a medical patient's healthcare history.'" A-10, ¶25. (quoting BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added)). But by the appellate court's reasoning, the exemption for medical records is utterly superfluous, because nothing in a medical record is protected from disclosure unless it also constitutes personally identifying information that is already exempt from disclosure under HIPAA and section 7(1)(a). Such a reading of FOIA to render its entire exemption for medical records superfluous is impermissible, as courts are required to read statutes to give all of their provisions full effect. *International Ass'n of Fire Fighters, Local 50 v. City of Peoria*, 2022 IL 127040, ¶ 12.

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

While FOIA's blanket exemption for medical records is reason enough, standing alone, to justify the denial of the Hospital's records request, that request was also properly denied because disclosure of the requested information would violate HIPAA. Under FOIA, all "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law" is categorically exempt from disclosure. 5

ILCS 140/7(1)(a). That is significant here because the Hospital is a "covered entity" under HIPAA, and "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).

HIPAA defines "protected health information" as all "individually identifiable health information" kept by a covered entity that is transmitted or maintained in any form, including electronic media. 45 C.F.R. § 160.103. "Health information," in turn, is defined as *any information*, including genetic information, whether oral or recorded in any form or medium, that:

> 1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> 2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Id. (emphasis added).

"HIPAA prohibits covered entities from *using* or disclosing protected health information except as provided in the HIPAA regulations." *King v. Cook County Health and Hospitals System*, 2020 IL App (1st) 190925 ¶27 (emphasis added). In general, a covered entity may use or disclose protected health information only if HIPAA specifically permits it, or if a patient submits written authorization. 45 C.F.R. § 164.502. "Use," with respect to individually identifiable health information, is defined as "the sharing, employment,

application, utilization, examination, or analysis of such information within an entity that maintains such information." 45 C.F.R. § 160.103. Permitted uses generally involve covered entities' providing, maintaining, or improving health care services. *See, e.g.*, 45 C.F.R. § 164.506(c)(1-5) (listing treatment, payment, or health care operations; treatment activities of a health care provider; payment activities; health care fraud and abuse detection; or disclosure to participants in an organized health care arrangement for any health care operations activities of the arrangement). Reviewing medical records in response to a FOIA request is not a permitted use of protected health information. *See id.*

Applying the HIPAA regulations here requires denial of the Sun-Times' FOIA request. It is beyond dispute that responding to the Sun-Times' FOIA request would have required an unauthorized "use" of the Hospital's patients' personal health information. This is in contrast to the records involved in *King,* where the Hospital had used protected health information, patient zip codes, to research locations in need of a community triage center, a use permitted under HIPAA. *King,* 2020 IL App (1st) 190925, ¶3. The plaintiff in *King* requested the data set of zip codes that the Hospital had used in determining the location of the new triage center after the information had already been culled from mental health records for research. *Id.* Because the information had been collected for an authorized use, and the use was for a

legitimate transaction of public business, the zip codes could be produced to Plaintiff as public records after de-identification.

In the instant case, the Sun-Times is requesting protected health information entirely located within medical records; information that has not been previously collected or analyzed by the Hospital. A-35. Here, the Hospital's only use of the protected health information would be in service of answering a public records request, which is not a permitted use under HIPAA. As we note above, "utilization, examination, or analysis" all constitute a "use" of personal health information, 45 C.F.R. § 160.103, and it is undisputed here that responding to the Sun-Times' request here would require extensive analysis of such information. *See* A-54-56, A-21-23, A-69-70, A-79-80, R-99-100. Because such use is nowhere authorized by HIPAA, and because the Sun-Times has not obtained authorization from any of the patients whose personal health information is at issue, the use of those patients' personal health information is prohibited by HIPAA, exempting those patients' records from production under section 7(1)(a).

In reaching a contrary conclusion, the appellate court found it significant that federal regulations permit covered entities "'to create information that is not individually identifiable health information or disclose protected health information only to a business associate for such purpose, whether or not the de-identified information is to be used by the covered entity.'" A-8, ¶22 (quoting 45 C.F.R. § 164.502(d)(1)). That was enough to

require compliance with the Sun-Times' FOIA request, the court concluded, because the creation of information "is exactly what is required in order for [the Hospital] to comply with the Sun-Times' request." *Id.* But if, as the appellate court concluded, compliance with the Sun-Times' FOIA request required the Hospital to "create information," that only means that request was improper on its face – after all, 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 already in their possession. *Martinez v. Cook County State's Atty.'s Office*, 2018 IL App (1st) 163153, ¶25; *Chicago Tribune Co. v. Dep't of Fin. & Prof'l Regulation*, 2014 IL App (4th) 130427, ¶ 34 (citing *Kenyon v. Garrels*, Ill. App. 3d 28, 32 (4th Dist. 1989)).

FOIA requires that a record exist and can be identified; FOIA does not compel an entity to compile data it does not keep in its ordinary course of business. *Martinez* at ¶25. It is stated as much in the FOIA preamble:

> This Act is not intended to create an obligation on the part of any public body to *maintain or prepare any public record which was not maintained or prepared by such public body* at the time when this Act becomes effective…
>
> 5 ILCS 140/1 [emphasis added].

In *Martinez*, the First District held that the plaintiff's request for each instance in which information obtained using a cell site simulator was used in a criminal prosecution did "not reasonably describe a record, but rather generally describe[d] 'instances,' in which information was 'used,' as scattered throughout records." *Id.* Like the improper request in *Martinez*, the Sun-Times'

request fails to reasonably describe an existing record and instead requires the compilation of each "instance" of a patient admission that can be determined from the treatment record to be a walk-in GSW and, once identified by the Hospital, each corresponding "instance" that law enforcement was notified, which can only be gleaned from incidental notations in the treatment record. Thus, the appellate court erred by requiring the Hospital analyze, compile, redact, and coordinate prohibited medical information in order to comply with the Sun-Times' FOIA request.

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

In addition, the appellate court should be reversed because the manner in which it orders the Hospital to comply with the FOIA request would be unduly burdensome. As FOIA's preamble explains, its disclosure requirements were not intended "to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body." 5 ILCS 140/1. Reflecting this intent, section 3(g) of FOIA provides an exemption where "the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information." 5 ILCS 140/3(g).

Here, there can be little doubt that the Sun-Times' FOIA request is unduly burdensome under section 3(g). There is no way to possibly narrow that request further, given that it has already been narrowed to a single data point: the "years" of unaccompanied gunshot wound patient admissions and the corresponding law enforcement notifications. A-63. As previously explained,

compliance with even that narrow request would require the Hospital's reviewers to search (*i.e.*, "use" or "obtain" a record, permitted use of which is governed by HIPAA) the trauma registry for all gunshot wound admissions. A-55 ¶5. Next, using those admissions' unique MRN, which are classified as PHI, the reviewer would have to pull every medical record for every gunshot wound patient (approximately 2000 for the years in question) and examine them for notes made by the doctor or nurse that indicate if law enforcement was present at admission, if the patient was unaccompanied, and if law enforcement was notified, then when. *Id.* Again, there is no guarantee that any such information was ever recorded as it is not required by law or policy. *Id.* Justin Mis estimated that at least 333 hours would be needed simply to identify the requested records. A-55 ¶6. And all that time and effort spent responding to the Sun-Times' request would produce nothing of any discernible public interest – at absolute most, the Hospital would produce a handful of documents that are blank other than their year. For instance, even if someone recorded that they had notified law enforcement, if they did not also record the date, the entire record would be redacted, even though it was responsive and evidenced compliance with the law. Such documents would not serve any discernible public purpose, let alone reveal any meaningful information about the Hospital's compliance with Illinois law. In such circumstances, when a request "requires the public body to locate, review, redact and arrange for inspection a vast quantity of material that is largely unnecessary to the [requestor's]

purpose," that request "constitutes an undue burden" and is properly denied. *Kelly v. Village of Kenilworth,* 2019 IL App (1st) 170780, ¶ 41.

Moreover, no public purpose is served by producing such vague and incomplete records that outweighs the burden of invading the privacy of thousands of patients, and examining their private medical records, in order to provide few if any answers to the Sun-Times' question. And because of FOIA's fee-shifting provision, it will be the taxpayers of Cook County who would bear the cost of the fruitless endeavor.

The appellate court's holding has numerous public policy consequences, the foremost of which is the potential invasion of the privacy of patients who seek subsidized care at public hospitals, without their notice or consent. Patients who can afford care at private hospitals would never have their private information subject to such review and disclosure at the request of a member of the public. In *Hardin County v. Valentine*, 894 S.W.2d 151, 152 (Ct. App. Ky. 1995)[2] the court stated that "the patients of a publicly-owned hospital have as great an expectation that their medical records will not be subject to public scrutiny as do the patients of private hospitals." *See also Trent v. Office of the Coroner*, 349 Ill. App. 3d 276, 281 (3rd Dist. 2004) in which the Appellate Court stated:

[2] When considering a FOIA issue, Illinois courts can look at case law from other jurisdictions for guidance. *Cf. Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836, ¶60, *citing People v. Crawford Distributing Co.*, 53 Ill. 2d 332, 338-339 (1972). While such case law is not binding, it is persuasive authority.

> The FOIA has a noble goal: it contemplates a policy of broad disclosure of government documents to serve the 'basic purpose of ensuring an informed citizenry, vital to the functioning of a democratic society. Stated another way, the FOIA's central purpose is to guarantee 'that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

Citing *Lakin Law Firm v. Federal Trade Comm'n*, 352 F.3d 1122, 1123 (7th Cir. 2003) (internal citations omitted).

The Hospital serves a vulnerable population in Cook County that often lacks access to private health care. Considering that victims of gunshot wounds are also usually victims of a crime, their privacy is of even higher concern. In contrast, private hospitals are not subject to FOIA and their patients are free from the risk of their medical records being accessed, viewed, and used to comply with a public records request. See, e.g., *King*, 2020 IL App (1st) 190925, ¶ 21. It would be deeply unjust to subject CCHHS's patients to such intrusions of privacy, particularly as these patients had no choice but to seek emergency medical care at a public hospital, and have no opportunity to object or be notified of the intrusion. Nonetheless, the appellate court's opinion subordinates these privacy interests to the Sun-Times' FOIA request.

Further, the Hospital risks the potential for severe fines, criminal liability, and loss of its hospital accreditation if it violates laws such as HIPAA that are designed to protect the use and disclosure of its patients' records. (A-21- ¶ 15, 22-¶17.) The ongoing Cook County Circuit Court case *Baby Doe v. Ann and Robert H. Lurie Children's Hospital,* 2020 CH 04123, illustrates just

this risk. There, a hospital employee improperly viewed patient records and was consequently terminated. Even though no information was disclosed, the hospital still faces a putative class action on behalf of all whose records were improperly *accessed*.[3] *See* also *United States v. Zhou*, 678 F.3d 1110 (9th Cir. 2012) (holding that a research assistant at the University of California at Los Angeles Health System was properly terminated after accessing patient records without authorization in violation of 42 U.S.C. §1320d-6.). The Hospital would similarly face such liability for allowing employees to access, review and manipulate records for a use not defined as permitted under HIPAA. The threat of multi-million-dollar lawsuits against a vulnerable and critical public hospital is too great a price to pay to satisfy the Sun-Times' FOIA request.

3 *See* Complaint: https://s3.amazonaws.com/jnswire/jns-media/61/ab/11426524/doe-lurie_complaint.pdf (accessed February 16, 2022); and https://www.chicagotribune.com/business/ct-biz-lurie-childrens-hospital-privacy-breach-lawsuit-20200508-atoyzonpizeirhuqzti4beg65e-story.html (Chicago Tribune, May 8, 2020, accessed February 16, 2022).

CONCLUSION

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

Dated: February 25, 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 21 pages.

/s/ Prathima Yeddanapudi
Prathima Yeddanapudi

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APPENDIX

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2021 IL App (1st) 192551

FIFTH DIVISION
JUNE 30, 2021

No. 1-19-2551

CHICAGO SUN-TIMES	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 18 CH 14507
	)	
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	Honorable
	)	Eve Reilly,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.
Presiding Justice Delort and Justice Hoffman concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff-appellant, the Chicago Sun-Times (Sun-Times), filed suit against defendant-appellee Cook County Health and Hospital System (CCHHS) in the circuit court of Cook County, alleging that CCHHS failed to produce records in response to the Sun-Times' request for documents pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2018)). The trial court granted CCHHS' motion for summary judgment, finding that the records sought were private information under FOIA and therefore barred from production. The court then denied the Sun-Times' partial motion for summary judgment. The Sun-Times appeals that ruling. For the following reasons, we reverse the judgment of the circuit court of Cook County and remand the case for further proceedings.

¶ 2 BACKGROUND

¶ 3 On September 10, 2018, the Sun-Times requested two categories of information from CCHHS, as set forth below:

> "1. Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statue [sic] (20 ILCS 2630/3.2).
>
> 2. Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 through the present day who were not been [sic] accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statue [sic] (20 ILCS 2630/3.2)."

¶ 4 CCHHS provided the policies requested in part 1 of the Sun-Times' request, but as to part 2, CCHHS stated that it was exempt from providing the requested time/date information pursuant to sections 7(1)(a) and 7(1)(b) of FOIA. Section 7(1)(a) exempts from disclosure records that federal or state law prohibit from disclosure, and section 7(1)(b) exempts "[p]rivate information" from disclosure. *Id.* § 7(1)(a), (b).

¶ 5 On November 21, 2018, the Sun-Times filed a complaint in the circuit court of Cook County, alleging that CCHHS wrongfully withheld the information requested in part 2 of its September 10, 2018, FOIA request. The Sun-Times sought, *inter alia*, an order requiring CCHHS to produce the requested records and enjoining CCHHS from withholding nonexempt public records under FOIA.

¶ 6 The parties filed cross-motions for summary judgment. In support of CCHHS' motion for summary judgment, it attached affidavits of Deborah Fortier, the FOIA officer for CCHHS, and Justin Mis, the trauma coordinator at John H. Stroger Jr. Hospital of Cook County (Stroger Hospital). Ms. Fortier averred that Stroger Hospital was the only CCHHS entity that had records potentially responsive to the Sun-Times' request. Mr. Mis, in turn, averred that the electronic trauma registry at Stroger Hospital contains entries for each individual patient arriving at the hospital and includes information such as the patient's name, date and time of arrival, medical records number, and the patient's chief complaint. Mr. Mis stated that he could "run" a report listing only the mechanism of injury (*i.e.*, gunshot wound) and the time of arrival in the emergency department. However, that report would not include whether the patient was accompanied by a law enforcement officer or when law enforcement was notified, if at all. Instead, Mr. Mis would have to cross-reference the information in that report with a log kept by trauma department clerks that indicates the time and date law enforcement officers request access to a patient. Significantly, the log does not indicate whether law enforcement access was prompted by notification to law enforcement by Stroger Hospital. In order to determine if a gunshot victim arrived with a law enforcement officer or if a law enforcement officer was notified of a gunshot victim's admission, the specific patient's medical record would have to be accessed.

¶ 7 Ms. Fortier averred that the trauma registry entries Mr. Mis referred to as well as the log of when law enforcement officers requested access to a patient contained protected health information as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (see 45 C.F.R. pts. 160, 162, 164) and could not be "de-identified"[1] sufficiently to allow

[1] De-identification requires removing any identifying information from the relevant record.

compliance with HIPAA. Further, Ms. Fortier averred that the records that the Sun-Times sought were medical records and protected from disclosure under Illinois law.

¶ 8 Based on Ms. Fortier and Mr. Mis' affidavits, CCHHS argued in its motion for summary judgment that it was exempt from disclosing the records requested by the Sun-Times.

¶ 9 The Sun-Times' motion for summary judgment argued that HIPAA permits the disclosure of the *year* of treatment and *year* of notification to law enforcement and that, therefore, CCHHS could provide the requested information in a de-identified report. The Sun-Times did not argue that the specific *time or date* of admission or notification to law enforcement was disclosable under FOIA.

¶ 10 On November 15, 2019, the trial court granted CCHHS' motion for summary judgment. Specifically, the trial court stated that, because the "year" identifier the Sun-Times was seeking was part of a medical record, it was exempt from disclosure under section 7(1)(b) of FOIA. The court further explained that, in the absence of case law affirmatively stating that medical records could be redacted, it could not find in favor of the Sun-Times. The Sun-Times appealed.

¶ 11 ANALYSIS

¶ 12 We note that we have jurisdiction to review this matter, as the Sun-Times filed a timely notice of appeal following the entry of summary judgment. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 13 Summary judgment is appropriate only when " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 20 (quoting 735 ILCS 5/2-1005(c) (West 2008)). All supporting materials are strictly construed against the movant and in favor of

the opposing party. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Where parties file cross-motions for summary judgment, as here, they agree that there are no issues of material fact and invite the court to decide the case based on the record. *Dome Tax Services Co. v. Weber*, 2019 IL App (3d) 170767, ¶ 8. We review *de novo* an order granting summary judgment. *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 24.

¶ 14 In this case, the trial court granted summary judgment in favor of CCHHS after finding that it was exempt from disclosing the year of admission of patients with gunshot wounds unaccompanied by a law enforcement officer and the year, if any, that law enforcement was notified of the admission.

¶ 15 Initially, CCHHS argues that the Sun-Times forfeited review of this issue because, in its original FOIA request and its complaint, it sought the "time/date" that patients with gunshot wounds were admitted to CCHHS and the "time/date" that law enforcement was notified, yet in its motion for summary judgment, it sought only the year of admission and notification. It is sufficient to note that the year is unquestionably part of the "time/date" and that the narrowing of the request reflects an implicit concession by the Sun-Times that it was not entitled to the more specific date and time information. So while we recognize a narrowing of its request, we do not find that the Sun-Times forfeited this issue.

¶ 16 Turning to the merits, it is helpful to begin with a general understanding of FOIA. FOIA was implemented with an eye toward opening governmental records " 'to the light of public scrutiny.' " *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 405 (2009) (quoting *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378 (1989)). Of course, FOIA is not intended to violate individual privacy. 5 ILCS 140/1 (West 2018). But to the extent that FOIA contains restraints on the "full and complete" disclosure

of governmental records, those restraints should be seen as "limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." *Id.* In other words, FOIA should be liberally construed to allow the public ready access to government information, and exemptions to disclosure should be narrowly interpreted so as not to defeat FOIA's overarching purpose. *Hites v. Waubonsee Community College*, 2016 IL App (2d) 150836, ¶ 53.

¶ 17 In this case, CCHHS relies on two exemptions in support of its denial of the Sun-Times' FOIA request: section 7(1)(a), which makes exempt from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law," and section 7(1)(b), which makes exempt "[p]rivate information." 5 ILCS 140/7(1)(a), (b) (West 2018). The public body that claims an exemption from disclosure bears the burden of proving by clear and convincing evidence that the requested information is exempt. *Id.* § 1.2.

¶ 18 Beginning with section 7(1)(a), CCHHS argues that regulations implementing HIPAA (Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in various sections of Titles 18, 26, 29, and 42 of the United States Code)), prohibit disclosure of the requested records. Indeed, HIPAA limits the use and disclosure of "protected health information," which is defined as "individually identifiable health information." 45 C.F.R. § 160.103 (2013). "Health information," in turn, is defined as information that is created by a health care provider relating to the past, present, or future physical health or condition of an individual. *Id.* But health information that does *not* identify an individual, "and with respect to which there is no reasonable basis to believe that

the information can be used to identify an individual," is *not* individually identifiable health information. *Id.* § 164.514(a).

¶ 19 CCHHS maintains that the year of treatment for a gunshot wound and the year that law enforcement were notified of that treatment are individually identifiable health information that cannot be disclosed to respond to a FOIA request. We disagree. HIPAA states that health information can be de-identified (and disclosed) if "identifiers of the individual" are removed. Examples of identifiers are names, geographic subdivisions smaller than a state, telephone numbers, Social Security numbers, medical records numbers, and "[a]ll elements of dates *(except year)* directly related to an individual, including birth date, admission date, discharge date, [and] date of death." (Emphasis added.) *Id.* § 164.514(b)(2)(i)(A)-(C), (G), (H). Here, the Sun-Times seeks *only* the year of admission for patients with gunshot wounds, *without* any identifiers. Further, the year of notification to law enforcement does not convey any identifying information.

¶ 20 Nevertheless, CCHHS claims that removing individual identifiers is not sufficient to de-identify information if the covered entity has "actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information." *Id.* § 164.514(b)(2)(ii). Ms. Fortier averred in her affidavit that she was "concerned" that someone with the *date and time* of admission of a Stroger Hospital patient with a gunshot wound could discover the identity of that patient through media accounts of shootings. But this is far from "actual knowledge" of the ability to identify a patient and amounts to speculation. More significantly, the Sun-Times is seeking only the *year* of admission of patients with gunshot wounds and the *year* law enforcement was notified. By CCHHS' own admission, thousands of patients are admitted to Stroger Hospital with gunshot wounds every year. It strains credulity to imagine that

any specific patient could be identified merely by the year they were admitted, and the year law enforcement was notified of their admission.

¶ 21 This is true even for the "short" years CCHHS refers to in its brief. The Sun-Times requested data from October 1, 2015 to September 10, 2018. CCHHS points out that only three months of data are requested from 2015 and only eight months of data from 2018. It theorizes that these "short" data years will make it easier to "re-identify" patients. But it is CCHHS' burden to prove this contention with clear and convincing evidence. CCHHS has not alleged that Stroger Hospital treated so few gunshot victims over the 2015 and 2018 "short years" that they could *actually* be sufficiently identified solely by the year of their treatment and nothing further. In the absence of such evidence, this argument does not withstand scrutiny.

¶ 22 CCHHS further argues that, even if the requested information could be de-identified, it would still need to parse protected health information in order to ascertain the nature of that information. Specifically, in order to determine whether and when law enforcement was notified of a patient who was admitted with a gunshot wound, Mr. Mis averred that it would be necessary to review the gunshot wound victim's medical records. CCHHS contends that using medical records for this purpose is a violation of HIPAA in and of itself. Again, we disagree. The regulations *explicitly* provide that a covered entity may use protected health information "to create information that is not individually identifiable health information or disclose protected health information only to a business associate for such purpose, whether or not the de-identified information is to be used by the covered entity." *Id.* § 164.502(d)(1). In other words, HIPAA permits a covered entity to review medical records—protected health information—to "create information" that is *not* individually identifiable health information. This is exactly what is required in order for CCHHS to comply with the Sun-Times' request. For all of these reasons, we

conclude that HIPAA does not bar disclosure of the requested records in the manner suggested by CCHHS.

¶ 23 CCHHS also cites Illinois law as a basis for refusing to disclose the requested records. To be sure, there is a strong public policy in Illinois in favor of protecting the rights of individuals with respect to their medical information. *Coy v. Washington County Hospital District*, 372 Ill. App. 3d 1077, 1082 (2007). To that end, there are several state laws cited by CCHHS that prohibit or limit the release of medical information. For example, the Code of Civil Procedure provides that communications between a patient and a doctor are privileged. 735 ILCS 5/8-802 (West 2018). The Hospital Licensing Act states that information regarding hospital patients "must be protected from inappropriate disclosure" and prohibits the hospital's employees from disclosing the "nature or details of services provided to patients" unless "authorized or required by law." 210 ILCS 85/6.17(b), (d) (West 2018). Also, the Medical Patient Rights Act states that every patient has a right to privacy and confidentiality in health care. 410 ILCS 50/3(d) (West 2018).

¶ 24 But the logic that led us to conclude that disclosure of the requested information does not violate HIPAA regulations compels us to reach the same conclusion here. Disclosure of the year of admission of a patient with a gunshot wound and the year in which law enforcement was notified of that admission in no way violates a patient's right to privacy, as that information does not identify a particular patient. Therefore, Illinois law does not prohibit the release of that information.

¶ 25 Next, we consider whether section 7(1)(b), prohibiting the disclosure of "private information," supports CCHHS' refusal to turn over the records. The definition of "private information" includes "medical records." 5 ILCS 140/2(c-5) (West 2018). "Medical records" is not defined in FOIA, but CCHHS urges us to adopt the definition in section 250.1510 of the Illinois

Administrative Code. That section addresses hospital licensing requirements and requires hospitals to maintain a minimum level of content for patients' medical records, including "admission information." 77 Ill. Adm. Code 250.1510(b)(2)(A) (2019). But when a term is undefined in a statute, we do not turn to an entirely unrelated statute in order to ascertain its meaning. Rather, it is appropriate to consult a dictionary for that purpose. See *Lacey v. Village of Palatine*, 232 Ill. 2d 349, 363 (2009). And Black's Law Dictionary defines "medical record[ ]" as "documents that compose a medical patient's healthcare history." Black's Law Dictionary (11th ed. 2019). 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 under this definition. In other words, the year of admission for a specific injury is not private information where it is entirely divorced from any personally identifying information.[2]

¶ 26 Lastly, CCHHS argues that the requested information will not answer the question of whether it is in compliance with its statutory obligation to notify law enforcement of a gunshot victim seeking treatment. But merely because the redacted information may not tell the whole story, it does not follow that CCHHS may refuse to provide it. See *Heinrich v. White*, 2012 IL App (2d) 110564, ¶ 19 (rejecting claim that redacted information would not prove useful as basis for noncompliance with FOIA).

[2]To the extent CCHHS argues that medical records need not be redacted and are "exempt in totality," it cites no authority for this proposition. And, indeed, section 7 of FOIA states the opposite: "When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under the 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.) 5 ILCS 140/7(1) (West 2018).

¶ 27 In sum, neither section 7(1)(a) nor section 7(1)(b) of FOIA exempts CCHHS from responding to the Sun-Times' FOIA request. Accordingly, we conclude that the trial court erred in granting summary judgment in favor of CCHHS.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the case for further proceedings consistent with this opinion.

¶ 30 Reversed and remanded.

No. 1-19-2551

Cite as:	*Chicago Sun-Times v. Cook County Health & Hospital System*, 2021 IL App (1st) 192551
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 18-CH-14507; the Hon. Eve M. Reilly, Judge, presiding.
Attorneys for Appellant:	Joshua Burday, Matthew Topic, and Merrick Wayne, of Loevy & Loevy, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Cathy McNeil Stein, Martha Victoria Jimenez, and James Beligratis, Assistant State's Attorneys, of counsel), for appellee.

MR. BERGSTROM: Okay. Thank you, your Honor.

THE COURT: Thank you. All right. Take a brief recess.

(Recess.)

THE COURT: All right. Counsels you can approach.

Thank you very much for your briefs and your arguments. It was helpful and they were very well done, but I am going to grant the Motion for Summary Judgment on behalf of Cook County Health and Hospital System.

Whether the trauma log is a medical record or not a medical record really wouldn't be that helpful, because it has been represented to this Court that the information as to whether or not they were accompanied by a law enforcement officer would only be contained in the medical records, and under the FOIA statute that would be private information, that would be exempt.

Without any case law presented to this Court, and I understand that there may not be any, that there is a medical records that can be turned over if the information is redacted, you know, maybe my decision would be different, but I don't have that.

And this states medical records, and the information about the law enforcement officers would be contained in the medical records, at least that is the information this Court has at this time.

So that is my decision. Thank you very much and have a wonderful day.

MR. BERGSTROM: You, too, your Honor. Thank you.

(WHICH were all of the proceedings had in the above entitled cause.

* * * *

Order (Rev. 02/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Chicago Sun-Times
v.
CCHHS

No. 18 CH 14507

ORDER

This matter coming on before the Court for hearing on the parties' cross-motions for summary judgment, the parties present through counsel, and the court being fully advised in the premises, and being heard,

IT IS HEREBY ORDERED:

Defendant's motion for summary judgment is granted.

Attorney No.: 10295
Name: J Registrom
Atty. for: D
Address: CCSAO
City/State/Zip: 312-603-2755
Telephone:

Judge Eve M. Reilly

ENTERED: NOV 15 2019

Circuit Court - 2122

Dated: ,

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	Case No. 18 CH 14507
	)	
v.	)	
	)	
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	Hon. Eve M. Reilly
	)	
	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT

Defendant COOK COUNTY HEALTH AND HOSPITAL SYSTEM ("CCHHS"), by and through Cook County State's Attorney Kimberly M. Foxx, through her Assistant State's Attorney, Jeremy P. Bergstrom, pursuant to 735 ILCS 5/2-1005, moves for summary judgment. In support, CCHHS states as follows:

Introduction

Plaintiff CHICAGO SUN-TIMES filed a Complaint on November 21, 2018, alleging CCHHS violated the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/1, *et seq.*, with respect to its response to Plaintiff's September 10, 2018 request for CCHHS's records pursuant to FOIA. Plaintiff seeks injunctive and declaratory relief ordering CCHHS to provide it with the requested documents, costs, and civil penalties. A copy of Plaintiff's Complaint is attached hereto as "Exhibit A" and incorporated herein by reference.

While CCHHS answered this first item in Plaintiff's FOIA request ("first request"), Plaintiff's Complaint alleges CCHHS willfully and intentionally violated FOIA when it denied the second item in Plaintiff's request ("second request"). CCHHS maintains that it fully complied with FOIA, and that its records containing the information sought in Plaintiff's second request are indeed

exempt from disclosure pursuant to FOIA. *Id.* See also CCHHS's Answer to Plaintiff's Complaint and Affirmative Defenses, attached hereto as "Exhibit B" and incorporated herein by reference.

Plaintiff cannot succeed on the merits because the requested records are prohibited from disclosure by state and federal law as private information, and CCHHS properly claimed the records as exempt under 5 ILCS 140/(7)(1)(a) and (b). For the following reasons, CCHHS respectfully requests that judgment be granted in its favor.

Facts

On September 10, 2018, Plaintiff, through one of its reporters, Matthew Hendrickson, sent an email to CCHHS requesting the following information pursuant to the Freedom of Information Act ("FOIA"), 5 ILCS 140/1 *et seq.*:

> 1. Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statute (20 ILCS 2630/3.2).
>
> 2. Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds though CCHHS between Jan. 1, 2015 through the present day who were not been [sic] accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that enforcement officials were notified of the patients' admission as required by state statue [sic] (20 ILCS 2630.3.2).

A copy of Plaintiff's FOIA request is attached hereto as "Exhibit C" and incorporated herein by reference. *See also* Complaint at Ex. A.

The FOIA Officer for CCHHS, Deborah Fortier, responded by email to Plaintiff's request. A copy of Deborah Fortier's October 26, 2018 email to Matthew Hendrickson is attached hereto as "Exhibit D" and incorporated herein by reference. *See also* Complaint at Ex. A.

Attached to her email, Ms. Fortier produced CCHHS's records responsive to Plaintiff's first request for policy documents. That request is not at issue in Plaintiff's Complaint. See Complaint at ¶ 8.

Ms. Fortier denied Plaintiff's second request for patient time and date information pursuant to two exemptions in the FOIA statute: Section 7(1)(a), which exempts records that are prohibited from disclosure by federal or State law or their implementing regulations; and Section (7)(1)(b), which exempts records of private information as defined by FOIA. See 5 ILCS 140/2(c-5), 140/7(1)(a) and (b). See also Exhibit D.

At this time, all responsive and non-exempt records have been produced to Plaintiff, and CCHHS has complied with FOIA in relation to its response to Plaintiff's requests.

Standard of Review

"Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 54 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992). However, unlike other civil actions, a decision to grant or deny summary judgment in a FOIA suit does not necessarily hinge on the existence of a genuine issue of material fact. *Hemenway v. Hughes*, 601 F. Supp. 1002, 1004 (D.C. Cir. 1985). In a FOIA action, summary judgment is proper when the public body demonstrates that it has fully discharged its obligations under the Act. *Miller v. United States Dept. of State*, 779 F.2d 1378, 1385 (8th Cir. 1985). The public body must show that it has conducted a search reasonably calculated to uncover all relevant documents. *Weisberg v. United States Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The issue is *not* whether any further documents might conceivably exist but rather, whether the government's search for

responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

The adequacy of a public body's search for requested documents is judged by a standard of reasonableness, which may be established through affidavits of responsible agency personnel. *Miller*, 779 F.2d at 1383. The affidavits must be relatively detailed, non-conclusory, and submitted in good faith. *Id.* Accordingly, affidavits supplying facts showing that the public body conducted a thorough search are accorded a presumption of good faith and are sufficient to sustain the public body's burden. *Carney v. United States Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (emphasis added). This holding has also been expressly adopted by the Illinois Appellate Court in *Bluestar Energy Services Inc. vs. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 996-997 (1st Dist. 2007). Moreover, without evidence of bad faith, the veracity of the public body's submissions should not be questioned. *Silets v. United States Dept. of Justice*, 945 F.2d 227, 230-231 (7th Cir. 1991).

Finally, as the Illinois Supreme Court has noted, summary judgment should be encouraged where it will avoid the expense of unnecessary trials and ease congestion of trial calendars. *Fooden v. Board of Governors*, 48 Ill. 2d 580, 586 (1971), *cert. denied*, 408 U.S. 943 (1972). This interest is especially compelling in FOIA litigation since public tax monies are being spent in the defense of such actions.

Argument

I. SUMMARY JUDGMENT IN FAVOR OF CCHHS IS PROPER BECAUSE CCHHS MET ITS OBLIGATIONS UNDER FOIA

CCHHS has met its burden of establishing that there is no genuine issue of material fact because it has complied with its duties under FOIA and, accordingly, CCHHS is entitled to judgment as a matter of law.

To fulfill its duties under FOIA, a defending public body must demonstrate that its search for the requested documents was adequate. *BlueStar Energy Services*, 374 Ill. App. 3d at 996. Affidavits that supply facts indicating the agency has conducted a thorough search are sufficient to sustain the agency's burden. *Id.* at 996-97.

CCHHS acted properly in response to Plaintiff's FOIA request. The Affidavit of Deborah Fortier, the FOIA Officer for CCHHS, demonstrates that CCHHS performed a reasonable search for records responsive to Plaintiff's requests and provided records that satisfied Plaintiff's first requests for CCHHS policies. *See* Affidavit of Deborah Fortier, attached hereto as "Exhibit E" and incorporated herein by reference.

Ms. Fortier further investigated Plaintiff's second request for dates and times of patient admissions and corresponding notifications to law enforcement by contacting Justin Mis, a CCHHS Trauma Coordinator and a records custodian for John H. Stroger, Jr. Hospital of Cook County ("Stroger"), the only CCHHS entity that Ms. Fortier knew would be in possession of responsive records. Ex. E at ¶ 7. In conversation with Mr. Mis and based on her own experience and training as CCHHS's FOIA officer and as a CCHHS attorney, Ms. Fortier determined CCHHS did not possess non-exempt records responsive to Plaintiff's request. *Id.*, generally, and at ¶¶ 15, 19. Ms. Fortier advised Plaintiff of this result along with a detailed explanation of the factual basis for the applicable exemptions and citations to supporting legal authority, in compliance with FOIA. *Id.*, Ex. D, Complaint at ¶ 9 and at Ex. A, Answer at ¶ 9. *See also* 5 ILCS 140/9.

A. CCSAO Produced all Non-Exempt Records Responsive to Plaintiff's Request

CCHHS complied with FOIA when it conducted a reasonable search for records responsive to Plaintiff's requests and produced all non-exempt records. CCHHS is therefore

entitled to judgment as a matter of law, and summary judgment is proper.

The affidavit of Deborah Fortier demonstrates that CCHHS's search was reasonable and diligent. Ex. E. It describes the process she took to locate records responsive to Plaintiff's requests and to produce responsive non-exempt records. *Id.* She explained in her email response to Plaintiff why CCHHS possessed no non-exempt records responsive to Plaintiff's second request for time and date information. *Id.*, Complaint at ¶ 9 and at Ex. A, Answer at ¶ 9. These procedures described in her affidavit are sufficient to demonstrate that CCHHS conducted a reasonable and adequate search, particularly since affidavits submitted by an agency are accorded a presumption of good faith. *Bluestar Energy Services*, 374 Ill. App. 3d at 997, *citing Carney v. United States Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Ms. Fortier's affidavit serves as ample and uncontradicted evidentiary support to establish that the CCHHS complied with its obligations under FOIA.

B. All Information Plaintiff Seeks Is Exempt From Disclosure Under FOIA

Plaintiff's second request in its September 10, 2018 email, the only request at issue in this case, seeks CCHHS records of two categories of information: 1) the date and time of admission of patients seeking treatment between January 1, 2015 and September 10, 2018 for gunshot wounds who were not accompanied by a law enforcement officer at the time of admission, and 2) the corresponding date and time that law enforcement officials were notified of that patient's admission. Complaint at ¶ 7 and at Ex. A. As explained through the affidavits of Deborah Fortier, Ex. E, and Justin Mis, attached hereto and incorporated herein as "Exhibit F," any record in CCHHS's possession that might contain such information is prohibited from disclosure under federal and State law and therefore exempt from disclosure under Section 7(1)(a) of FOIA. Further, any such information is only found in CCHHS patient medical records which constitutes

"private information" as defined by Section 2(c-5) of FOIA, and which is therefore exempt from disclosure under Section 7(1)(b). *Id.*, 5 ILCS 140/2(c-5) and 140/7(1)b).

1. All information Plaintiff seeks is prohibited from disclosure by federal and state law and is therefore exempt from disclosure under Section 7(1)(a) of FOIA.

As set forth in the affidavits of Deborah Fortier and Justin Mis, all information sought by Plaintiff's request at issue in this case is prohibited from disclosure by federal and State laws and their implementing regulations, and therefore exempt from disclosure under FOIA. FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."

Ms. Fortier's affidavit explains that the John H. Stroger, Jr. Hospital of Cook County ("Stroger") is the only CCHHS facility that she believed was likely to possess records potentially responsive to Plaintiff's reqeust. Ex. E at 6. Justin Mis, a Trauma Coordinator for Stroger, explains in his affidavit that Stroger does not keep independent records of the date and time of arrivals for patients seeking treatment for gunshot wounds. Ex. F at ¶ 10. His affidavit explains that Stroger keeps a trauma log indicating the date and time of a patient's arrival in the Trauma Department, along with the patient's name and chief complaint. *Id.* at ¶7. He further explains that the trauma log constitutes a patient's medical record, and that the trauma log would have to be cross-referenced with a patient's record of treatment in order to investigate Plaintiff's request. *Id.* at ¶¶ 5, 7, 8, 12. Ms. Fortier further explains in her affidavit that, in her professional assessment as CCHHS's FOIA officer and attorney, the trauma log constitutes Protected Health Information as defined by the implementing regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191 (1996). Ex. E at ¶ 8, 45 C.F.R. § 160.103.

2. CCHHS records are Protected Health Information under HIPAA

CCHHS records pertaining to is health care of patients consist of private, individually-identifiable protected health information, such that the use and disclosure of those records are subject to the HIPAA Privacy Rule arising out of Title II of HIPAA, Pub. L. No. 104-191 (1996). This is true because, as a CCHHS is a "covered entity" under HIPAA as "health care provider" as defined by that act. *See* Affidavit of Deborah Fortier, Ex. E at ¶ 8. *See also* 45 C.F.R. § 160.103

The HIPAA Privacy Rule, found at 45 C.F.R. §§ 160 and 164, covers "Protected Health Information" (PHI) which is defined by HIPAA as "individually identifiable health information" kept by a covered entity that is transmitted or maintained in any form, including electronic media. 45 C.F.R. §§ 160.103. "Health information," in turn, is defined by HIPAA as

> *any information*, including genetic information, whether oral or recorded in any form or medium, that:
>
> 1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Id. (emphasis added).

In general, a covered entity may only use or disclose PHI if the HIPAA Privacy Rule specifically permits it, or if a patient gives written authorization. 45 C.F.R. § 164.502. Responding to a FOIA request for public records is not described as one of the permitted uses or disclosures of a patient's PHI under HIPAA. *Id.* Wisely, CCHHS policy does not permit its

staff to do so, and CCHHS has determined its staff could not lawfully access patient records to look for records responsive to Plaintiff's request. Ex. E at ¶ 10.

3. Plaintiff's request seeks information that cannot be de-identified from CCHHS's records

While Plaintiff's request invites CCHHS to respond "without providing identifying patient information," CCHHS's records potentially responsive to Plaintiff's request cannot be de-identified in a way that both complies with HIPAA and would allow the redacted records to be disclosed. PHI that has been properly de-identified in accordance with HIPAA is not considered to be "individually identifiable health information." 45 C.F.R. § 164.502(d)(2). However, HIPAA contains strict requirements concerning the de-identification of PHI. 45 C.F.R. § 164.514(a) and (b). *See also* Ex. E at ¶ 12.

HIPAA requires many individual identifiers to be removed before any patient record has been sufficiently de-identified so that it falls outside HIPAA's definition of PHI. These include, but are not limited to, patient names and all elements for dates related to an individual, including his or her date of admission. 45 C.F.R. § 164.514(b)(2)(i)(A) and (C). As Plaintiff is specifically seeking information regarding the dates and times of patients' admissions, CCHHS could never de-identify its records and provide that information to Plaintiff in a way that complies with HIPAA. Ex. E at ¶¶ 12-14.

Further, records are not considered de-identified under HIPAA if the covered entity has actual knowledge that the information to be disclosed could be used in combination with other information to identify the corresponding patient. 45 C.F.R. § 164.514(b)(2)(ii). Ex. E at ¶ 13. As Ms. Fortier explained in her affidavit, CCHHS believes that anyone with specific information about the date and time of admission of a CCHHS patient with a gunshot wound could potentially discover the identity of that patient through media accounts of shootings that

correspond to the approximate date and time of that patient's admission. *Id.* The potential exists that someone could combine information from media accounts of shootings with information that CCHHS disclosed pursuant to Plaintiff's request. *Id.* For this additional reason, HIPAA prohibits CCHHS from disclosing the information Plaintiff seeks, and it is exempt under Section 7(1)(a) of FOIA.

4. CCHHS's records are confidential under State law

CCHHS is further prohibited from disclosing records that might be responsive to Plaintiff's request under State law, because its records regarding patients are confidential under various provisions of State law.

Communications between a patient and his or her physician, such as descriptions of the source of an injury, are privileged under 735 ILCS 5/8-802. If a physician learned, for example, that the cause of a patient's injury was a gunshot, that communication is confidential.

Further, under the Illinois Hospital Licensing Act, "*All* information regarding a hospital patient gathered by the hospital's medical staff and its agents and employees shall be the property and responsibility of the hospital and must be protected from inappropriate disclosures." 210 ILCS 85/6.17(b). That act prohibits all hospital staff from disclosing "the nature or details of services provided to patients" for any purpose other than very narrow exemptions, which do not include responding to FOIA requests. *Id.* at 85/6.17(d) and (e). The act provides that, "Any person who, in good faith, acts in accordance with the terms of this Section [6.17] shall not be subject to any type of civil or criminal liability …." *Id.* at 85/6.17(h).

In Illinois, patients have a statutory right to the privacy of their health care and health care records. 410 ILCS 50/3(a) and (d). This right should apply equally and with as much practical effect to patients of public facilities such as CCHHS as it should for patients of private

facilities that are not subject to FOIA. Ms. Fortier took this right seriously and acted appropriately when she determined that the information Plaintiff seeks is prohibited from disclosure and therefore exempt under Section 7(1)(a) of FOIA.

5. CCHHS's Only Responsive Records Constitute "Private Information" And Are Therefore Exempt From Disclosure Under Section 7(1)(b) of FOIA

Again, as explained in the affidavit of Justin Mis, any record in CCHHS's possession that might contain such information is found in patient medical records which constitute "private information" under FOIA, and which is exempt from disclosure under 5 ILCS 140/7(1)(b). Ex. F.

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." 5 ILCS 140/2(c-5) (emphasis added). CCHHS explains through its affidavits of Jusin Mis and Deborah Fortier that the only records in CCHHS's possession that might contain the information Plaintiff seeks are kept in medical records which are *per se* "private information" and exempt from disclosure under Section 7(1)(b). Exs. E and F.

FOIA does not require medical records to be any further redacted; they are simply exempt. 5 ILCS 140/2(c-5), 140/7(1)(b). CCHHS therefore properly withheld those records and met its obligations under FOIA when it informed Plaintiff that it possessed no other non-exempt records responsive to its request. CCHHS has fully complied with FOIA and is entitled to summary judgment.

II. CCHHS'S DENIAL OF PLAINTIFF'S REQUEST WAS IN GOOD FAITH AND DID NOT WILLFULLY OR INTENTIONALLY VIOLATE FOIA

CCHHS'S FOIA Officer, Deborah Fortier, conducted a reasonable investigation of Plaintiff's FOIA requests and provided all non-exempt documents in its possession. Ms. Fortier's affidavit describes the process she employed to perform a reasonable search for responsive records, and explains her analysis behind her determination that CCHHS records potentially responsive to Plaintiff's request for date and time information are exempt from FOIA. Ex. E. In her email in response to Plaintiff's request, she accurately communicated details of the nature of CCHHS's records and the reasons they are exempt under FOIA. Ex. D. As her affidavit sets forth, she acted both reasonably and in good faith, and without any ill will or malice. Ex. E at ¶ 18.

The record in this case is devoid of any evidence whatsoever of ill will, bad faith or intent to violate FOIA and Plaintiff can point to no instance in his dealings with CCHHS that would even hint at bad faith. CCHHS is entitled to summary judgment on Count II.

III. PUBLIC POLICY STRONGLY DISFAVORS USING CCHHS PATIENT RECORDS TO COMPLY WITH PUBLIC RECORDS REQUESTS

Patient privacy is integral to quality health care. Ex. F at ¶ 14. Illinois law reflects its import by codifying a patient's right to privacy in its Medical Patients Rights Act. 410 ILCS 50/3(a). Public policy strongly favors protecting patients' privacy in the balance of responding to a FOIA request.

Plaintiff's FOIA request at issue in this case involves the private, personal medical records of thousands of CCHHS patients of Stroger Hospital. Stroger hospital serves a vulnerable population in Cook County who often do not have access to other facilities such as private hospitals. Ex. F at ¶15. The privacy of these citizens is even more of concern

considering that victims of gunshot wounds are also usually victims of a crime; it would be deeply unfair for these patients' medical records to be accessed, viewed, and used to comply with a public records request under FOIA.

Private hospitals are not subject to FOIA. It could have a chilling effect on the public's willingness to seek treatment from CCHHS facilities if its records are exposed to FOIA requests in a way that records of patients of private facilities are not. Even the act of redacting patient medical records would require multiple people involved in the opening and reading of a patient's chart and manipulation of the information contained therein. It would be unjust for a person to bear that additional risk simply because he/she/they obtain health care from a public health care provider that is subject to FOIA.

Moreover, CCHHS risks the potential for severe fines, criminal liability, and loss of its hospital accreditation if it violates laws such as HIPAA that are designed to protect the use and disclosure of its patients' records. Ex. E at ¶¶ 15 and 17. The potential loss of a public health care option for more than 300,000 patients a year is too great a price to pay to satisfy Plaintiff's FOIA request.

Conclusion

For the reasons above, and others, pursuant to 735 ILCS 5/2-1005, Defendant CCHHS respectfully moves for summary judgment in its favor and against the Plaintiff as to all counts, and for any other relief that may be fair and just.

Dated: August 6, 2019

KIMBERLY M. FOXX
Cook County State's Attorney

By: */s/ Jeremy P. Bergstrom*
Assistant State's Attorney

Jeremy P. Bergstrom
Assistant State's Attorney
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Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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8/6/2019 4:26 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018CH14507

6070001

EXHIBIT A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	
	)	2018CH14507
v.	)	
	)	
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	
	)	
	)	
Defendant.	)	

COMPLAINT

NOW COMES Plaintiff, CHICAGO SUN-TIMES, by its undersigned attorneys, LOEVY & LOEVY, and brings this suit to overturn Defendant COOK COUNTY HEALTH AND HOSPITAL SYSTEM's refusal, in willful violation of the Illinois Freedom of Information Act, to provide records in response to CHICAGO SUN-TIMES's Freedom of Information Act request for information related to the reporting of "walk-in" gunshot victims. In support of its Complaint, CHICAGO SUN-TIMES states as follows:

INTRODUCTION

1. Pursuant to the fundamental philosophy of the American constitutional form of government, it is the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of the Illinois Freedom of Information Act ("FOIA"). 5 ILCS 140/1.

2. Restraints on access to information, to the extent permitted by FOIA, are limited exceptions to the principle that the people of this state have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of

government activity that affect the conduct of government and the lives of the people. 5 ILCS 140/1.

3. All public records of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt. 5 ILCS 140/3.

4. Under FOIA Section 11(h), "except as to causes the court considers to be of greater importance, proceedings arising under [FOIA] shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way."

PARTIES

5. Plaintiff CHICAGO SUN-TIMES ("SUN-TIMES") is the FOIA requester in this case.

6. Defendant COOK COUNTY HEALTH AND HOSPITAL SYSTEM ("CCHHS") is a public body located in Cook County, Illinois.

SEPTEMBER 10, 2018 FOIA REQUEST

7. On September 10, 2018, SUN-TIMES requested the following records related to the reporting of "walk-in" gunshot victims: "(1) Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statue [sic.] (20 ILCS 2630/3.2). (2) Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 through the present day who were not been accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients'

admission as required by state statue [sic.] (20 ILCS 2630/3.2)." A true and correct copy of the request is attached as Exhibit A.

8. On October 26, 2018, CCHHS responded by providing policies. These policies are properly responsive to the first request. See Exhibit A.

9. In response to the second request, CCHHS claimed that the records are exempt under Sections 2(c-5) and 7(1)(a) of the FOIA because they contain personally identifiable information. See Exhibit A. CCHHS did not redact any personally identifiable information and produced the remainder of the records. See 5 ILCS 140/7(1).

10. As of the date of filing CCHHS has not produced any records in response to the SUN-TIMES' second request.

COUNT I – SEPTEMBER 10, 2018 FAILURE TO PRODUCE RECORDS

11. The above paragraphs are incorporated by reference.

12. CCHHS is a public body under FOIA.

13. The records sought in SUN-TIMES's FOIA request are non-exempt public records of CCHHS.

14. CCHHS violated FOIA by failing to produce records in response to the FOIA request by the required deadline.

COUNT II – SEPTEMBER 10, 2018 WILLFUL AND INTENTIONAL VIOLATION OF FOIA

15. The above paragraphs are incorporated by reference.

16. CCHHS is a public body under FOIA.

17. The records sought in SUN-TIMES's FOIA request are non-exempt public records of CCHHS.

18. CCHHS willfully and intentionally, or otherwise in bad faith failed to comply

with FOIA.

WHEREFORE, SUN-TIMES asks that the Court:

i. in accordance with FOIA Section 11(f), afford this case precedence on the Court's docket except as to causes the Court considers to be of greater importance, assign this case for hearing and trial at the earliest practicable date, and expedite this case in every way;

ii. declare that CCHHS has violated FOIA;

iii. order CCHHS to produce the requested records;

iv. enjoin CCHHS from withholding non-exempt public records under FOIA;

v. order CCHHS to pay civil penalties;

vi. award Plaintiff reasonable attorneys' fees and costs;

vii. award such other relief the Court considers appropriate.

RESPECTFULLY SUBMITTED,

/s/ *Matthew V. Topic*

_____

Attorneys for Plaintiff
CHICAGO SUN-TIMES

Matthew Topic
Joshua Burday
LOEVY & LOEVY
311 North Aberdeen, 3rd Floor
Chicago, IL 60607
312-243-5900
foia@loevy.com
Atty. No. 41295

Dear Mr. Hendrickson,

My apology for the delay. CCH responds to your information request (attached) as follows:

Please find the attached policies, Policy # PC.002.08 and PC 01.00.40 that are responsive to your request, and a Trauma Department instructional flow sheet. PC 01.00.40 is the policy that was applicable to the practice of reporting, in accordance with the flowsheet, prior to the newer policy.

According to Trauma administration, there is a trauma registry that logs arrival information of all trauma patients not just walk in gunshot patients, however that log is identifiable private patient health/medical information that is protected from release by medical privacy laws and regulations, including but not limited to HIPAA. Further, there is no independent written record of patient information that simply tracks times/dates of walk in gunshot patients and reporting; so there is no existing document that is responsive to your request. Respectfully, CCH is not required under the FOIA to create a document that is not kept in the regular course of business in order to respond to your request. Further, it would be improper and a violation of state and federal medical privacy laws, including but not limited to HIPAA, for CCH to release the specific arrival times and dates and reporting dates of individual walk in gunshot patients, as this could allow for patient identification.. This patient information, which is individual protected patient health/medical information, is therefore exempt from public release under Sections 2(c-5) and 7(1)(a) of the FOIA. This would also include where arrival times and dates and date of any reporting would be entered into individual patient medical records; medical records are not public records and are private records per se under Section 2(c-5) of the FOIA. In fact, it would be a violation of medical privacy laws, for CCH staff to review or even access patient medical information to respond to a FOIA request, as responding to a public records request is not a lawful purpose to access patient medical information.

Thank you.

Deborah J. Fortier

Assistant General Counsel

Office of the General Counsel

Cook County Health

1900 W. Polk Street, Ste. 104

Chicago, IL. 60612

(312) 864-0810

Sept. 10, 2018

Re: Illinois Freedom of Information Act Request

To: FOIA officer for Cook County Health and Hospital Systems

This is a request for information under the Illinois Freedom of Information Act, 5 ILCS 140.

Exhibit A

I am requesting information from the Cook County Health and Hospital System (CCHHS) for information related to the reporting of so called "walk-in" gunshot victims. The Chicago Sun-Times is requesting the following information:

1. Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statue (20 ILCS 2630/3.2).

2. Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 though the present day who were not been accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statue (20 ILCS 2630/3.2).

I understand that the Act permits a public body to charge a reasonable copying fee not to exceed the actual cost of reproduction and not including the costs of any search or review of the records. 5 ILCS 140/6. I request a waiver of all fees for this request.

Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest; I am a journalist working for the Chicago Sun-Times.

I look forward to hearing from you in writing within seven working days, as required by the Act. 5 ILCS 140(3).

Sincerely,

Matthew Hendrickson
Reporter
Chicago Sun-Times
(312) 321-2147
mhendrickson@suntimes.com
30 N. Racine Ave.
Chicago, IL 60607

--

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EXHIBIT B

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	Case No. 18 CH 14507
	)	
v.	)	
	)	
COOK COUNTY HEALTH AND, HOSPITAL SYSTEM,	)	Hon. Eve M. Reilly
	)	
	)	
Defendant.	)	

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT AND AFFIRMATIVE DEFENSES

Defendant, COOK COUNTY HEALTH AND HOSPITAL SYSTEM ("CCHHS"), by KIMBERLY M. FOXX, State's Attorney of Cook County, and through her Assistant State's Attorney, Martha-Victoria Jimenez, states as follows for its Answer and Affirmative Defenses to the Complaint of the Plaintiff, CHICAGO SUN-TIMES:

INTRODUCTION

1. Pursuant to the fundamental philosophy of the American constitutional form of government, it is the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of the Illinois Freedom of Information Act ("FOIA"). 5 ILCS 140/1.

ANSWER: Paragraph 1 of Plaintiff's Complaint is merely a recitation of the preamble in the FOIA statute; therefore, no answer is required. Nevertheless, to the extent that Paragraph 1 of Plaintiff's Complaint makes allegations against this Defendant, Defendant denies the allegations of Paragraph 1 of Plaintiff's Complaint.

2. Restraints on access to information, to the extent permitted by FOIA, are limited exceptions to the principle that the people of this state have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and lives of the people. 5 ILCS 140/1.

ANSWER: Paragraph 2 of Plaintiff's Complaint does not make allegations against this Defendant; therefore, no answer is required. Nevertheless, Defendant denies that Paragraph 2 of Plaintiff's Complaint is an accurate summary of all the relevant FOIA law applicable to this action. Further, to the extent that Paragraph 2 of Plaintiff's Complaint makes allegations against this Defendant, Defendant denies the allegations in Paragraph 2 of Plaintiff's Complaint.

3. All public records of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt. 5 ILCS 140/3.

ANSWER: Paragraph 3 of Plaintiff's Complaint is merely a recitation of law and does not make allegations against this Defendant; therefore, no answer is required. Nevertheless, Defendant denies that Paragraph 3 of Plaintiff's Complaint is an accurate summary of all the relevant FOIA law applicable to this action further state that the records that are the subject of this request are not public records; rather, they are private medical records. Moreover, to the extent that Paragraph 3 of Plaintiff's Complaint makes allegations against this Defendant, Defendant denies the allegations in Paragraph 3 of Plaintiff's Complaint.

4. Under FOIA Section 11(h), "except as to causes the court considers to be of greater importance, proceedings arising under [FOIA] shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way."

ANSWER: Paragraph 4 of Plaintiff's Complaint is merely a recitation of law and does not make allegations against this Defendant; therefore, no answer is required. Nevertheless, Defendant denies that Paragraph 4 of Plaintiff's Complaint is an accurate summary of all the relevant FOIA law applicable to this action. Further, to the extent that Paragraph 4 of Plaintiff's Complaint makes allegations against this Defendant, Defendant denies the allegations in Paragraph 4 of Plaintiff's Complaint.

PARTIES

5. Plaintiff CHICAGO SUN-TIMES ("SUN-TIMES") is the FOIA requester in this case.

ANSWER: Upon information and belief, Defendant admits the allegations of Paragraph 5.

6. Defendant COOK COUNTY HEALTH AND HOSPITAL SYSTEM ("CCHHS") is a public body located in Cook County, Illinois.

ANSWER: Defendant admits that CCHHS is a public body for purposes of FOIA and is located in Cook County, Illinois.

SEPTEMBER 10, 2018 FOIA REQUEST

7. On September 10, 2018, SUN-TIMES requested the following records related to the reporting of "walk-in" gunshot victims: "(1) Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statue [sic.] (20 ILCS 2630/3.2). (2) Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 through the present day who were not been accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statute [sic.] (20 ILCS 2630/3.2) A true and correct copy of the request is attached as Exhibit A.

ANSWER: Defendant admits that it received Plaintiff's September 10, 2018, FOIA request and states that the document in Exhibit A appears to be a true and accurate copy thereof.

8. On October 26, 2018, CCHHS responded by providing policies. These policies are properly responsive to the first request. See Exhibit A.

ANSWER: Defendant admits the allegation of Paragraph 8 of Plaintiff's Complaint.

9. In response to the second request, CCHHS claimed that the records are exempt under Sections 2(c-5) and 7(1)(a) of the FOIA because they contain personally identifiable information. See Exhibit A. CCHHS did not redact any personally identifiable information and produced the remainder of the records. See 5 ILCS 140/7(1).

ANSWER: Defendant admits the allegation of Paragraph 9 of Plaintiff's Complaint.

10. As of the date of filing CCHHS has not produced any records in response to the SUN-TIMES' second request.

ANSWER: Defendant admits that it did not produce records in response to the second part of Plaintiff's FOIA request because they were exempt from disclosure under FOIA.

COUNT I – SEPTEMBER 10, 2018 FAILURE TO PRODUCE RECORDS

11. The above paragraphs are incorporated by reference.

ANSWER: Defendant incorporates by reference its responses to Paragraphs 1 to 10 of the Plaintiff's Complaint as if each were fully set forth herein.

12. CCHHS is a public body under FOIA.

ANSWER: Defendant admits that CCHHS is a public body for purposes of FOIA.

13. The records sought in the SUN-TIMES FOIA request are non-exempt public records of CCHHS.

ANSWER: Defendant admits the allegation of Paragraph 13 insofar as it relates to the first part of Plaintiff's FOIA request but denies the remainder of the allegations of Paragraph 13 of Plaintiff's Complaint.

14. CCHHS violated FOIA by failing to produce records in response to the FOIA request by the required deadline.

ANSWER: Defendant denies the the allegation of Paragraph 14 of Plaintiff's Complaint.

COUNT II – SEPTEMBER 10, 2018 WILLFUL AND INTENTIONAL VIOLATION OF FOIA

15. The above paragraphs are incorporated by reference.

ANSWER: Defendant incorporates by reference its responses to Paragraphs 1 to 14 of the Plaintiff's Complaint as if each were fully set forth herein.

16. CCHHS is a public body under FOIA

ANSWER: Defendant admits that CCHHS is a public body for purposes of FOIA.

17. The records sought in the SUN-TIMES FOIA request are non-exempt public records of CCHHS.

ANSWER: Defendant admits the allegation of Paragraph 17 insofar as it relates to the first part of Plaintiff's FOIA request but denies the remainder of the allegations of Paragraph 17 of Plaintiff's Complaint.

18. CCHHS has willfully and intentionally, or otherwise in bad faith failed to comply with FOIA.

ANSWER: Defendant denies the allegations of Paragraph 18 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

Exemptions under FOIA (5 ILCS 140/7, et seq.)

Certain records, or portions thereof, that are responsive to the FOIA request at issue in Plaintiff's Complaint are exempt from production pursuant to one or more exemptions set forth in Section 7 of FOIA in that they contain:

- Information which may be exempt pursuant to Section 7(1)(a) of FOIA, which exempts from disclosure, "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."

- Information which is exempt pursuant to Section 7(1)(b), which exempts "private information," which is defined in Section 2(c-5) to specifically include the types of information listed.

- To the extent that this Court disagrees with CCHHS' assertion that these records are not private medical records, in the alternative, these records contain information which is exempt pursuant to Section 7(1)(c), which exempts "personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

WHEREFORE, Defendant requests this Honorable Court dismiss Plaintiff's Complaint with prejudice and enter judgment in favor of Defendant or for such other relief as this Court deems just and appropriate.

Dated: March 27, 2019

Respectfully submitted,

KIMBERLY M. FOXX
State's Attorney of Cook County

By: */s/ Martha-Victoria Jimenez*
Assistant State's Attorney
Cook County State's Attorney's Office
500 Richard J. Daley Center
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EXHIBIT C

Sept. 10, 2018

Re: Illinois Freedom of Information Act Request

To: FOIA officer for Cook County Health and Hospital Systems

This is a request for information under the Illinois Freedom of Information Act, 5 ILCS 140.

I am requesting information from the Cook County Health and Hospital System (CCHHS) for information related to the reporting of so called "walk-in" gunshot victims. The Chicago Sun-Times is requesting the following information:

1. Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statue (20 ILCS 2630/3.2).

2. Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 though the present day who were not been accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statue (20 ILCS 2630/3.2).

I understand that the Act permits a public body to charge a reasonable copying fee not to exceed the actual cost of reproduction and not including the costs of any search or review of the records. 5 ILCS 140/6. I request a waiver of all fees for this request.

Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest; I am a journalist working for the Chicago Sun-Times.

I look forward to hearing from you in writing within seven working days, as required by the Act. 5 ILCS 140(3).

Sincerely,

Matthew Hendrickson
Reporter
Chicago Sun-Times
(312) 321-2147
mhendrickson@suntimes.com
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EXHIBIT D

Dear Mr. Hendrickson,

My apology for the delay. CCH responds to your information request (attached) as follows:

Please find the attached policies, Policy # PC.002.08 and PC 01.00.40 that are responsive to your request, and a Trauma Department instructional flow sheet. PC 01.00.40 is the policy that was applicable to the practice of reporting, in accordance with the flowsheet, prior to the newer policy.

According to Trauma administration, there is a trauma registry that logs arrival information of all trauma patients not just walk in gunshot patients, however that log is identifiable private patient health/medical information that is protected from release by medical privacy laws and regulations, including but not limited to HIPAA. Further, there is no independent written record of patient information that simply tracks times/dates of walk in gunshot patients and reporting; so there is no existing document that is responsive to your request. Respectfully, CCH is not required under the FOIA to create a document that is not kept in the regular course of business in order to respond to your request. Further, it would be improper and a violation of state and federal medical privacy laws, including but not limited to HIPAA, for CCH to release the specific arrival times and dates and reporting dates of individual walk in gunshot patients, as this could allow for patient identification.. This patient information, which is individual protected patient health/medical information, is therefore exempt from public release under Sections 2(c-5) and 7(1)(a) of the FOIA. This would also include where arrival times and dates and date of any reporting would be entered into individual patient medical records; medical records are not public records and are private records per se under Section 2(c-5) of the FOIA. In fact, it would be a violation of medical privacy laws, for CCH staff to review or even access patient medical information to respond to a FOIA request, as responding to a public records request is not a lawful purpose to access patient medical information.

Thank you.

Deborah J. Fortier

Assistant General Counsel

Office of the General Counsel

Cook County Health

1900 W. Polk Street, Ste. 104

Chicago, IL. 60612

(312) 864-0810

EXHIBIT E

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	Case No. 18 CH 14507
	)	
v.	)	
	)	
COOK COUNTY HEALTH AND, HOSPITAL SYSTEM,	)	Hon. Eve M. Reilly
	)	
	)	
Defendant.	)	

AFFIDAVIT OF DEBORAH J. FORTIER

I, Deborah J. Fortier, certify that, if called as a witness in this case, I would testify that the following facts are true and correct to the best of my knowledge and belief, and are based on my personal knowledge:

1. I am Assistant General Counsel for Cook County Health and Hospital System ("CCHHS"). I also serve as CCHHS's FOIA Officer. I am an Illinois licensed attorney. I have been an attorney at CCHHS since 2009.

2. My duties and responsibilities as FOIA Officer included overseeing the day to day handling of FOIA requests and ensuring requests are responded to efficiently and appropriately.

3. CCHHS records are maintained within CCHHS departments by CCHHS departmental staff. Upon receipt of any FOIA request, I analyze the plain language of the request and I conduct a records inquiry by contacting appropriate CCHHS staff. I rely on my knowledge, experience, background, and training to review requests and available documents produced by CCHHS departments, determine based on the information provided to me if CCHHS is lawfully able to produce the documents, and then respond to requests.

4. On September 10, 2018, CCHHS received a FOIA request sent by Matthew Hendrickson of Chicago Sun-Times for the following records:

> 1. Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statute (20 ILCS 2630/3.2).
>
> 2. Without providing identifying patient information, we seek the time/date of admission of patients seeking treatment for gunshot wounds though CCHHS between Jan. 1, 2015 through the present day who were not been [sic] accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that enforcement officials were notified of the patients' admission as required by state statue [sic] (20 ILCS 2630.3.2).

5. After inquiry with the relevant personnel, I emailed Mr. Hendrickson on October 26, 2018 and provided policies and a Trauma Department instructional flow sheet responsive to his first request.

6. To investigate Mr. Hendrickson's second request, I contacted Justin Mis, a member of the Trauma Department administration at John H. Stroger Hospital of Cook County ("Stroger"), which upon my information and belief was the CCHHS facility reasonably likely to possess records that could potentially be responsive to Mr. Hendrickson's request.

7. I learned from Mr. Mis that the Stroger Hospital Trauma Department currently maintains a trauma registry of all trauma patients, and that log includes the arrival information of all trauma patients, not just those seeking treatment for gunshot wounds. Mr. Mis explained that the log data is tied to individual patients in that it includes the name, date and time of arrival, and the patient's general complaint. I understand Mr. Mis is completing his own affidavit to further describe this log and Stroger's records.

8. I know from my training and experience as a CCHHS attorney and FOIA officer that the data Mr. Mis described that is kept in the trauma log and CCHHS records consists of private, individually-identifiable protected health information, such that the use and disclosure of those records are subject to the HIPAA Privacy Rule arising out of Title II of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191 (1996). This is true because CCHHS is a covered entity under HIPAA. See 45 C.F.R. § 160.103.

9. The HIPAA Privacy Rule, found at 45 C.F.R. §§ 160 and 164, covers "Protected Health Information" (PHI) which is defined by HIPAA as "individually identifiable health information" kept by a covered entity that is transmitted or maintained in any form, including electronic media. 45 C.F.R. §§ 160.103. In general, a covered entity may only use or disclose PHI if the HIPAA Privacy Rule specifically permits it, or if a patient gives written authorization. 45 C.F.R. § 164.502.

10. In general, a covered entity such as CCHHS may only use or disclose PHI for treatment, payment or health care operations. 45 C.F.R. § 164.502(a)(1). Responding to a FOIA request for public records is not a permitted use or disclosure of a patient's PHI under HIPAA, and CCHHS policy does not permit its staff to do so.

11. HIPAA does provide that PHI that has been properly de-identified in accordance with HIPAA is not considered to be "individually identifiable health information." 45 C.F.R. § 164.502(d)(2). However, HIPAA contains strict requirements concerning the de-identification of PHI. 45 C.F.R. § 164.514(a) and (b).

12. Before CCHHS can determine that any patient record has been sufficiently de-identified such that it falls outside HIPAA's definition of PHI, HIPAA requires many individual identifiers to be removed. These include, but are not limited to, patient names and all elements for dates

related to an individual, including their date of admission. 45 C.F.R. § 164.514(b)(2)(i)(A) and (C).

13. Records are not considered de-identified under HIPAA if the covered entity has actual knowledge that the information to be disclosed could be used in combination with other information to identify the corresponding patient. 45 C.F.R. § 164.514(b)(2)(ii). I was and remain concerned that anyone with specific information about the date and time of admission of a Stroger patient with a gunshot wound could discover the identity of that patient through media accounts of shootings that correspond to the approximate date and time of that patient's admission.

14. For these reasons I knew it would be impossible for CCHHS to redact the PHI from its records that might contain information responsive to Mr. Hendrickson's second request in a way that remains in compliance with HIPAA. I also learned from my reasonable search that, upon information and belief, CCHHS does not possess responsive records that are outside HIPPA's definition of PHI.

15. Based on my training and experience, I was also aware that the records requested by Mr. Hendrickson, which constitute Stroger patients' medical records, are additionally protected by Illinois law regarding the confidentiality of medical records and physician/patient confidentiality. 735 ILCS 5/8-802. In Illinois, patients have a statutory right to the privacy of their health care and health care records. 410 ILCS 50/3(a) and (d). The privacy of patients and their records are also fundamental aspects of Stroger's hospital accreditation.

16. In my capacity as counsel and FOIA Officer for CCHHS, I am familiar with, and work in a professional capacity with, the aforementioned provisions of the HIPAA Privacy Rule and Illinois law. I reasonably relied on my professional understanding, information and belief of these laws and regulations as I have described in this affidavit, in denying Mr. Hendrickson's FOIA second request by email to him on October 26, 2018.

17. Upon information and belief, violations of HIPAA could subject CCHHS to civil money penalties up to $1.5 million and direct criminal liability. Upon information and belief, an individual can also face criminal charges for violations of HIPAA. Full compliance with HIPAA, Illinois law and hospital accreditation standards is crucial for CCHHS to continue to serve its important role as the public health agency for Cook County, and is the standard I employ in the exercise of my professional judgment when analyzing and responding to FOIA requests.

18. I fulfilled this FOIA request to the best of my ability and based on my experience and training as a FOIA Officer. I had no malice or ill will in regard to the fulfilling of this request and I did not attempt to improperly withhold records responsive to Plaintiff's request. It is my personal and CCHHS's professional goal to fully comply with FOIA to the extent we are able. I believe the public records I provided to Mr. Hendrickson, along with my denial of those private records CCHHS is unable to lawfully produce, constituted as complete a response as possible to his FOIA requests.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Deborah J. Fortier

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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/ Deborah J. Fortier

EXHIBIT F

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	Case No. 18 CH 14507
	)	
v.	)	
	)	
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	Hon. Eve M. Reilly
	)	
	)	
Defendant.	)	

AFFIDAVIT OF JUSTIN MIS

I, Justin Mis, certify that, if called as a witness in this case, I would testify that the following facts are true and correct to the best of my knowledge and belief, and are based on my personal knowledge:

1. My name is Justin Mis, BSN, RN, CCRN, TCRN, TNS. I am a Trauma Coordinator employed by Cook County Health and Hospital System (CCHHS) at John H. Stroger, Jr. Hospital of Cook County.

2. By way of education and certifications, I have a Bachelor of Science in Nursing Degree. I am a Registered Nurse, which is a designation given to a nurse who has passed a national examination and met all state licensing standards. I have CCRN certification, which is a specialty certification for nurses who provide direct care to acutely or critically ill adult patients regardless of their physical location. I am a Trauma Certified Registered Nurse, a certification available to trauma nurses who are licensed Register Nurses and who meet minimum experience requirements and pass an examination. Finally, I am a Trauma Nurse Specialist, a certification given by the State of Illinois upon successful application and examination. I am compliant with ongoing continuing education required by my various certifications and licenses.

3. As part of my duties and responsibilities as a Trauma Coordinator, I oversee data entry and quality control for Stroger's electronic trauma software and database, and oversee Stroger's input of data to national and state databases. I perform rounds with patients' clinical team to ensure quality of care, and perform clinical functions in the form of direct patient care. I conduct education of nursing staff, and oversee a team of seven hospital registrars.

4. There is no way for Stroger to search its Trauma Database to identify and isolate the admission of patients seeking treatment for gunshot wounds before October 1, 2015, when Stroger began keeping its own trauma registry on an electronic records database called Digital Innovations.

5. The only way to identify records of self-arriving patients seeking treatment for gunshot wounds admitted from January 1, 2015 to September 30, 2015 would be to manually open and review the electronic patient medical records for all patients admitted for between those dates.

6. Based on my experience and knowledge of patient admissions, I estimate the number of self-arriving patients seeking treatment for gunshot wounds between January 1, 2015 and September 10, 2018 to be approximately 2000, and that, on average, it would take approximately 10 minutes per chart reviewed by staff who are trained to read medical records to determine at what exact date and time or some other law agency arrived.

7. Each entry into the trauma registry is tied to a specific, individual Stroger patient. Data points entered for each trauma patient arrival include the patient's name, date and time of arrival, Medical Records Number (which is unique number tied to an individual patient used to track that patient's medical records), and the patient's chief complaint. A search report could be generated with de-identified information. However, for the purpose of complying with the Plaintiff's request, a report with both the patients name and MRN would need to be ran in order to cross reference the trauma registry record with the patient's electronic medical record (EMR) as well as our Law Enforcement Tracking Log.

8. I can run a report to determine the mechanism of injury (gunshot wound) and the time they arrived in the ED. However, we would have to open the record to determine whether the time of police notification and/or arrival. Reports such as this are not generated or kept in our ordinary course of business, and they do not currently exist.

9. It is not a given that a patient's medical record would indicate whether the patient is accompanied by a law enforcement officer upon admission. In some instances a health care provider may make a note to that effect, in others not.

10. Similarly, Stroger does not keep independent records of times and dates of notifications to law enforcement of the admission of a patient seeking treatment for a gunshot wound.

11. The Trauma Department clerks do keep a log indicating the time and date that law enforcement officers request access to any patient. However, the log does not distinguish between instances when a law enforcement officer is accompanying a patient for admission and when an officer is making contact with a patient who is already admitted. Again, each log entry is tied to the name of a specific patient. The log tracks the arrival of ALL law enforcement officers, not just victims of gun violence.

12. In my experience, records of a patient's accompaniment by a law enforcement officer upon admission, or the mention of notification to a law enforcement official of that patient's admission, might usually be found in the patient's "History and Physical" report which is authored by the patient's admitting physician, or in a document called the "Trauma Nurse Flow Sheet" ("TNFS"). In some instances the arrival of law enforcement will be documented on the TNFS. Both of these documents are medical records of that patient's care.

13. Based on my experience in my role of ensuring quality patient care, to attempt to ascertain the information I've described above would be a tremendous and undue burden to Stroger, and an interruption of the health care we provide to hundreds of patients on a daily basis.

14. Patient privacy is absolutely integral to the provision of quality medical care. It is offensive to basic concepts of patient privacy to think that patient charts at Stroger could be opened to comply with a public records request.

15. Stroger provides acute health care to a vulnerable population. It is absolutely crucial that CCHHS remain a health care provider that Cook County residents can trust to protect their privacy. Furthermore, some of the records that would need to be be scrutinized have potential to relate to unsolved homicide cases, as well as high profile cases not only in the city of Chicago, but in neighboring states.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Justin Mis
Justin Mis, BSN, RN, CCRN, TCRN, TNS

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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Justin Mis
Justin Mis, BSN, RN, CCRN, TCRN, TNS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	
	)	18 CH14507
v.	)	
	)	Hon. Eve M. Reilly
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a Freedom of Information Act dispute regarding Defendant Cook County Health and Hospital System's Office's ("CCHHS") refusal to comply with to Plaintiff Chicago Sun-Times's Freedom of Information Act requests seeking information about whether CCHHS properly complies with the statutory requirement of alerting law enforcement when there is an walk-in patient with a gunshot wound who does not initially arrive at the hospital with a law enforcement officer. *See* 20 ILCS 2630/3.2. CCHHS must prove by clear and convincing evidence that the responsive records are exempt, but CCHHS has failed to do so. Sun-Times states as follows:

I. FACTUAL BACKGROUND

CCHHS is a public body under FOIA. Ans. at ¶¶ 6, 12, 16. On September 10, 2018, Sun-Times requested the following records related to the reporting of "walk-in" gunshot victims:

> "(1) Written policy and/or related policy documents, and/or internal memos or communications setting policy or providing guidelines, instructions and/or directives to staff in the reporting of patients who have suffered gunshot wounds to law enforcement agencies as required by state statue [sic.] (20 ILCS 2630/3.2). (2) Without providing identifying patient information, we seek the time/date of

> admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 through the present day who were not been accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statue [sic.] (20 ILCS 2630/3.2)."

Id. at ¶ 7. On October 26, 2018, after CCHHS's statutory deadline of 5 business days had passed, CCHHS responded by providing policies. These policies are properly responsive to the first request. *Id.* at ¶ 8. In response to the second request, CCHHS claimed that the records are exempt under Sections 2(c-5) and 7(1)(a) of the FOIA alleging that they contain personally identifiable information. *Id.* at ¶ 9. CCHHS did not redact any personally identifiable information and produced the remainder of the records. *Id.* CCHHS has not produced any records in response to Sun-Times's second request. *Id.* at ¶ 10.

II. LEGAL STANDARDS

A. FOIA Generally

The General Assembly and Illinois courts have long recognized that government secrecy is rarely appropriate and often abused:

> We are not surprised that governmental entities, including the United States Attorney generally prefer not to reveal their activities to the public. If this were not a truism, no FOIA would be needed. Our legislature enacted the FOIA in recognition that (1) blanket government secrecy does not serve the public interest and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the sunshine of public scrutiny is the best antidote to public corruption, and Illinois courts are duty-bound to enforce that policy.

Better Gov't Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 818 (2008) (requiring disclosure of federal grand jury subpoenas). Because of this, the FOIA statute and interpreting caselaw impose a demanding standard on public bodies seeking to keep records from the public, no matter what the exemption or the nature of the issues.

First, every public record is presumed by law to be open to the public, and so a public record may only be withheld if a specific statutory exemption applies and is proven by clear and convincing evidence. 5 ILCS 140/1.2; *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (2009) (reversing trial court order granting motion to dismiss and collecting cases setting forth demanding standard to withhold records). If records contain both exempt and non-exempt material, the exempt material may be redacted but the remainder must be released. 5 ILCS 140/7(1).

Second, a public body asserting an exemption must "provide a detailed justification for its claimed exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." *Id.* at 74 (quoting and citing *Ill. Ed. Ass'n. v. Ill. State Bd. of Ed.*, 204 Ill. 2d 456, 464 (2003)). Public bodies may not treat exemption language "as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some objective indicia that the exemption is applicable under the circumstances." *Id.* at 73, 75 ("These affidavits are one-size-fits-all, generic and conclusory. . . . That is rubber stamp judicature. We decline to take part in it. The City is asking us, as it did the trial court, to take the affiants' word for it. For us to do so would be an abdication of our responsibility.").

Further, FOIA exemptions must be "read narrowly" and in furtherance of the statutory purpose: "to open governmental records to the light of public scrutiny." *E.g., Day*, 388 Ill. App. 3d at 73; *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997) ("In conducting our analysis, we are guided by the principle that under the Freedom of Information Act, public records are presumed to be open and accessible. The Act does create exceptions to disclosure, but those exceptions are to be read narrowly.").

Finally, the "function of the courts is to interpret the [FOIA] statute as it is written," and not to vary from clear statutory text on policy or other grounds, especially when such variation does not further the statutory purpose of transparency. *Fagel v. Dep't of Transp.*, 2013 IL App (1st) 121841, ¶ 35 (declining to create exemption judicially for electronic data that could be "manipulated") (citing *Pritza v. Village of Lansing*, 405 Ill.App.3d 634, 645 (2010) (courts may not legislate but must interpret the law where the language of the statute is plain and certain)). The Illinois Supreme Court has repeatedly held that unless records are exempt under a specific FOIA provision, they must be produced. *Illinois Education Ass 'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463 (2003) ("Thus, when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in section 7 of the Act applies."); *American Federation of State, County & Municipal Employees (AFSCME), AFL-CIO v. County of Cook*, 136 Ill. 2d 334, 341 (1990) ("The Act, therefore, creates a simple mechanism whereby a public body must comply with a proper request for information unless it can avoid providing the information by invoking one of the narrow exceptions provided in the Act.").

B. Adequacy Of Search

A public body also bears the "burden of showing that its search was adequate." *BlueStar Energy Servs., Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 996-97 (2007). To meet that burden, the public body "must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *see also, e.g., Lee v. U.S. Attorney for So. Dist. of Fla.*, 289 F. App'x 377, 380 (11th Cir. 2008). A public body "must set forth sufficient information in its affidavits for a court to determine if the search was adequate." *Nation Magazine, Washington Bureau v. U.S. Customs*

Serv., 71 F.3d 885, 890 (D.C. Cir. 1995). Affidavits must be reasonably detailed, "setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id.* "Conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment." *Id.*

The search must include all places where responsive records "might reasonably be found." *Miller v. United States*, 779 F.2d 1378, 1383 (8th Cir. 1985). The public body "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). If there is substantial doubt about the adequacy of the search, the public body has not satisfied its obligations. *See, e.g., Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003). Discovery is appropriate when a public body "has not taken adequate steps to uncover responsive documents." *Schrecker v. Dept. of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002); *see also SafeCard v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991).

C. The Specific FOIA Provisions

CCSO relies on two specific exemptions to withhold the records: Section 3(g) and Section 7(1)(a). Section 3(g) states:

> Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any public body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.

5 ILCS 140/3(g). Additionally, Section 3(d) limits the applicability of Section 3(g) to only the

public body's timely denial. Section 3(d) states:

> Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. Denial shall be in writing as provided in Section 9 of this Act. Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request. A public body that fails to respond to a request within the requisite periods in this Section but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies. A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g).

5 ILCS 140/3(d).

Section 7(1)(a) exempts:

> Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

5 ILCS 140/7(1)(a).

D. Summary Judgment

In response to a summary judgment motion, the party bearing the burden of proof (here, CCHHS), must come forward with supporting evidence and may not rest on mere argument or its own pleadings. *Harrison v. Hardin Cty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001).

III. ARGUMENT

CCHHS has failed to meet its burden of proof by clear and convincing evidence that any of the claimed exemptions apply to the responsive records. First, CCHHS can de-identify the records regarding the admission of patients with gunshot wounds. Second, CCHHS has failed to perform an adequate search for the records regarding the notification of law enforcement.

A. The Requested Records Can Be Properly De-identified in Compliance with HIPAA.

Sun-Times requested the dates and times of admission for walk-in gunshot wound victims. Ans. at ¶ 7. CCHHS has admitted that it does track the admission dates and times. *See*

CCHHS MSJ at 7; CCHHS MSJ at Ex. F at ¶¶ 7-8 (Affidavit of Justin Mis). To support its withholding of the dates and times, CCHHS cites to 45 C.F.R. § 164.514(b)(2)(i)(C). *See* CCHHS MSJ at 9. HIPAA Privacy Rule 164.514(b)(2)(i)(C) states:

> A covered entity may determine that health information is not individually identifiable health information only if:...The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:...All elements of dates (***except year***) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older.

45 C.F.R. § 164.514(b)(2)(i)(C) (emphasis added). This HIPAA Privacy Rule allows CCHHS to withhold all elements of dates except for the year. *Id.* Health information that is properly de-identified under Section 164.514(b) is not considered individually identifiable health information. 45 C.F.R. § 164.502(d)(2). Justin Mis admits, in his affidavit, that a "search report could be generated with de-identified information." Aff. of Mis at ¶ 7. Therefore, CCHHS must produce the year of admission for each instance of an unaccompanied walk-in patient with a gunshot wound.

Moreover, de-identifying the records to only provide years will resolve CCHHS's other issues under Section 7(1)(a) and 7(1)(b). De-identified records will not violate any patient's right to privacy, under Section 7(1)(b) for the same reason that HIPAA does not apply, because if the records are only years, then they will not contain any individually identifying health information. CCHHS claims that disclosure could cause a chilling effect on those seeking treatment from CCHHS facilities. *See* CCHHS MSJ at 13. However, Defendant points to no evidence to support its claim that providing the years of admission would cause such a chilling effect. To the contrary, disclosure of the requested records will assist the public with making informed decisions about where they seek treatment because these records can reveal to what

extent CCHHS complies with its statutory requirement of notifying law enforcement about unaccompanied walk-in gunshot wound injuries. *See* 5 ILCS 140/1; 20 ILCS 2630/3.2. Finally, CCHHS failed to prove how producing de-identified records would result in any fine or other sanction under HIPAA. Thus, there is no public policy disfavoring disclosure, and the de-identified records should be produced.

B. CCHHS Has Failed to Perform an Adequate Search for the Notifications to Law Enforcement.

CCHHS's affidavits fall short of proving that CCHHS conducted an adequate search for the law enforcement notification records. In addition to requesting the year of admission for unaccompanied walk-in gunshot wound patients, Sun-Time also seeks the year of the notification that was sent to law enforcement. *See* Ans. at ¶ 7. CCHHS is required by statute to provide these notifications to law enforcement. *See* 20 ILCS 2630/3.2. In his affidavit, Justin Mis explains that he can "run a report to determine the mechanism of injury (gunshot wound) and [the patient] arrived in the ED." Aff. of Mis at ¶ 8. Mr. Mis goes on to admit the Trauma Department tracks the arrival of all law enforcement officers in its Law Enforcement Tracking Log and that CCHHS is able to determine the date and time of notification and/or arrival through the patient's record. *Id.* at ¶¶ 8, 11. Mr. Mis also states that he can cross-reference the Law Enforcement Tracking Log with the trauma registry record and the patient's electronic medical record. *Id.* at ¶ 7.

Further, a key component missing from CCHHS's affidavits is how law enforcement is notified of a gunshot wound victim. If CCHHS is making these notifications through a written communication, then that is a record which is entirely separate from any patient's record and CCHHS must produce de-identified. CCHHS has provided no justification for why it cannot do all of this. As discussed above, Sun-Times is not seeking any individually identifying patient

health information, and CCHHS is able to de-identify the requested records. CCHHS has not shown why it cannot conduct the search Mr. Mis describes in his affidavit and then de-identify the law enforcement notification records.

There is no dispute that CCHHS must make these notifications to law enforcement. *See* 20 ILCS 2630/3.2. CCHHS admits that it can figure out the years of each notification made to law enforcement. Aff. of Mis at ¶¶ 7-8, 11. CCHHS can provide the year of notification and any other non-exempt portions of the notifications because they are not individually identifiable information. *See* 45 C.F.R. § 164.514(b)(2)(i)(C). Therefore, CCHHS has failed to show in any way why it cannot search and produce the requested records.

C. CCHHS Willfully and Intentionally Violated the FOIA.

Sun-Times contends that it would make more sense to address this issue separately after this Court rules on the substantive merits of Defendants' exemption claims. Because Sun-Times has not yet moved for penalties, the only question is whether, taking the facts in the light most favorable to Sun-Times, there is a basis to conclude that CCHHS acted in bad faith for each of the FOIA requests in this case. *E.g.*, *McMackin v. Weberpal Roofing, Inc.*, 2011 Ill. App. (2d) 100461, ¶ 19. In fact, there was bad faith on the part of CCHHS when it failed properly respond to Sun-Times's request within the 5 business day statutory deadline. See Ans. ¶¶ 7-8 (CCHHS admitting that the FOIA request was submitted on September 10, 2018 and that CCHHS did not respond until October 26, 2018). Additionally, for present purposes, case law makes clear that when a public body asserts a position with no legal justification, the violation is willful. *Rock River Times v. Rockford Pub. Sch. Dist. 205*, 2012 IL App (2d) 110879, ¶¶ 53-54 (finding that the public body asserting an exemption while knowing that it actually must produce the requested records was a willful and intentional violation of FOIA).

IV. CONCLUSION

For these reasons, Sun-Times is entitled to summary judgment and the records should be immediately released.

RESPECTFULLY SUBMITTED,

/s/ Merrick J. Wayne

_____

Attorneys for Plaintiff
CHICAGO SUN-TIMES

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CERTIFICATE OF SERVICE

I, Merrick J. Wayne, certify that on August 27, 2019, I caused the foregoing PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT to be served via electronic mail on all counsel of record.

/s/ Merrick J. Wayne

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	
	)	18 CH 14507
v.	)	
	)	Hon. Eve M. Reilly
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	
	)	
	)	
Defendant.	)	

DEFENDANT CCHHS'S REPLY AND CROSS-RESPONSE TO PLAINTIFF'S COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff's Combined Cross-Motion for Partial Summary Judgment and Response to Defendant's Motion for Summary Judgment (hereinafter "Plaintiff's Response") does not dispute that the records it requested pursuant to FOIA are confidential medical records consisting of Protected Health Information as defined by HIPAA, which is exempt from disclosure under FOIA. Instead, Plaintiff now presents an altogether new request for only the *years* of admission of CCHHS patients seeking treatment for gunshot wounds, and the *years* of notifications to law enforcement. Plaintiff's Response actually makes CCHHS's case, as it concedes it is not entitled to the records sought by its FOIA request at issue in this lawsuit.

Even so, the records Plaintiff now requests still consist of Protected Health Information found entirely within CCHHS patient medical records which cannot be de-identified in a way that complies with HIPAA, and which are exempt from disclosure under HIPAA, state law, and FOIA itself.

Finally, Plaintiff's Response further deteriorates any meaningful public benefit to the information sought which is outweighed by Illinois's strong public policy of protecting the confidentiality of individuals' health information – especially when complying with Plaintiff's request would create a disparity between the treatment of medical records of low-income individuals treated at a public health facility and the records of those able to afford private care.

I. PLAINTIFF'S RESPONSE/CROSS-MOTION SUPPORTS SUMMARY JUDGMENT FOR CCHHS

At issue in the instant litigation is Plaintiff's September 10, 2018 FOIA request for, in relevant part, records indicating

> the time/date of admission of patients seeking treatment for gunshot wounds through CCHHS between Jan. 1, 2015 through the present day who were not been [sic] accompanied by a law enforcement officer at the time of their admission as well as the corresponding time/date that law enforcement officials were notified of the patients' admission as required by state statute [sic] (20 ILCS 2630/3.2).

CCHHS has denied this specific request because records of the times and dates of patients' admissions, as well as records of law enforcement notifications generated in the course of their care, constitute Protected Health Information prohibited from disclosure under HIPAA and medical confidentiality provisions of state law, and are accordingly exempt under Section 7(1)(a) of FOIA. Further, as medical records, these records constitute private information exempt under Section 7(1)(b) of FOIA.

Plaintiff's Response does not dispute that the records it requested are exempt from disclosure. Instead, Plaintiff now wishes to revise its request to seek only the *years* of those admissions and notifications. *See* Plaintiff's Response at 7, 8. But it is the September 10, 2018 FOIA request as presented by Plaintiff to CCHHS that is at issue in this lawsuit, which requests the "time/date of admission of patients … as well as the corresponding time/date that law enforcement officials were notified of the patient's admission." *See* Plaintiff's Complaint at ¶¶

7-10. Plaintiff's Response raises no argument refuting the exemption from FOIA of the times and dates of admissions of individual patients, and the corresponding times and dates of a corresponding notification to law enforcement regarding those specific patients.

As such, CCHHS's Motion for Summary Judgment as to the September 10, 2018 FOIA request at issue in this lawsuit should be granted. Subsequently, if Plaintiff wishes to present CCHHS with a new FOIA request for a different category of records, it may do so, allowing CCHHS a reasonable opportunity to search for and respond to that new request, and to claim whatever exemptions may be appropriate to that particular set of requested records. At this time, however, Plaintiff's Response supports the Court granting summary judgment in favor of CCHHS.

II. PLAINTIFF'S REVISED RECORD SET REMAINS EXEMPT UNDER FOIA

While Plaintiff's Response does not dispute the records it requested on September 10, 2018 are exempt, Plaintiff now argues that it is entitled to only the years of admissions of CCHHS patients seeking treatment for gunshot wounds who were not accompanied by a law enforcement officer, and the years of notifications to law enforcement officers of those patients' arrival at CCHHS. Plaintiff should not be allowed to use its Response to revise its records request at this stage of the litigation. Doing so prejudices CCHHS from performing a search specific to that new request and from raising appropriate exemptions and/or defenses, such as an argument that Plaintiff's new request is unduly burdensome under Section 3(g) of FOIA. Indeed, it is unduly burdensome because, as explained in Justin Mis's affidavit, it would involve manually searching for, reading through and redacting thousands of medical records of admissions of CCHHS patients, requiring approximately 333 hours of staff time by staff trained

to read medical records who would be taken away from the provision of health care. *See* Affidavit of Justin Mis at ¶6.

While the court should grant summary judgment for CCHHS based on its original requests, for the sake of replying, CCHHS will address Plaintiff's new requests below. CCHHS's reply, though, is made without waiver of any appropriate response or exemption it would claim to Plaintiff's requests in the context of a newly presented FOIA request.

A. Records Indicating the Year of Relevant Patient Admissions and Law Enforcement Notifications Is PHI Contained in Medical Records

Records of the two categories of information now sought by Plaintiff – the years of admission of patients unaccompanied by law enforcement officers seeking treatment for gunshot wounds and the years of notifications to law enforcement of those patients' arrival – if they exist, are only found in the medical records of individual CCHHS patients and constitutes protected Protected Health Information (PHI) under HIPAA. *See* Affidavit of Justin Mis at ¶¶ 7, 8, 12.

Plaintiff's Response misinterprets the affidavit of Justin Mis and incorrectly asserts that a thoroughly de-identified report can be produced in response to Plaintiff's request. *See* Plaintiff's Response at 7. In actuality, Justin Mis explains through his affidavit that Stroger Hospital tracks the admission of patients to its trauma department in a trauma registry, which can generate a report of the date and time of admission of patients seeking treatment for gunshot wounds. However, that partially de-identified report would not indicate whether those patients arrived with or without a law enforcement officer. To learn that information, a trauma registry report would have to be generated indicating the patient's name and individual Medical Record Number – data points which Plaintiff does not dispute are exempt from FOIA. CCHHS would then have to open and read through the medical record of the corresponding individual patient to determine if a record exists indicating whether that patient arrived accompanied by a law

enforcement officer. *See* Affidavit of Justin Mis at ¶¶ 7, 8 and 12; Second Affidavit of Justin Mis at ¶¶ 3-4, attached hereto and incorporated herein as "Reply Exhibit A." Doing so would constitute an impermissible use of a patient's PHI under HIPAA. *See* 45 C.F.R. § 164.502; Affidavit of Deborah Fortier at ¶ 10; and Section II(B), *infra*.

If the record for that patient indicates the patient arrived unaccompanied by a law enforcement officer, the patient's medical record would have to be further read to determine whether a notation was made regarding a notification to law enforcement of that patient's arrival. Affidavit of Justin Mis at ¶ 12, Second Affidavit of Justin Mis at ¶ 5. Only then could the year of such notification potentially be identified. Thus, according to the affidavits of Justin Mis, records indicating the year of relevant patient arrivals and subsequent law enforcement notifications are found only in the Protected Health Information kept in the private medical records of individual patients. *Id.* Again, accessing patient records to comply with FOIA would be an impermissible use of PHI under HIPAA. *See* 45 C.F.R. § 164.502; Affidavit of Deborah Fortier at ¶ 10; and Section II(B), *infra*.

Section III(B) of Plaintiff's Response misstates the affidavit of Justin Mis as to the usefulness of Stroger's trauma registry, which tracks the arrival of trauma patients, and law enforcement notification log, which tracks the arrival of law enforcement officers requesting access to patients. For the sake of explaining Stroger's records as completely as possible, Mr. Mis explained in paragraph 11 of his affidavit that Stroger maintains the law enforcement log. Affidavit of Justin Mis at ¶ 11. However, his affidavit further explains how that log is ultimately not responsive to Plaintiff's FOIA request because the log does not indicate whether a law enforcement officer had arrived with a patient, nor does it indicate the reason the law enforcement officer had arrived or was seeking access to the patient. *Id.* *See also* Second

Affidavit of Justin Mis at ¶ 7. As the law enforcement log does not indicate whether the officer had arrived in response to a notification from Stroger, it is not responsive to Plaintiff's FOIA request. *Id.* Moreover, the law enforcement log is tied to individual patients and, as such, constitutes the private medical record of that patient. *Id.* Even if the information contained in the law enforcement log were somehow responsive to Plaintiff's FOIA request, it would be exempt from disclosure under Sections 7(1)(a) and 7(1)(b) of FOIA.

B. Answering a FOIA Request For Public Records Is Not a Permitted Use of PHI Under FOIA

As set forth in CCHHS's motion and supporting affidavits, HIPAA covers both the use and disclosure of Protected Health Information (PHI), and CCHHS has determined that responding to Plaintiff's FOIA request is neither a permitted use or disclosure of its patients' PHI under HIPAA. *See* CCHHS's Motion at 8 and Affidavit of Deborah Fortier, CCHHS Motion Ex. E at 10; *see also* 45 C.F.R. § 164.502. Plaintiff's Response offers no argument that accessing and using patient medical records to comply with a FOIA request is a permitted *use* under HIPAA. It is not. CCHHS is entitled to summary judgment for this reason alone.

C. Producing Only the Years of Admission and Law Enforcement Notifications Does Not Constitute De-Identification of PHI Under HIPAA

Plaintiff's Response acknowledges that the HIPAA Privacy Rule allows CCHHS to withhold all elements of dates from patient medical records except for the year. *See* Plaintiff's Response at 7. However, Plaintiff incorrectly argues that CCHHS could comply with HIPAA by producing only the dates of relevant admissions and law enforcement notifications.

As CCHHS and Plaintiff have both referenced, HIPAA does indeed allow for a mechanism of de-identification of PHI. *See* CCHHS's Motion at 9-10, Plaintiff's Response at 6-8. However, as set forth in CCHHS's Motion at 9-10, PHI is not considered de-identified under

HIPAA if the covered entity has "actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. 164.514(b)(2)(ii); see also CCHHS's Motion at 9-10. Plaintiff's new request for only the years of admissions of patients unaccompanied by a law enforcement officer seeking treatment for gunshot wounds and the year a notification of that admission was made to law enforcement does not change the inability of CCHHS to comply with HIPAA.

The affidavit of Justin Mis explains that Stroger's trauma registry – CCHHS's only records containing potentially responsive records of relevant patient admissions – only contains data beginning on October 1, 2015. Affidavit of Justin Mis at 4. Thus, only three months of data is available for 2015, a substantially smaller data set than subsequent full calendar years. Similarly, for the year 2018, Plaintiff's FOIA request at issue in this case seeks records between January 1, 2018 and September 10, 2018. For years 2015 and 2018, it is therefore impossible to fully de-identify the potential months of patient admissions and law enforcement notifications for those years.

As described in the Affidavit of Deborah Fortier at ¶¶ 13-14, CCHHS is concerned that providing any information regarding the admission or care of the subset of patients requested by Plaintiff – including just the years – could be used in tandem with media reports to identify individual patients. This court can take judicial notice of public information available to it. A simple Internet search using Google, a popular search website, can be used to reveal many media stories of gunshot wound victims transporting themselves to Stroger Hospital. Those search results can be limited and organized by year, and would reveal the names of patients whose records would be subject to Plaintiff's FOIA request.

Considering a nuanced hypothetical example can more acutely demonstrate the risk. A media account of a gunshot wound victim being transported by witnesses or him/herself to Stroger Hospital just before midnight on New Year's Eve could be used to connect that individual to a set of CCHHS records produced to Plaintiff indicating an admission in one year and a law enforcement notification in the next. While this risk may seem low, CCHHS is not required to demonstrate that the risk of re-identification be high or even reasonable; only that it has actual knowledge that it could happen. 45 C.F.R. 164.514(b)(2)(ii). *See also Southern Illinoisan v. Ill. Dep't of Pub. Health*, 218 Ill. 2d 390, 422 (Feb. 2, 2006) (holding it was improper of the lower court to insert the word "reasonably" into the analysis of whether a requested record "tends to lead to the identity" of a patient which, if so, would have rendered that record confidential under the statute in question and thereby exempt from FOIA). In the context of Plaintiff's FOIA request, CCHHS could not satisfy HIPAA's de-identification requirements by producing records of the years of relevant patient admissions and law enforcement notifications.

D. Plaintiff's Response Does Not Controvert the Applicability of Confidentiality, Privilege and Privacy Protections of State Law

As set forth in CCHHS's Motion, individual medical records are additionally confidential under various provisions of Illinois law. *See* Section B(4) of CCHHS's MSJ, at p. 10. Plaintiff's Response does not controvert CCHHS's claims, and CCHHS is further entitled to summary judgment on these grounds, under Section 7(1)(a) of FOIA.

III. CCHHS PERFORMED AN ADEQUATE SEARCH FOR RECORDS OF RELEVANT NOTIFICATIONS TO LAW ENFORCEMENT

In response to Plaintiff's FOIA request, CCHHS's FOIA Officer, Deborah Fortier, learned from Justin Mis that potentially responsive CCHHS records consist of confidential,

individually identifiable health information. Affidavit of Deborah Fortier at ¶ 8 and generally, Affidavit of Justin Mis at ¶ 10, 12, Second Affidavit of Justin Mis at ¶ 5. The Affidavit of Justin Mis makes it clear that CCHHS maintains no independent record of law enforcement notifications and that any such record, if it exists, is only contained in patient medical records. Affidavit of Justin Mis at ¶¶ 10, 12. To answer the specific question presented by Plaintiff's Response concerning the form of law enforcement notifications, Justin Mis explains in his Second Affidavit that notifications are not made in writing but by a telephone call to 911. Second Affidavit of Justin Mis at ¶6.

IV. THE BALANCE OF PUBLIC POLICY INTERESTS STRONGLY DISFAVORS THE REQUESTED USE AND PRODUCTION OF PATIENT RECORDS

Plaintiff's requests of September 10, 2018 and its new request proposed in Plaintiff's Response is of very little utility. Plaintiff's Response offers that its purpose is to assist the public to identify to what extent CCHHS complies with its statutory requirement of notifying law enforcement about unaccompanied walk-in gunshot wound injuries. *See* Plaintiff's Response at 8; 20 ILCS 2630/3.2.

However, that analysis cannot be made through the Plaintiff's FOIA request. The statute Plaintiff cites requires notification to law enforcement, but does not compel CCHHS to keep a written record of those notifications. 20 ILCS 2630/3.2. Indeed, sometimes CCHHS does not. *See* Affidavit of Justin Mis at 9, 10, 12. CCHHS is not required to keep a record of instances when patients arrive accompanied by law enforcement, even though some patients' medical records will indicate that occurrence when a note is made incidental to a patient's care. *Id.* at 9. Thus, both data sets requested by Plaintiff would paint an incomplete picture of CCHHS's compliance with the law enforcement notification statute.

Even if CCHHS could comply with Plaintiff's request, CCHHS could provide Plaintiff with thousands of records of relevant patient admissions and zero law enforcement notifications (or any number in-between), and still be in full compliance with the statute requiring notifications. Conversely, records responsive to Plaintiff's FOIA request could never be used to substantiate a violation of the notification statute. Plaintiff's request is an exercise in futility, and using thousands of patients' personal medical records to comply with Plaintiff's public records request under FOIA is simply not justified by the potential discovery of some evidence of CCHHS's compliance.

That is especially true because courts have recognized Illinois's very strong public policy to protect medical records and the confidentiality of health care. *See Coy v. Wash. County Hosp. Dist.*, 372 Ill. App. 3d 1077 (5th Dist. 2005) (recognizing a "strong and broad public policy in favor of protecting the privacy rights of individuals with respect to their medical information" which "is articulated and reflected in numerous Illinois statutes"); *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 587 (1st Dist. 1986) (holding that Illinois public policy "strongly favors the confidential and fiduciary relationship" existing between a patient and his or her physician); *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 932 (7th Cir. 2004) ("Patients, physicians, and hospitals in Illinois rely on Illinois' strong policy of privacy of medical records.")

Plaintiff disingenuously implies that Stroger patients will appreciate Plaintiff investigating CCHHS's compliance with the statute requiring a hospital's notification to law enforcement notification when a patient is treated for a firearm injury. If a Stroger patient wants to ensure law enforcement is notified of his/her shooting, that patient can call the police. The reality, as set out in CCHHS's uncontroverted affidavits, is that CCHHS has a strong interest in

protecting its patients' privacy for several compelling reasons. That expectation of privacy should not be diminished merely because those patients sought care from a public hospital.

V. CCHHS DID NOT WILFULLY OR INTIONALLY VIOLATE FOIA

CCHHS complied with FOIA and is entitled to summary judgment. In response to Plaintiff's request, it completed an adequate search and provided all non-exempt responsive records. While Plaintiff raises for the first time in its Response that CCHHS responded beyond 5 business days, that point is inconsequential because a late response is treated as a denial, and CCHHS has indeed denied and continues to deny Plaintiff's request that is at issue in this litigation. 5 ILCS 140/3(d). CCHHS's denial is legally justified, and it has not violated FOIA – willfully, intentionally or otherwise.

CONCLUSION

For the reasons set forth in its Motion and this Reply/Cross-Response, Defendant CCHHS respectfully requests the Court grant summary judgment in its favor and against the Plaintiff on all counts.

Dated: September 9, 2019

KIMBERLY M. FOXX
Cook County State's Attorney

By: /s/ Jeremy P. Bergstrom
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Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

FILED
9/9/2019 6:31 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2018CH14507

6501617

REPLY EXHIBIT A

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CHICAGO SUN-TIMES,	)	
	)	
Plaintiff,	)	Case No. 18 CH 14507
	)	
v.	)	
	)	
COOK COUNTY HEALTH AND HOSPITAL SYSTEM,	)	Hon. Eve M. Reilly
	)	
	)	
Defendant.	)	

SECOND AFFIDAVIT OF JUSTIN MIS

I, Justin Mis, certify that, if called as a witness in this case, I would testify that the following facts are true and correct to the best of my knowledge and belief, and are based on my personal knowledge:

1. My name is Justin Mis. I am a Trauma Coordinator employed by Cook County Health and Hospital System (CCHHS) at John H. Stroger, Jr. Hospital of Cook County.

2. I previously signed an affidavit in this case, attached here as "Mis Exhibit A," regarding the records I understand to be at issue in this lawsuit. I offer this second affidavit to further clarify and explain my first affidavit and to answer arguments I understand the plaintiff has raised regarding it.

3. As I noted in paragraphs 7 and 8 of my first affidavit, I can generate a partially de-identified report indicating the dates and times of arrivals of gunshot wound victims to the Stroger trauma department from October 1, 2015 through September 10, 2018.

4. Again, though, that report would not indicate whether a patient arrived accompanied or unaccompanied by law enforcement. That information, if it exists, can be found only in a record made in an individual patient's medical record by a member of that patient's health care team in the course of the patient's care.

5. Nor would that report indicate the year, date or time that Stroger notified law enforcement of an unaccompanied patient's arrival for treatment of a gunshot wound. As set out in paragraph 10 of my first affidavit, Stroger does not keep any independent record of the years, dates or times of notifications to law enforcement of the arrival of a patient seeking treatment for a gunshot wound. The only record indicating that information, if it exists, would be contained within an individual patient's medical record in a note made by that patient's health care team in the course of the patient's care.

6. Any such notification is made to law enforcement only by a telephone call by Stroger staff to 911. Again, no written record of the notification is made other than, in some instances, in the patient's individual medical record by a member of the patient's health care team.

7. Stroger's log of law enforcement requests for access to patients is not the same as the trauma registry referenced in above paragraphs 1-5 which tracks the arrival of patients to Stroger's trauma department. The law enforcement log does not in any way indicate whether law enforcement arrived at the hospital in response to a law enforcement notification made by Stroger or for any other reason. Its entries are tied to individual patient identities and constitute a patient's medical record. Its entries cannot be cross-referenced with the trauma log or the rest of a patient's medical record to deduce whether a law enforcement notification was made by Stroger, as Stroger does not control the response or lack of response of law enforcement to such notifications, and law enforcement often arrive at Stroger for reasons other than a call from Stroger.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Justin Mis
Justin Mis, BSN, RN, CCRN, TCRN, TNS

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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Justin Mis
Justin Mis, BSN, RN, CCRN, TCRN, TNS

Notice of Appeal **(10/17/18) CCG 0256 A**

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY **DEPARTMENT,** CHANCERY **DIVISION/DISTRICT**

CHICAGO SUN-TIMES

Plaintiff/ ◉ Appellant ○ Appellee

v.

COOK COUNTY HEALTH AND HOSPITAL SYSTEM

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.: _____

Circuit Court No.: 2018 CH 14507

NOTICE OF APPEAL

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☑ Separate Appeal ☐ Cross Appeal

Appellant's Name: Chicago Sun-Times

◉ Atty. No.: 41295
○ Pro Se 99500

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Appellee's Name: Cook County Health and Hs

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Notice of Appeal **(10/17/18) CCG 0256 B**

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 11/15/19

Name of judge who entered the judgment/order being appealed: Hon. Eve M. Reilly

Relief sought from Reviewing Court:

Plaintiff-Appellant appeals the circuit court's order granting Defendant-Appellee's motion for summary judgment and asks that the Appellate Court reverse the decision and remand the case for further proceedings.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $110 made prior to the preparation of the Record on Appeal. The Clerk's Office will not begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

To be signed by Appellant or
Appellant's Attorney

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.

TABLE OF CONTENTS OF THE RECORD ON APPEAL

Common Law Record

STATUTES INVOLVED

This appeal concerns the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq*.), specifically:

5 ILCS 140/1 [Public Policy]

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.

This Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information.

This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law.

5 ILCS 140/2 Definitions.

(c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of

physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

(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 140/7 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:

(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

(b) Private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order.

This appeal also involves the Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.500-534:

Section 164.502 Uses and disclosures of protected health information: general rules.

(d) Standard: Uses and disclosures of de-identified protected health information.
(1) Uses and disclosures to create de-identified information. A covered entity may use protected health information to create information that is not individually identifiable health information or disclose protected health information only to a business associate for such purpose,

whether or not the de-identified information is to be used by the covered entity.

(2) Uses and disclosures of de-identified information. Health information that meets the standard and implementation specifications for de-identification under § 164.514(a) and (b) is considered not to be individually identifiable health information, i.e., de-identified. The requirements of this subpart do not apply to information that has been de-identified in accordance with the applicable requirements of § 164.514, provided that:

(i) Disclosure of a code or other means of record identification designed to enable coded or otherwise de-identified information to be re-identified constitutes disclosure of protected health information; and

(ii) If de-identified information is re-identified, a covered entity may use or disclose such re-identified information only as permitted or required by this subpart.

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 February 25, 2022, there was electronically filed and served upon the Clerk of the above court the Appellant's Opening Brief and Appendix. On February 25, 2022, service of the Appellant's Opening Brief and Appendix 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 Opening Brief and Appendix 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