

THIRD DIVISION
September 23, 2015

No. 1-13-1618

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VERNON TOLBERT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 12 CH 43816
OFFICE OF EMERGENCY MANAGEMENT)	
COMMUNICATIONS, CITY OF CHICAGO,)	
JOSE A. SANTIAGO and DIONNE A. TATE,)	Honorable
)	Thomas R. Allen,
Defendants-Appellees.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justice Mason concurred in the judgment.
Justice Pucinski dissented.

O R D E R

- ¶ 1 *Held:* Dismissal of plaintiff's complaint filed under the Illinois Freedom of Information Act affirmed where the record shows that defendants conducted an adequate search and informed plaintiff that the information he requested no longer exists.
- ¶ 2 Plaintiff Vernon Tolbert appeals *pro se* from an order of the circuit court of Cook County granting defendants' motion to dismiss his complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)). Plaintiff filed a complaint

under the Illinois Freedom of Information Act (FOIA) against defendants, the Office of Emergency Management and Communications for the city of Chicago (OEMC), its former executive director Jose Santiago, and its FOIA officer Dionne Tate, alleging that they failed to comply with his requests for information. On appeal, plaintiff contends that the circuit court erred in dismissing his complaint because the search conducted by defendants for the information he requested was inadequate.

¶ 3 Documents contained in the record show that on March 12, 2009, plaintiff mailed a FOIA request to OEMC for documents related to a 911 call made between 2 a.m. and 3:30 a.m. on August 27, 2000, from the vicinity of 939 North Pulaski Road, and any information transmitted over the police radio regarding an incident at that location at that time. On March 17, 2009, OEMC's FOIA officer, Mary Thompson, sent plaintiff a letter stating that OEMC could not provide the information he requested because event queries and computer printouts are retained by OEMC for up to four years, and thus, records prior to March 17, 2005, no longer existed. Thompson further explained that, pursuant to the Illinois Records Act, audiotapes for 911 calls are maintained for only 30 days from the date of the incident.

¶ 4 On July 7, 2010, plaintiff mailed a second request to OEMC, acknowledging defendant's response to his initial request, but construing that response as a denial, and again requesting the same information. On July 22, 2010, OEMC sent plaintiff a letter substantially similar to the March 2009 letter, stating that it could not provide the information he requested because event queries and computer printouts are retained for four years, and therefore, records prior to July 22, 2006, no longer existed. OEMC further explained that event queries pertaining to an incident that occurred on August 27, 2000, were only available until August 27, 2004, and thus, the event

queries and radio communications plaintiff sought from August 27, 2000, no longer existed.

OEMC stated that it had responded to plaintiff's request, and that there was no additional information available from its office.

¶ 5 On May 28, 2012, plaintiff submitted a third request to OEMC requesting the same 911 tapes and information from August 27, 2000. On June 21, 2012, plaintiff filed a request for review by the Public Access Bureau (PAB) of the Illinois Attorney General's Office, alleging that OEMC failed to respond to his FOIA request. The PAB sent a letter to OEMC's FIOA officer, Dionne Tate, requesting copies of OEMC's responses to plaintiff and a detailed explanation of its receipt and handling of plaintiff's FOIA request. OEMC provided the PAB with a copy of Tate's response to plaintiff's request, dated July 2, 2012, which stated that OEMC no longer possessed any records to respond to his request because its records are retained for five years.

¶ 6 On December 11, 2012, plaintiff filed a *pro se* complaint against defendants alleging that he was entitled to the information he requested under the FOIA that was related to the witnesses who testified against him in his criminal trial, *People v. Tolbert*, No. 01 CR 17131. Plaintiff acknowledged that OEMC notified him that it retained 911 tapes for only 30 days, and other queries for four or five years. He asserted, however, that OEMC was required to provide evidentiary proof that it conducted a diligent search for the records he requested. Plaintiff further asserted that defendants failed to show by clear and convincing evidence that he did not have a right to the information he requested, and that OEMC did not retain the requested information. Plaintiff asked that defendants be ordered to comply with his FOIA requests and provide him with the information he sought.

¶ 7 Defendants moved to dismiss plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure. (735 ILCS 5/2-619 (West 2012)). Defendants first argued that Santiago and Tate should be dismissed from the case pursuant to section 2-619(a)(1) because FOIA provides the circuit court with jurisdiction to enjoin only public bodies from withholding public records, not employees of the public body in their individual capacities. Defendants further asserted that the city of Chicago should replace OEMC as the defendant in this case because individual operating departments within the city do not have an independent legal existence, and thus, cannot be sued as entities.

¶ 8 Defendants also argued that plaintiff's complaint should be dismissed as moot under section 2-619(a)(9) because OEMC no longer possessed the requested documents. Defendants asserted that their search for the requested event inquiries and 911 tapes was more than adequate, and, as evidentiary support, attached an affidavit from Tate which detailed the steps taken to locate the requested documents and confirmed that OEMC no longer possessed the documents sought by plaintiff. Defendants further asserted that Tate's affidavit certified that a thorough search was conducted and provided sufficient evidentiary support to show that OEMC complied with plaintiff's FOIA request. Defendants stated that all event queries and 911 tapes from August 27, 2000, were purged after the retention period expired in accordance with the Illinois Local Records Act. Consequently, because OEMC no longer possessed the requested documents, it had no duty under the FOIA. Defendants also argued that they timely responded to plaintiff's FOIA request, and thus, the factual basis underlying his complaint no longer existed, and because no actual controversy existed, the issue was moot.

¶ 9 In support, defendants attached the affidavit of Dionne Tate averring that she responded to plaintiff's request for information on July 2, 2012, and informed him that OEMC no longer possessed the records he requested. Tate acknowledged that she told plaintiff that the event queries were retained for five years, but that she since learned that they were retained for four years. Tate provided a detailed explanation of her search process in the OEMC database, and stated that when she ran the report for plaintiff's request for August 27, 2000, at 939 N. Pulaski Road, the report produced no results, which meant that there were no events for that date and location in the database. Tate further explained that after she received a letter from the PAB requesting more specific information, she ran the search again, and received the same negative results. She also obtained a copy of OEMC's retention schedule and verified that the event queries are only retained by OEMC for four years. Due to the PAB's request, Tate also searched for any responsive 911 tapes from August 27, 2000, even though she knew that 911 tapes are only retained for 30 days before they are recycled. Tate further searched to see if the Investigation Division had preserved the tapes closer to the date of the incident. She discovered that on June 9, 2001, a public defender had requested that the calls from August 27, 2000, be preserved; however, the calls had already been recycled by that date. Tate averred, "[a]fter a thorough and diligent search, I was unable to locate any documents responsive to Mr. Tolbert's FOIA request," and again pointed out that, pursuant to OEMC's retention schedule, event queries are retained for four years, and under the Illinois Local Records Act, 911 tapes are maintained for only 30 days. Tate attached a copy of her computer-generated report showing her search for August 27, 2000, at 939 N. Pulaski Road, with the "Total" results of "0." Also attached to defendants' motion were applications for authority to dispose of local records showing that

computer back-up tapes for 911 calls are disposed of after four years, and radio communication tapes are erased or disposed of after 30 days.

¶ 10 On January 17, 2013, the circuit court found that the facts stated in defendants' motion, along with the supporting exhibits and Tate's affidavit, established that the documents requested by plaintiff no longer existed. Accordingly, the court granted defendants' motion and dismissed plaintiff's complaint.

¶ 11 The next day, the court received plaintiff's motion for an extension of time to file a reply to defendants' motion to dismiss, and on January 30, 2013, plaintiff filed a *pro se* motion to reconsider the dismissal of his complaint, asserting that the court erred when it dismissed his complaint without giving him an opportunity to reply to defendants' motion. Along with his motion to reconsider, plaintiff filed a *pro se* motion for leave to file an amended complaint and an amended complaint alleging that defendants failed to show by clear and convincing evidence that (1) he had no right to the requested information, and (2) that they did not retain or possess the requested information. Plaintiff alleged that the "search conducted by defendants was inadequate because defendants did not go to the well known source where the requested information is permanently stored on the computers hard drive also known as microfilm the computer's storage." Plaintiff stated that the fact that information requested under FOIA is located in a different place does not mean that the response to the request would require creation of a new record, citing *Hamer v. Lentz*, 132 Ill. 2d 49 (1989). Plaintiff asserted that the requested information was vital to his claim of actual innocence in his criminal case and asked the court to order defendants to comply with his FOIA request. Defendant also requested that the court issue an injunction against defendants to prevent them from erasing 911 tapes, dispatch tapes, and

police and fire radio transmissions in all violent cases, or alternatively, order them to automatically send copies of such tapes in all violent cases to the Illinois State Police, Chicago police department, Illinois Attorney General's Office, the State's Attorney's Office, and the public defender's office before such tapes are erased.

¶ 12 The circuit court granted plaintiff's motion to reconsider and accepted his amended complaint as his response to defendants' motion to dismiss. On March 8, 2013, the court found that defendants did not claim that the records plaintiff sought existed at a different location, but instead, that the records did not exist at all. Accordingly, the court ruled that *Hamer v. Lentz* did not apply to this case. The court further found that defendants explained in multiple letters to plaintiff that the records he requested were no longer in existence. The court noted the retention schedule and pointed out that Tate conducted several searches for the records requested by plaintiff, but found none. The court found that Tate's affidavit sufficiently demonstrated that defendants' search for the documents was adequate. The court further found that based on defendants' timely and adequate response to plaintiff's requests, there was no longer a factual basis underlying his complaint, and thus, no actual controversy, thereby rendering the case moot. Consequently, the court again granted defendants' motion and dismissed plaintiff's complaint.

¶ 13 On appeal, plaintiff contends that the circuit court erred in dismissing his complaint because the search conducted by defendants for the information he requested was inadequate. Plaintiff maintains that "defendants did not go to the well known source where the requested information is permanently stored on the computer's hard drive also known as microfilm computer's storage." In addition, plaintiff asserts that the court erred when it found that *Hamer v. Lentz* does not apply to his case, and in reliance thereon, argues that the fact that the information

he requested is located in a different place does not excuse defendants from responding to his request. Plaintiff asks this court to order defendants to comply with his FOIA request by locating the requested information as he suggested.

¶ 14 Defendants respond that the dismissal of plaintiff's complaint was proper because OEMC responded to all of his FOIA requests, none of the records requested by plaintiff exist, and Tate's affidavit was sufficient to show that the search was adequate. Defendants also assert that their documentation shows that the records were disposed of in accordance with the retention schedule, and plaintiff's suggestion that the information may be located somewhere else is pure speculation.

¶ 15 Pursuant to section 2-619(a)(9) of the Code, defendants may move to dismiss a cause of action where the claim asserted against them is barred by other affirmative matter which avoids the legal effect of or defeats such claim. 735 ILCS 5/2-619(a)(9) (West 2012). The purpose of a motion for involuntary dismissal based upon certain defenses or defects is to dispose of legal issues and easily proved factual issues early in the litigation. *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 436 (2008). When ruling on a section 2-619 motion to dismiss, the trial court may consider pleadings, depositions and affidavits, and where supporting affidavits are not contradicted or challenged by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). When defendants satisfy their initial burden of proof by providing an affidavit in support of their motion, the burden then shifts to plaintiff. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). If plaintiff fails to submit admissible evidence to refute defendants' affidavit, then the trial court's granting of defendants' motion to

dismiss is proper. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101-02 (2009). The circuit court's ruling on a section 2-619(a) motion to dismiss a complaint is reviewed *de novo*. *Rodriguez v. Sheriff's Merit Comm'n of Kane County*, 218 Ill. 2d 342, 349 (2006).

¶ 16 In this case, plaintiff's complaint arose from a failed FOIA request to the OEMC and two of its officers. Under Illinois' FOIA, a public body is required to make all of its public records available to any person for inspection or copying, unless the requested information is exempt from disclosure. 5 ILCS 140/3(a) (West 2012). After receiving a written request for public records, the public body must either comply with the request by promptly providing the requested records to the requestor, or promptly deny the request in writing. 5 ILCS 140/3(b)-(d) (West 2012). FOIA defines "public records" as any documentary materials pertaining to the transaction of public business, regardless of the format of such materials, which are "in the possession of, or under the control of any public body." 5 ILCS 140/2(c) (West 2012). Illinois' FOIA was patterned after the federal FOIA, and therefore, case law construing the federal statute may be used to interpret our state statute. *BlueStar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App. 3d 990, 996 (2007).

¶ 17 When a plaintiff challenges the adequacy of an agency's search for information pursuant to a FOIA request, the question raised is whether the search was reasonably calculated to discover the requested information, not whether the information was actually found. *SafeCard Services, Inc. v. Securities & Exchange Comm'n*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). A defending agency has the burden of showing that its search was adequate, and an affidavit containing facts demonstrating that the agency conducted a thorough search is presumed to be made in good faith and sufficient to sustain that burden. *BlueStar Energy*, 374 Ill. App. 3d at

996-97. Purely speculative claims that other documents exist do not undermine a finding that the agency conducted a reasonable search in good faith. *SafeCard Services*, 926 F.2d at 1200-01.

Moreover, an agency is not required to recreate or reacquire documents that it no longer possesses. *Id.* at 1201. FOIA provides a claimant with relief only where an agency has improperly withheld information. *Id.* "If the agency is no longer in possession of the document, for a reason that is not itself suspect, then the agency is not improperly withholding that document and the court will not order the agency to take further action in order to produce it." *Id.*

¶ 18 Here, our review of the documents contained in the record reveals that defendants met their burden and established that their search for the information requested by plaintiff was adequate. In her affidavit, OEMC's FOIA officer, Dionne Tate, provided a detailed explanation of multiple searches she conducted in an attempt to find the 911 tapes and radio transmissions requested by plaintiff under the FOIA. Tate explained that she entered the date of August 27, 2000, and the location of 939 North Pulaski Road into the database, which yielded no results, and she attached a copy of the computer-generated report showing those search terms and a result of "0" as further evidentiary support of her search efforts. Tate also averred that pursuant to OEMC's retention schedule, event queries are retained for four years, and in accordance with the Illinois Local Records Act, 911 tapes are retained for only 30 days. As additional proof of the retention schedules, defendants attached copies of their applications for authority to dispose of their records showing that the computer back-up tapes for 911 calls are disposed of after four years, and radio communication tapes are erased or disposed of after 30 days. We find that Tate's affidavit and the additional documentation establish that defendants conducted a thorough search

1-13-1618

in good faith which was reasonably calculated to discover the information requested by plaintiff, and thus, their search was adequate under the FOIA.

¶ 19 Plaintiff's claim that information he requested is permanently stored on a computer hard drive or microfilm, and that defendants' search is inadequate because they failed to check these sources, is nothing more than pure speculation. Defendants provided ample evidence that the information plaintiff requested is no longer in existence in accordance with their retention schedules, and there is no evidence that such information was ever permanently stored on a computer hard drive or microfilm. Plaintiff has provided no affidavit, counter-affidavit, or other evidence to either support his claim, or to contradict the statements in Tate's affidavit and supporting evidence. Consequently, plaintiff's purely speculative claim does not undermine our finding that OEMC conducted a reasonable search in good faith. *SafeCard Services*, 926 F.2d at 1200-01.

¶ 20 In addition, we reject plaintiff's assertion that *Hamer v. Lentz* applies to this case. In *Hamer*, the plaintiff sought certain public records, and the defendants acknowledged that those records were in their possession, but refused to release them, claiming that the information was exempt from disclosure. *Hamer*, 132 Ill. 2d at 53. Defendants also claimed that they did not need to comply with the request because to do so would require them to go through two different types of ledgers and create a new document, and there was no duty imposed on a public body to create a new record in order to comply with a FOIA request. *Id.* at 54. The supreme court found that the defendants' position was not supported by legal authority or logic, and held that they must disclose the information requested by the plaintiff. *Id.* Unlike *Hamer*, defendants in this case are not in possession of the information requested by plaintiff and they have not refused to

disclose such information; instead, the information plaintiff requested does not exist.

Accordingly, *Hamer* does not apply to this case.

¶ 21 We therefore conclude that the circuit court's granting of defendants' section 2-619 motion to dismiss was proper, and we affirm its judgment.

¶ 22 Affirmed.

JUSTICE PUCINSKI, dissenting:

¶ 23 With respect, I dissent.

¶ 24 The Court dismissed Tolbert's complaint on the defendants' 2-619 Motion to Dismiss. The defendants said, simply, the material requested doesn't exist.

¶ 25 In his amended complaint Tolbert alleged that the defendants did not conduct a thorough search, i.e., that they did not search or did not aver that they had searched the OEMC computer hard drive and any microfilm records. He is correct, the affidavit of Dionne Tate lists several sources of material that Tate searched, but does not include a search of the hard drive or microfilm. Since those sources may, indeed, still have information about the activities of August, 2000 that Tolbert is seeking, the affidavit is unresponsive to the amended complaint. Since there remains an issue outstanding, this case should not have been dismissed based on this affidavit. It is impossible to say that *no* record of those events exist without a query to the hard drive and a search of any microfilm that exists. OEMC at the very least needs to create a more robust check list for its FOIA searches. Microfilm, if it is part of the routine business records system, is clearly a source of information and should routinely be included in any search. Metadata counts as a source of information and should be searched under FOIA requests, even when the requestor has not specifically asked for it.