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NO. 5-13-0232

APPELLATE COURT OF ILLINOIS

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).

) Honorable  
) James L. Roberts,  
) Judge, presiding.

turned over to plaintiff a copy of the requested record. Each party filed a motion for summary judgment. The circuit court entered an order granting the OEIG's motion and denying plaintiff's motion. Plaintiff now appeals. For the reasons stated below, this court affirms the circuit court's judgment as modified.

¶ 3

### BACKGROUND

¶ 4 On December 7, 2012, in the circuit court of Christian County, plaintiff filed his FOIA complaint *pro se*. The complaint alleged that on a few occasions in June and July of 2012, plaintiff, an inmate in the Illinois Department of Corrections (IDOC), mailed to the OEIG a FOIA request and other correspondence, but on each occasion the OEIG merely returned the items to him, and never did respond to his FOIA request in any way. The object of plaintiff's FOIA request was a copy of the OEIG's written report on two IDOC parole officers who had been accused of leaking confidential information to a news reporter. "Upon information and belief," the defendant claimed, "[the OEIG] willfully and intentionally disregarded Plaintiff's FOIA request and other correspondence solely because of Plaintiff's status as an incarcerated person." For relief, plaintiff sought an order compelling the OEIG to furnish the written report, as well as civil penalties of \$5,000, compensation for the time he spent and the expenses he incurred in prosecuting the FOIA action, and other relief.

¶ 5 Attached to the FOIA complaint were several exhibits, including photocopies of two envelopes addressed to the OEIG's Chicago office. One of these envelopes specified "freedom of information officer" in the address. Each of the two envelopes bore

plaintiff's address as the return address. Each had been marked "RTS," presumably indicating "return to sender."

¶ 6 On January 14, 2013, the OEIG filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)). The OEIG asserted that it was entitled to summary judgment because its report on the IDOC parole officers was either (1) exempt from disclosure by the OEIG or (2) not in the possession or control of the OEIG. The OEIG did not deny plaintiff's allegation that it failed to respond in any way to plaintiff's FOIA request.

¶ 7 On January 28, 2013, plaintiff filed *pro se* a response to the OEIG's motion for summary judgment. In his response, plaintiff stated, *inter alia*, that he had submitted to the Office of the Governor a FOIA request identical to the one he submitted to the OEIG, and that the Office of the Governor had responded to his request with a redacted version of the OEIG's report on the IDOC parole officers. Attached to the response was a copy of the 15-page redacted version of the OEIG's report on the IDOC parole officers. In a memorandum of law accompanying the response, plaintiff stated, *inter alia*, that the Executive Ethics Commission (EEC) was the entity that had produced the redacted version of the OEIG's report, and that this redacted version was the object of plaintiff's FOIA request.

¶ 8 Also on January 28, 2013, plaintiff filed *pro se* his own motion for summary judgment. Notably, paragraph 4 of this motion read as follows: "Since the preparation of Plaintiff's response to Defendant's Motion for Summary Judgment and for Transfer of Venue, the OEIG has furnished Plaintiff with a copy of the redacted EEC [Executive

Ethics Commission] report thus proving that Defendant was in possession of the records sought in Plaintiff's FOIA request."

¶ 9 Copies of several letters were attached to plaintiff's summary-judgment motion, including a letter dated September 20, 2012, from the OEIG's FOIA officer. In that particular letter, the OEIG's FOIA officer stated that "it appear[ed]" that the OEIG's Chicago office had "inadvertently" marked plaintiff's FOIA request "return to sender" and had returned it to plaintiff without ever routing it to the FOIA officer.

¶ 10 On May 13, 2013, the circuit court entered a docket-entry order granting the OEIG's motion for summary judgment and denying plaintiff's motion for summary judgment. The order did not explain the court's reasoning. Plaintiff filed a timely notice of appeal from this order, thus perfecting the instant appeal.

¶ 11 ANALYSIS

¶ 12 This appeal is from the circuit court's order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. A circuit court's entry of summary judgment is reviewed *de novo*. *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14.

¶ 13 On appeal, plaintiff argues that (1) the OEIG failed to respond to his FOIA request within five business days of its receiving the request, in violation of section 3(d) of the FOIA (5 ILCS 140/3(d) (West 2012)); (2) the report that he requested was not exempt from FOIA disclosure; (3) the requested report was a public record in the OEIG's possession; (4) the circuit court erred in granting summary judgment for the OEIG; (5) the circuit court erred in not granting summary judgment for plaintiff, and the court

should have granted plaintiff "injunctive relief in the form of an order prohibiting [the OEIG] from future unlawful withholding of redacted summary reports"; and (6) the circuit court should have imposed civil penalties upon the OEIG pursuant to section 11(j) of the FOIA (5 ILCS 140/11(j) (West 2012)).

¶ 14 Before this court, the OEIG has not discussed the first three of plaintiff's arguments. The OEIG argues that the circuit court (1) should have dismissed as moot that portion of plaintiff's complaint seeking an injunction requiring the OEIG to turn over a copy of its redacted report, since plaintiff had received a copy of the report, and (2) did not err in refusing to grant summary judgment for plaintiff or in refusing to impose civil penalties upon the OEIG.

¶ 15 Summary judgment may be granted where "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." 735 ILCS 5/2-1005(c) (West 2012). All of the pleadings, etc., must be construed strictly against the party moving for summary judgment and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists. *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. Summary judgment is proper only if the movant's right to judgment is "clear and free from doubt." *Williams*, 228 Ill. 2d at 417.

¶ 16 This action concerns the Illinois FOIA. The FOIA is intended to facilitate the public's access to public records concerning the policies, procedures, and activities of

public bodies at all levels. 5 ILCS 140/1 (West 2012). A public body includes any executive body of the State of Illinois. 5 ILCS 140/2 (West 2012). Every public body's records are presumed to be open to inspection or copying upon request, and if any public body asserts that a record is exempt from disclosure, it has the burden of proving the exemption by clear and convincing evidence. 5 ILCS 140/1.2 (West 2012). In general, a public body has five business days in which to comply with or deny a request for public records. 5 ILCS 140/3(d) (West 2012). Failure to respond to a request within the statutory time frame is considered a denial of the request. 5 ILCS 140/3(d) (West 2012). If a public body denies a requester access to any public record, the requester may file suit for injunctive or declaratory relief in a circuit court. 5 ILCS 140/11(a) (West 2012). If the court finds that the public body withheld access to the public record improperly, it may order the production of the public record. 5 ILCS 140/11(d) (West 2012). If the requester prevails in the proceeding, "the court shall award such person reasonable attorneys' fees and costs." 5 ILCS 140/11(i) (West 2012). If the court finds that the public body "willfully and intentionally failed to comply with [the FOIA], or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence." 5 ILCS 140/11(j) (West 2012).

¶ 17 The OEIG does not dispute that it failed to respond to plaintiff's FOIA request within the statutory five-business-days time frame. However, the pleadings establish that during the pendency of this action in the circuit court, but before a trial was held, the OEIG turned over to plaintiff the record he had requested, namely, a copy of the OEIG's

redacted report on the two IDOC parole officers accused of leaking information to a reporter. In addition, the pleadings also establish that plaintiff received from the Office of the Governor another copy of that same redacted report. Once plaintiff received a copy of the report, access to the report was no longer a matter of controversy between the parties. The question of whether the OEIG was obligated under the FOIA to turn over the report became moot. See, e.g., *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 116 (1992) (an issue is moot if no actual controversy exists or there is no effectual relief that the court can grant).

¶ 18 No doubt realizing that there was no longer an actual controversy concerning plaintiff's access to the OEIG's report, the circuit court granted summary judgment for the OEIG. However, in regard to that portion of plaintiff's complaint seeking an order directing the OEIG to produce the report, the correct ruling would have been to dismiss that portion as moot. See *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 198 (1997) (circuit court properly dismissed as moot plaintiff's FOIA suit for access to public records, where defendant produced the requested documents during pendency of litigation). The judgment of the circuit court will need to be modified accordingly.

¶ 19 In regard to all the other portions of plaintiff's complaint, i.e., those portions seeking civil penalties against the OEIG, compensation for the time plaintiff devoted to his lawsuit, the expenses he incurred, etc., the court was correct in entering summary judgment for the defendant. There was no genuine issue of material fact as to these matters, and the OEIG was entitled to summary judgment thereon. Necessarily, plaintiff was not entitled to summary judgment.

¶ 20 A court will impose upon a public body a civil penalty between \$2,500 and \$5,000 in the event of a willful and intentional failure to comply with the FOIA, or other bad faith. 5 ILCS 140/11(j) (West 2012). In his FOIA complaint, plaintiff claimed, upon information and belief, that the OEIG, upon receiving his FOIA request and other correspondence, simply returned them to him "solely because of [his] status as an incarcerated person." He did not allege any specific facts indicating a willful or intentional failure to comply with the FOIA in particular. The exhibits attached to plaintiff's complaint give the impression that the OEIG did not even open the envelopes in which plaintiff sent his FOIA request and other correspondence. Meanwhile, the OEIG's FOIA officer, in an affidavit, essentially stated that the OEIG returned the mailings to plaintiff due to simple bureaucratic bungling. Under these circumstances, there was no genuine issue of a willful or intentional failure to comply with the FOIA, or other bad faith.

¶ 21 As for plaintiff's prayer that the court order OEIG to reimburse him for the time he spent, and the expenses he incurred, in connection with his FOIA action, here too there was no genuine issue of material fact, for there is no legal authority for such an order. In Illinois, each party to litigation is responsible for his own attorney fees and all other expenses associated with the litigation, absent some statute or agreement to the contrary. *Ritter v. Ritter*, 381 Ill. 549, 552-53 (1943). Without an authorizing statute or an agreement, the circuit court cannot order one litigant to pay litigation expenses incurred by another litigant. *Id.*



¶ 22 No provision of the FOIA allows the court to order a public body to reimburse a FOIA requester for the time he devoted to prosecuting a FOIA action *pro se*. As mentioned above, section 11(i) of the FOIA (5 ILCS 140/11(i) (West 2012)) allows for an award of attorney fees. However, as a *pro se* litigant, plaintiff did not incur any attorney fees. Clearly, section 11(i) does not offer any relief to plaintiff under these circumstances. In *Hamer v. Lentz*, 132 Ill. 2d 49, 62-63 (1989), our supreme court held that an attorney who prosecuted his own FOIA action *pro se* did not incur attorney fees and therefore was not entitled to an award of attorney fees under the FOIA. There is no sound reason to treat a nonattorney any differently in this regard. See *Brazas v. Ramsey*, 291 Ill. App. 3d 104, 110 (1997) (nonlawyer *pro se* FOIA litigant did not incur attorney fees and therefore was not entitled to award of attorney fees). If a requester did not incur attorney fees, he cannot recover such fees under the FOIA. See *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, ¶ 25 (FOIA requester, a not-for-profit legal organization, did not incur attorney fees where it was represented by two of its salaried employees in FOIA proceeding, and therefore it was not entitled to an award of attorney fees). Accordingly, plaintiff clearly needed to pay his own expenses relating to this litigation, since no statute or agreement demanded otherwise.

¶ 23 In the brief he filed in this court, plaintiff argued that the circuit court should have granted plaintiff "injunctive relief in the form of an order prohibiting [the OEIG] from future unlawful withholding of redacted summary reports." However, plaintiff did not request such relief in his complaint, and therefore this court will not consider the matter now. An appellant forfeits issues he did not raise in the circuit court; he cannot raise

them for the first time on appeal. *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985). See also, *e.g.*, *Feeley v. Michigan Avenue National Bank*, 141 Ill. App. 3d 187, 188 (1986) (where litigant requested only declaratory relief in his complaint, he could not seek specific performance on appeal). Even if plaintiff had requested such relief, the circuit court would have been right to refuse it. A court should not speculate about, or issue advisory opinions concerning, hypothetical disputes that may or may not arise between the parties in the future. See, *e.g.*, *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 410 (1990).

¶ 24 Under Supreme Court Rule 366(a)(5), this court may "enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief \*\*\* that the case may require." Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994). Pursuant to that grant of authority, this court hereby modifies the judgment of the circuit court of Christian County so that the portion of plaintiff's complaint seeking an order directing the OEIG to produce the requested report is dismissed as moot. In all other respects, the judgment is affirmed.

¶ 25 Affirmed as modified.