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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KILROY WATKINS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 CH 2061
)	
EDDIE T. JOHNSON, as Superintendent of the)	
City of Chicago Police Department; and THE CITY)	Honorable
OF CHICAGO POLICE DEPARTMENT,)	Moshe Jacobious,
Defendants-Appellees.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed judgment in favor of defendants, police department and superintendent, on plaintiff's Freedom of Information Act claims where certain requested documents were not in the possession of defendants and where the record on appeal was inadequate to determine whether redactions to the responsive documents were exempt from disclosure and whether statutory exemptions had been waived.

¶ 2 Plaintiff-appellant, Kilroy Watkins, appeals *pro se* from the order of the circuit court entering judgment in favor of defendants-appellees, the City of Chicago Police Department (the Department) and Eddie T. Johnson, as Superintendent of the Department (collectively, the Department), on his action for declaratory and *mandamus* relief relating to the Department's

No. 1-15-2958

response to his request for documents under the Freedom of Information Act (FOIA). 5 ILCS 140/1 *et seq.* (West 2012). The request sought documents relating to the police investigation which led to plaintiff's conviction for murder. On appeal, plaintiff argues that: (1) he was entitled to the handwritten statements of witnesses; (2) the Department made redactions to the responsive documents which were not exempt under the FOIA; and (3) any applicable exemptions were waived by the production of "unexpurgated" copies of records during discovery in his criminal case. We affirm.

¶ 3 On August 10, 2011, plaintiff filed a request with the Department under the FOIA for the production of "any and all oral and/or handwritten statements that [were] prepared in connection with the investigation under RD No. P-418238, witness statements that [were] obtained by Detective J. McCann #20461 and Detective L. Caesar #20441, between August and December 1991." Plaintiff sought the documents to support his postconviction petition, which challenges his murder conviction and which claims his actual innocence and that the witnesses' statements against him were coerced. In particular, plaintiff, in his postconviction petition, alleged that Krista Campbell, the State's "chief witness" at his criminal trial, had recanted her written statement because the statement resulted from threats and coercion from Detectives McCann and Caesar.

¶ 4 On August 15, 2011, the Department notified plaintiff that it had no documents responsive to his request.

¶ 5 Plaintiff filed a request for a review of the Department's response with the Public Access Counselor (PAC) of the Office of the Illinois Attorney General (AG), pursuant to section 9.5(c) of the FOIA (5 ILCS 140/9.5(c) (West 2012)). By letter dated October 25, 2011, PAC advised

No. 1-15-2958

the Department that a further inquiry as to plaintiff's request was warranted and asked the Department to determine whether it possessed documents responsive to plaintiff's request, and, if so, to provide PAC with copies of responsive documents and to state whether the Department believed the records were covered by any exemption provisions of the FOIA.

¶ 6 By letter, dated December 1, 2011, the Department responded to PAC's requests and informed PAC that it had in its possession records with information relating to witness statements as to R.D. No. P-418238. However, the Department maintained that the exemptions contained in sections 7(1)(c), (1)(d)(iv), and (1)(d)(vi) of the FOIA (5 ILCS 140/7(1)(c), (1)(d)(iv), (vi) (West 2012)), applied to portions of the requested documents.

¶ 7 The Department set forth its position as follows. First, disclosure of the personal information of the witnesses including names, telephone numbers and addresses which are contained in the records would constitute an unwarranted invasion of their privacy and was exempt under section 7(1)(c). Second, the requested records contained the names of individuals who provided information to the police regarding the murder committed by plaintiff and this information was exempt under section 7(1)(d)(iv). Third, the exemption of section 7(1)(d)(vi) applied to the records because the disclosure to plaintiff of the identities of the individuals who spoke to the police would endanger those individuals.

¶ 8 The Department did provide PAC with the unredacted responsive documents for review. The Department, under section 9.5(c), asked that PAC not provide the unredacted documents to plaintiff.

¶ 9 On March 29, 2013, by letter, PAC issued a nonbinding, advisory opinion addressing whether the claimed FOIA exemptions were applicable to certain portions of the requested

No. 1-15-2958

records. PAC concluded that, under section 7(1)(d)(iv), the Department could redact "confidential information furnished only by confidential sources which was not revealed in court proceedings" and the identifying information of individuals who did not testify at plaintiff's trial. However, PAC believed that "information disclosed in court proceedings [and] information identifying witnesses who testified in open court" were not exempt from disclosure under this section. As to sections 7(1)(b) and 7(1)(c), PAC concluded that "the names of [testifying] witnesses and portions of their statements which were revealed in court proceedings do not constitute highly personal information" and were not exempt from disclosure. However, the birth dates and other private information, as defined under section 2(c-5) (5 ILCS 140/2 (c-5) (West 2014)), such as social security numbers and home addresses of testifying (as well as non-testifying and confidential) witnesses, constitute "private information" and may be redacted. Finally, PAC opined that the Department had not sufficiently established that the release of "information identifying witnesses who testified at trial and information disclosed in court proceedings," would endanger the life or physical safety of any person as was necessary for an exemption under section 7(1)(d)(vi). Based on these conclusions, PAC asked that the Department "disclose to [plaintiff] redacted versions of any records in its possession that identify the names of testifying witnesses and portions of their statements that were disclosed in court proceedings."

¶ 10 On January 24, 2013, plaintiff filed a *pro se* suit against the AG seeking a declaratory judgment that he was entitled to full disclosure of the requested documents and a writ of *mandamus* compelling the AG to produce these documents. The AG filed a motion to dismiss the complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615

No. 1-15-2958

(West 2014)). The AG contended that section 9.5(c) of the FOIA prohibited her from producing the unredacted documents received from the Department in connection with PAC's review of plaintiff's FOIA request, because the Department had asserted the applicability of statutory exemptions. Following a hearing, the circuit court found that the AG was not a proper party to plaintiff's suit because PAC issued a nonbinding opinion and the AG had no authority to order the Department to turn over the information requested by plaintiff.

¶ 11 On June 13, 2013, and now represented by counsel, plaintiff filed a motion for leave to file an amended complaint and substitute the Superintendent and the Department as defendants. On July 8, 2015, the circuit court granted this motion and dismissed the AG from the suit. Plaintiff's amended complaint was filed on July 9, 2013. Plaintiff sought a declaration that the Department had violated the FOIA, and that plaintiff was entitled to full disclosure of the requested documents. Additionally, plaintiff asked that the circuit court "grant an order of *mandamus* directing [the Department] to forthwith provide documents and redact any personal and/or private information (*i.e.*, social security number, address, telephone number) from requested documents, other than the name of the witnesses and the identities of those interviewed by detectives."

¶ 12 On October 2, 2013, the Department provided plaintiff's counsel with copies of records in its possession in response to plaintiff's FOIA request, including redacted copies of the general offense case report and supplementary reports of the police including the detectives, and the evidence report and an unredacted copy of the crime laboratory report. The Department recovered those documents upon a search of its records storage warehouse and maintained that

No. 1-15-2958

no other documents relating to plaintiff's criminal case were stored there. Those redacted documents (almost 30 pages) are included in the record on appeal.

¶ 13 On October 24, 2013, the Department moved to dismiss plaintiff's amended complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). In the motion, the Department stated that the documents it had provided to plaintiff on October 2, 2013, were "*the only non-exempt* documents responsive to the FOIA request that is the subject of this lawsuit," and that the production of those documents mooted plaintiff's claims. (Emphasis in original.) The Department provided the affidavits of Terrance Collins, Legal Officer I, in the Department's Office of Legal Affairs; Jack Enter, the Department's Freedom of Information Officer; and Andrew Robertson, a civilian employee in the Department's Record Services Division, to establish that "a thorough and diligent search was conducted and all known non-exempt responsive records under R.D. No. P-418238 have been tendered to the best of the affiants' knowledge." The Department redacted from those documents information which was protected under sections 7(1)(b) and 7(1)(c) in a manner which the Department believed was consistent with PAC's nonbinding advisory opinion and under section 7(1)(d)(iv) as to all individuals who gave information to the police, including those who testified at plaintiff's criminal trial.

¶ 14 In response, plaintiff argued that the Department "persists in redacting public information," and that it did not search "the investigative files located in the basement." Defendant requested that the court deny the motion to dismiss, conduct an *in camera* inspection of the unredacted documents, and require the Department to provide an affidavit that it searched "the files located in the basement of 51st and Wentworth." The Department replied that its redactions were proper, testifying witnesses fell within the exemption of section 7(1)(d)(iv), and

No. 1-15-2958

reiterated that the documents it produced were "*the only non-exempt* documents responsive to [plaintiff's] FOIA request." (Emphasis in original.)

¶ 15 On November 14, 2013, after a hearing on the motion to dismiss, the circuit court entered an order directing plaintiff to provide the Department with the names of those individuals who testified at his criminal trial and the substance of their testimony, so the Department could determine whether the disclosed records "can be redone with those [witness] names not redacted."

¶ 16 On May 8, 2014, the circuit court entered an order with memorandum denying the Department's motion to dismiss. In denying the motion, the circuit court found that the facts contained in the Department's affidavits offered in support of the motion to dismiss were deemed admitted as the affidavits were uncontroverted. The circuit court also concluded that plaintiff's unsupported claim that responsive documents might be found in "the basement of 51st and Wentworth" was insufficient to challenge the affidavits.

¶ 17 The circuit court further found that the Department's redactions as to birth dates, home addresses, phone numbers, social security numbers, employment information, license plate information, other personal or private information of individuals involved in the police investigation, and information as to confidential sources were proper. However, the circuit court also found that the information as to the names of testifying witnesses, and their statements, insofar as this information was revealed during the criminal proceedings, was not exempt. The court noted that, although plaintiff had asserted in his response to the motion to dismiss that a copy of his affidavit which set forth the names of witnesses who had testified at his criminal trial was attached (initial affidavit), the initial affidavit in fact was not included with the response.

No. 1-15-2958

The court, however, determined that "to the extent [the Department] knows the identity of witnesses who actually testified openly in [p]laintiff's criminal case and the substance of those witnesses' in-court testimony, the redaction of that information from the records tendered to [p]laintiff constitutes an actual controversy that defeats [d]efendants' motion to dismiss."

¶ 18 On June 5, 2014, the Department moved to reconsider the denial of its motion to dismiss, arguing that the plain language of section 7(1)(d)(iv) exempts from disclosure all information that would "unavoidably disclose the identity of a *** person who *** [provides] information to *** law enforcement," and does not include an express exception for those persons who later provided testimony at trial. The Department also maintained that it did not have a copy of the transcript of the proceedings of plaintiff's criminal trial, does not maintain transcripts of criminal trials in the regular course of its business, and would have to obtain the transcript in order to comply with the court's direction in its May 8, 2014, order. Plaintiff opposed the motion, arguing that the court should "assume [that] unexpurgated copies" of the requested documents were produced by the State during plaintiff's criminal case, thus, the section 7(1)(d)(iv) exemption had been waived.

¶ 19 In a written order with memorandum entered on September 10, 2014, the circuit court confirmed its previous finding that section 7(1)(d)(iv) did not apply to the identity or other nonpersonal information of witnesses who testified in the criminal trial to the extent of their testimony. The court ordered the Department to tender to the court the unredacted documents in the Department's possession for an *in camera* review to "determine whether there is any reason to withhold information in those records" and continued the motion to reconsider. The

No. 1-15-2958

Department complied with the circuit court's request. The unredacted responsive documents, however, are not included in the record on appeal.

¶ 20 On December 18, 2014, after conducting an *in camera* review, the circuit court entered an order which stated that plaintiff had provided the court with a copy of the initial affidavit which set forth the names of the witnesses who testified at his criminal trial as: Nicole James, Krista Campbell, and Leslie Bell, but plaintiff later asserted that Nicole James had not been called to testify. In the order, the court further stated that plaintiff, in the initial affidavit, had averred that these trial witnesses had recanted their testimony. The initial affidavit is not in the record on appeal. The court found that the Department's redactions on the evidence report and other redactions on the police reports were exempt under the FOIA. The court stated that it could not determine whether the remaining redactions on certain pages of the detective reports were exempt as the initial affidavit did not clearly state the identity of the trial witnesses and the nature of their testimony. The court directed plaintiff to provide an amended affidavit to clarify the issue and he complied. In the amended affidavit, plaintiff stated that, prior to trial, the State provided in discovery the handwritten statements of Nicole James, Leslie Bell, Krista Campbell, and Antonio Triplett, obtained by Detectives McCann and Cesar.

¶ 21 On March 20, 2015, after considering the amended affidavit, the circuit court denied the Department's motion to reconsider stating:

"The Court finds that there is an open question as to whether [p]laintiff is entitled to unredacted records containing information that Ms. Campbell, whom the [a]mended [c]omplaint identifies as the chief witness against [p]laintiff, disclosed at [p]laintiff's criminal trial. In addition, to the extent that Nicole James, Leslie Bell, and/or Antonio

Triplett testified at [p]laintiff's criminal trial, there is also an open question as to whether [p]laintiff is entitled to unredacted records pertaining to them."

The circuit court ordered "a hearing wherein the burden will be upon [plaintiff] to establish which witnesses testified at his trial and what such witnesses actually disclosed."

¶ 22 The Department filed an answer and affirmative defenses to the amended complaint on April 10, 2015. In an affirmative defense, the Department stated that it had "complied with its obligations under FOIA because all nonexempt responsive documents have been provided to [p]laintiff."

¶ 23 On July 8, 2015, plaintiff submitted to the circuit court an excerpt from the transcript of his criminal trial containing the testimony of Krista Campbell on March 10, 1993 (excerpt). The excerpt does not appear in the record on appeal. On July 23, 2015, plaintiff advised the court that he had "no further documents to tender" as to his waiver argument.

¶ 24 On September 10, 2015, after examining the excerpt, the circuit court entered an order wherein the court summarized the testimony of Ms. Campbell as follows:

"[Ms.] Campbell, who was sixteen years old at the time of [p]laintiff's trial, testified that on December 27, 1991, she talked to an [Assistant State's Attorney] at Area 3 Police Station and was told to sign a statement so that she '[could] go home.' She did not read the statement before signing it and claimed at trial that '[everything wasn't on there when [I] signed it.' "

[Ms.] Campbell further testified about a September 10, 1992, visit from representatives of the [office of the Cook County Public Defender]. She identified an exhibit, shown to her by [p]laintiff's defense counsel, as a statement, handwritten and

signed by her, indicating the truth—that she was not in the area where the crime occurred on the night in question."

¶ 25 The circuit court found that Ms. Campbell's written statement was not among the materials the Department tendered for the *in camera* review. The court further found that Ms. Campbell's handwritten statement "was not prepared or obtained by detectives working on the criminal investigation of [p]laintiff" but, rather, "in fact, was one of the exhibits proffered by [p]laintiff's own defense counsel during his criminal trial." (Emphasis in original.) Additionally, the court concluded that the information relating to Ms. Campbell in the unredacted records tendered by the Department differed from her trial testimony and was, therefore, exempt and properly redacted. Finding that no further issues remained for its consideration and that no further production of documents by the Department was necessary, the circuit court entered judgment for the Department on plaintiff's declaratory and *mandamus* claims. Plaintiff has appealed.

¶ 26 On appeal, plaintiff contends that the circuit court erred in denying him declaratory and *mandamus* relief. Plaintiff argues that he is entitled to witnesses' handwritten statements, and the redacted names and other information of individuals who were interviewed by the police in connection with his criminal case. He further argues that the FOIA exemptions had been waived because the State produced "unexpurgated copies" of the requested documents during discovery in his criminal case.

¶ 27 The purpose of the FOIA is "to open governmental records to the light of public scrutiny." (Internal quotation marks omitted.) *Watkins v. McCarthy*, 2012 IL App (1st) 100632,

¶ 13. Therefore, under the FOIA, public records are presumed to be open and accessible.

No. 1-15-2958

Heinrich v. White, 2012 IL App (2d) 110564, ¶ 8. The FOIA must be liberally construed to achieve its goal of "provid[ing] the public with easy access to government information." *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006). A public body "must comply with a valid request for information unless one of the narrow statutory exemptions set forth in section 7 of the FOIA applies." *Watkins*, 2012 IL App (1st) 100632, ¶ 13.

¶ 28 The public body has the burden to prove, by clear and convincing evidence, that the requested records fall within an exemption. 5 ILCS 140/11(f) (West 2012). This burden is met where the public body provides "a *detailed* justification for its claimed exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." (Emphasis in original and internal quotation marks omitted.) *Day v. City of Chicago*, 388 Ill. App. 3d 70, 74 (2009). The issue of whether an exemption applies is generally a matter of statutory construction and reviewed *de novo*. *Lucas v. Prisoner Review Board*, 2013 IL App (2d) 110698, ¶ 15.

¶ 29 A person whose request for records has been denied may request review by PAC who "shall determine whether further action is warranted." 5 ILCS 140/9.5(a)(c) (West 2012). PAC may resolve the request for review by mediation, binding opinion, or other means. 5 ILCS 140/9.5(f) (2012). Only a binding opinion is subject to administrative review. 5 ILCS 140/11.5 (West 2012). However, "[a]n individual whose request for public records is denied may also file an action in the circuit court for injunctive or declaratory relief." *Chicago Tribune Co. v. Department of Financial and Professional Regulation*, 2014 Il App (4th) 130427, ¶ 23 (citing 5 ILCS 140/11(a) (West 2010)).

No. 1-15-2958

¶ 30 Section 11(f) of the FOIA requires that the circuit court review the request for documents *de novo* and conduct such *in camera* examination of the requested records as it finds appropriate to determine if the records, or any part thereof, may be withheld under any provision of the FOIA. 5 ILCS 140/11(f) (West 2012); *Southern Illinoisan*, 218 Ill. 2d at 418.

¶ 31 "In order to bring a declaratory judgment action, ' "there must be an actual controversy between adverse parties, with the party requesting the declaration possessing some personal claim, status, or right which is capable of being affected by the grant of such relief." ' " *Brown v. Grosskopf*, 2013 IL App (4th) 120402, ¶ 10 (quoting *Village of Chatham, Illinois v. County of Sangamon, Illinois*, 216 Ill. 2d 402, 420 (2005) (quoting *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 493 (1988))). "When a trial court's decision in a declaratory judgment is based on questions of law rather than factual determinations, this court reviews the trial court's decision under the *de novo* standard of review." *Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327, ¶ 12 (citing *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 592-93 (2009)).

¶ 32 " *Mandamus* is an extraordinary civil remedy that will be granted to enforce, as a matter of right, the performance of official nondiscretionary duties by a public officer." " *DuPree v. Hardy*, 2011 IL App 4th 100351, ¶ 22 (quoting *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003)). A court will issue a *mandamus* only where a plaintiff has demonstrated: a clear right to the requested relief; a clear duty on the part of the public official to act; and clear authority exists in the public official to comply with the order of *mandamus*. *Id.* A "decision to grant or deny a writ of *mandamus* will not be disturbed unless it is against the manifest weight of the evidence." *1350 Lake Shore Associates v. Randall*, 401 Ill. App. 3d 96, 102 (2010) (citing *Lombard*

No. 1-15-2958

Historical Comm'n v. Village of Lombard, 366 Ill. App. 3d 715, 719 (2006)). Any possible challenge to plaintiff pursuing a *mandamus*, rather than an injunctive action as provided by section 11(a) of the FOIA (5 ILCS 140/11(a) (West 2016)), was forfeited by the Department's failure to raise it in the circuit court. *Williams v. Klinicar*, 237 Ill. App. 3d 569, 573 (1992).

¶ 33 We first address plaintiff's argument on appeal that the Department was required to produce all handwritten statements of witnesses which were obtained by the police during the investigation which resulted in his conviction. Plaintiff contends that the circuit court decided this issue on the Department's motion to dismiss after finding that the handwritten statements were exempt from production. The Department's motion to dismiss, in fact, was denied by the circuit court. The record establishes that the circuit court denied plaintiff relief as to his requests for handwritten statements after an *in camera* examination of the unredacted documents and on the ground that the handwritten statements were not in the possession of the Department. We find the circuit court acted properly.

¶ 34 Section 11(f) requires the circuit court to conduct a *de novo* review of a request under the FOIA. 5 ILCS 140/11(f) (West 2012). The public entity, generally by affidavit, must provide a detailed explanation as to the application of any exemption and the circuit court is to conduct such *in camera* review which it finds is appropriate " 'to determine if such records or any part thereof may be withheld under any provision of [the FOIA].' " *Day*, 388 Ill. App. 3d at 74 (quoting 5 ILCS 140/11(f) (West 2006) and citing *Illinois Education Ass'n. v. Illinois State Board of Education*, 204 Ill. 2d 456, 469 (2003)).

¶ 35 The Department, in moving to dismiss plaintiff's suit under section 2-619, provided the circuit court with affidavits to establish that all responsive documents had been produced to

No. 1-15-2958

plaintiff after an exhaustive search. Plaintiff failed to controvert the affidavits and the circuit court found the factual assertions of the affidavits were deemed admitted. The circuit court then conducted an *in camera* review of the unredacted responsive documents and confirmed there were no handwritten statements included with the responsive documents. Additionally, after reviewing the excerpt, the circuit court concluded that the handwritten statement of Ms. Campbell was produced by trial counsel for plaintiff and not by the State during plaintiff's criminal trial. The circuit court properly followed the procedures required by section 11(f) in reaching its conclusion that the documents produced by the Department after its exhaustive search did not include handwritten statements. The circuit court did not err in denying plaintiff declaratory and *mandamus* relief as to his request for witnesses' handwritten statements as the Department cannot be compelled to produce documents which are not in its possession.

¶ 36 Plaintiff next argues that the Department erred by redacting as exempt the identities and other information relating to individuals who were interviewed by police in connection with his criminal case. Other than his claim of waiver, plaintiff does not specifically challenge the redactions pertaining to private information under FOIA section 7(1)(b) (5 ILCS 140/7(1)(v) (West 2012) (which exempts private information prohibited from disclosure by federal or state law or rules and regulations implementing federal or state law)), personal information under section 7(1)(c) (5 ILCS 140/7(1)(c) (West 2012) (which exempts "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy")), and private information as is defined in section 2(c-5) (5 ILCS 140/2(c-5) (West 2012)). In fact, plaintiff, in his complaint, asked that the Department be

No. 1-15-2958

compelled to produce responsive documents with "personal and/or private information" redacted. The central issue below was the applicability of section 7(1)(b)(iv).

¶ 37 Section 7(1)(b)(iv) exempts from disclosure "the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies." 5 ILCS 140/7(1)(b)(iv) (West 2012). The circuit court found that the redactions were exempt under this section of the FOIA (and sections 7(1)(b) and (c)), only after conducting an *in camera* examination of the unredacted responsive documents. The record on appeal however does not contain copies of the unredacted responsive documents. Plaintiff, as the appellant, had the duty to provide a record sufficient to review his claims of error as to the redactions. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). In the absence of a complete record, we must presume that a circuit court's order conformed with the law and had a sufficient factual basis. *Id.* Further, where the record is inadequate, we will resolve any doubts against the appellant. See *Unifund CCR Partners v. Shah*, 2013 IL App 1st 113658, ¶ 22 (where, under a different context, appellant provided only redacted copies of documents relating to issues on appeal). Plaintiff, as the appellant, failed to provide a sufficient record on appeal to review any error resulting from the circuit court's *in camera* review of the unredacted responsive documents. We must affirm the circuit court's findings that the redactions were exempt under the FOIA and its denial of declaratory and *mandamus* relief seeking the disclosure of the redactions.

¶ 38 Plaintiff argues that certain individuals who were interviewed by the police were later called to testify at his criminal trial, which makes their identity and the information revealed through their testimony public information and not exempt. In support of this argument below

No. 1-15-2958

plaintiff submitted the excerpt, the initial affidavit and the amended affidavit. The Department argues that the plain language of section 7(1)(b)(iv) does not contain an exception for testifying witnesses who provide information to law enforcement.

¶ 39 The excerpt, plaintiff's initial affidavit, and the unredacted responsive documents are not in the record and, again, we are without a sufficient record to review plaintiff's challenge to the circuit court's decision on the ground that the redacted information did not fall within section 7(1)(b)(iv) or were not otherwise protected from disclosure. As a result, we presume that the circuit court's decision—that the redactions were exempt from disclosure—was in compliance with the law and supported by the facts. *Foutch*, 99 Ill. 2d at 393. Therefore, we do not reach the merits of the issue, including whether the exemption of section 7(1)(b)(iv) applies to witnesses who are later called to testify.

¶ 40 Further, plaintiff claims that the exemptions asserted by the Department, including the exemption of section 7(1)(b)(iv), were waived by the State's production of unredacted documents during discovery in his criminal case. The Department argues that the State, as a separate public entity, cannot act to waive the Department's right to assert exemptions under the FOIA and that the relevant privacy interests belonged only to the individuals who gave information to the police.

¶ 41 A prior voluntary disclosure of requested information may constitute waiver of an exemption under the FOIA. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 412-13. The waiver rule seeks to prevent a public entity from selective disclosure and preferential treatment in its compliance with the FOIA. *Id.* at 413 (quoting *State of North Dakota ex rel. Olson v. Andrus*, 581 F. 2d 177, 182 (8th Cir. 1978)). However, "[t]he waiver

No. 1-15-2958

rule must not be mechanically applied, whenever there is a disclosure of information but, rather requires consideration of the circumstances related to the disclosure, including the purpose and extent of the disclosure as well as the confidentiality surrounding the disclosure.' " *Chicago Alliance for Neighborhood Safety*, 348 Ill. App. 3d 188, 202 (2004) (quoting *Mobil Oil Corp. v. United States Environmental Protection Agency*, 879 F. 2d 698, 700 (9th Cir. 1989)). It was for plaintiff to establish any waiver. See *Id.* at 203; *Day*, 388 Ill. App. 3d at 78.

¶ 42 In the circuit court, plaintiff submitted insufficient evidence as to what information was produced by the State during discovery in his criminal case. Plaintiff asked the circuit court to "assume [that] unexpurgated copies" of the requested documents were produced by the State during the criminal discovery. When asked to provide evidence of the waiver and to corroborate his averment in the amended affidavit that the State produced handwritten statements of Nicole James, Leslie Bell, Krista Campbell, and Antonio Triplett during criminal discovery, defendant produced only the excerpt. The excerpt, however, related solely to Ms. Campbell, and showed that her handwritten statement was not produced by the State, but rather, by plaintiff's trial counsel. Therefore, the record does not establish the contents or the circumstances of the State's discovery disclosure, and we have no factual basis to determine any waiver of the exemptions of the FOIA on this ground. See *id.* Further, we must again note that the record on appeal does not include the unredacted responsive records and the excerpt. Because of plaintiff's failure to establish the waiver in the court below and provide this court with a sufficient record on appeal, we must affirm the circuit court's decision that the redactions were proper and decline to address the merits of the waiver issue.

No. 1-15-2958

¶ 43 For the reasons stated, we affirm the judgment of the circuit court which denied plaintiff's requests for declaratory and *mandamus* relief related to his FOIA request to the Department.

¶ 44 Affirmed.