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NO. 4-15-0189

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March 17, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

RALPH MLASKA, Plaintiff-Appellant, v. THE ILLINOIS DEPARTMENT OF CORRECTIONS, Defendant-Appellee.	)))))))))	Appeal from Circuit Court of Sangamon County No. 14MR689 Honorable Chris Perrin, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justice Holder White concurred in the judgment.
Justice Appleton specially concurred.

ORDER

¶ 1 *Held*: The documents plaintiff requested from the Illinois Department of Corrections (Department) were exempt from disclosure under sections 7(1)(a), (1)(e-7), and (1)(f) of the Freedom of Information Act (5 ILCS 140/7(1)(a), (1)(e-7), (1)(f) (West 2012)).

¶ 2 Pursuant to section 3 of the Freedom of Information Act (Act) (5 ILCS 140/3 (West 2012)), plaintiff, Ralph Mlaska, requested some documents from defendant, the Department of Corrections (Department). Defendant refused to provide him the documents, asserting, under various subsections of section 7 of the Act (5 ILCS 140/7 (West 2012)), the documents were exempt from disclosure.

¶ 3 Consequently, plaintiff sued defendant. See 5 ILCS 140/11(a) (West 2012). On plaintiff's motion, the trial court ordered defendant to turn over to the court, for an *in camera* inspection, all the withheld documents, along with an index describing each document and

stating the exemption applicable to each document. See 5 ILCS 140/11(e) (West 2012). Defendant did so, and after the *in camera* inspection, the court entered a judgment in defendant's favor, setting forth its findings and reasons in a written order.

¶ 4 Plaintiff appeals. In our *de novo* review, we affirm the trial court's judgment because none of the statutory exemptions was misapplied.

¶ 5 I. BACKGROUND

¶ 6 A. The Complaint and the Answer

¶ 7 On June 20, 2014, plaintiff filed, *pro se,* a "Verified Freedom of Information Complaint," which consisted of two counts. It appears, from the complaint and the answer, the following facts are undisputed. The record also contains two motions for leave to file an amended complaint, each containing an attached proposed amended complaint. Apparently, plaintiff never requested a hearing on those motions and no amended complaint was allowed to be filed. Consequently, we are dealing with plaintiff's original complaint.

¶ 8 1. *Count I*

¶ 9 On October 7, 2012, plaintiff, an inmate at Shawnee Correctional Center, submitted to the Department a request pursuant to the Act. The request was for "[a]ll [d]ocuments sent to Warden A. Martin or [A]ssistant [W]arden Hilliard from Danville [c]orrectional, [s]ecurity[,] or [a]dministrative officials[,] that contain[ed,] mention[ed,] or refer[red] to [plaintiff's] mental health issues or basis for transfer[,] from [September 6 to October 6, 2012]."

¶ 10 The Department refused to provide these documents plaintiff had requested. In justification of its refusal, the Department cited section 7(1)(f) of the Act, which "exempt[ed] from inspection and copying" any "[p]reliminary drafts, notes, recommendations, memoranda[,]

and other records in which opinions [were] expressed, or policies or actions [were] formulated, except that a specific record or relevant portion of a record [should] not be exempt when the record [was] publicly cited and identified by the head of the public body." 5 ILCS 140/7(1)(f) (West 2012).

¶ 11 Plaintiff requested the public access counselor of the Attorney General's office to review the Department's refusal of his request. See 5 ILCS 140/9.5(a) (West 2012). On December 26, 2012, Lisa Weitekamp, the Department's freedom of information officer, responded to an inquiry by an assistant public access counselor in the Attorney General's office, Tola Sobitan. Weitekamp wrote to Sobitan:

> "Please accept this as our response to the Request for Review submitted by [plaintiff], as described in your letter. You have requested [the Department to] provide your office with un-redacted copies of the responsive records for a confidential review. We have enclosed the responsive documents as requested.
>
> [The Department] asserts that the documents in question are exempt pursuant to Section 7(1)(f) of the *** Act ***." The requested documents are emails where opinions are expressed and actions are being formulated. Staff must be free to discuss issues such as these to promote an effective plan for addressing the handling of inmates at various facilities."

¶ 12 Count I alleges no further facts. It does not disclose what decision, if any, the public access counselor made on plaintiff's request of October 7, 2012. Count I merely concludes with the argument the Act "was not formulated to conceal a criminal conspiracy to

promote the denials of recognizing a potentially serious medical condition nor the intentional promotion of denials to test the said condition or the promotion of calculated harassment." Also, count I points out "any real material exempt from disclosure can be redacted after a[n] in court camera viewing of such said documents."

¶ 13 2. *Count II*

¶ 14 On July 30, 2013, plaintiff submitted to the Department another request pursuant to the Act. This request sought the following documents:

> "all correspondence, emails[,] documents[,] and memos from [the attorneys] of Heyl, Royster, Voelker & Allen[,] P.C.[,] to Shawnee [w]ardens, healthcare unit administrators ***, doctors[,] and psychologists which refer to his medical or legal issues[,] from September 30[,] 2012[,] to present[,] as well as all correspondence, documents, emails[,] and memos from [the Department's] [m]edical director[,] Louis Shicker[,] to [w]ardens, medical [personnel], [health care unit administrators], and psychologists discussing/mentioning his medical conditions."

¶ 15 On August 12, 2013, the Department denied this request, citing the exemptions in sections 7(1)(f) (discussed above) and (1)(m) of the Act (5 ILCS 140/7(1)(f), (1)(m) (West 2012)). Section 7(1)(m) exempted from disclosure any "[c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil[,] or administrative proceeding upon the request of an attorney advising the

public body, and materials prepared or compiled with respect to internal audits of public bodies." 5 ILCS 140/7(1)(m) (West 2012).

¶ 16 Plaintiff filed a request for review with the public access counselor. At this point, count II begins citing exhibit C of the amended complaint.

¶ 17 Exhibit C is a letter dated April 2, 2014. It is impossible to determine specifically whom this letter is from, since the final page of the letter, which apparently contained the signature block, is missing. This document is clearly incomplete. The letter has, at the top, the seal and letterhead of the Office of the Attorney General of the State of Illinois, below which, at the left, are printed the name of Lisa Madigan and her title, Attorney General. From the body of the letter, it is apparent the letter is from the Public Access Bureau (Bureau). The letter is addressed jointly to plaintiff and to Joel Diers of the Department's Freedom of Information Office, and the letter begins: "This determination is issued pursuant to section 9.5(f) of the *** Act (5 ILCS 140/9.5(f) (West 2012)). For the reasons that follow, the *** Bureau concludes that the *** Department improperly denied [plaintiff's] July 30, 2013, *** request."

¶ 18 The section the Bureau cited, section 9.5(f), provided as follows:

> "(f) Unless the Public Access Counselor extends the time by no more than 30 business days by sending written notice to the requester and the public body that includes a statement of the reasons for the extension in the notice, or decides to address the matter without the issuance of a binding opinion, the Attorney General shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion in response to the request

for review within 60 days after its receipt. The opinion shall be binding upon both the requester and the public body, subject to administrative review under Section 11.5 [(5 ILCS 140/11.5 (West 2012))].

In responding to any request under this Section 9.5 [(5 ILCS 140/9.5 (West 2012))], the Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. The decision not to issue a binding opinion shall not be reviewable.

Upon receipt of a binding opinion concluding that a violation of this Act has occurred, the public body shall either take necessary action immediately to comply with the directive of the opinion or shall initiate administrative review under Section 11.5. If the opinion concludes that no violation of the Act has occurred, the requester may initiate administrative review under Section 11.5.

A public body that discloses records in accordance with an opinion of the Attorney General is immune from all liabilities by reason thereof and shall not be liable for penalties under this Act." 5 ILCS 140/9.5(f) (West 2012).

¶ 19 In the letter of April 2, 2014, attached as exhibit C to the amended complaint, the Bureau noted plaintiff had requested two categories of documents on July 30, 2013:

"(1) all correspondence, e-mails, documents, and memos from attorneys of Heyl, Royster, Voelker & Allen, P.C., to Shawnee wardens, health care unit administrators (HCUA), doctors, and psychologists which refer to his medical or legal issues from September 30, 2012, to present; and (2) all correspondence, documents, e-mails, and memos from [the Department's] Medical Director Louis Schicker to wardens, medical personnel, HCUA, and psychologists discussing or mentioning his medical conditions."

¶ 20 In the succeeding four pages of its letter, the Bureau explained why it had found in favor of plaintiff in this dispute. The reason was the Department's refusal to comply with the Bureau's request to " 'provide a copy of the responsive records for [the public access officer's] confidential review.' " See 5 ILCS 140/9.5(c) (West 2012) ("Within 7 business days after receipt of the request for review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the Public Access Counselor.").

¶ 21 The Bureau quoted the correspondence back and forth, in which the Department had persisted in its refusal to turn over the responsive documents for the Bureau's confidential inspection. Although the Department had withdrawn its reliance on the exemption in section 7(1)(m) because the Department did not even possess any of the documents described in the first request, the Department continued to insist turning over to the Bureau the documents described in the second request would violate federal law. In a letter to the Bureau dated February 13, 2014, the Department "reas[s]ert[ed] its position that such a release [was] prohibited by federal

privacy laws contained in the Health Insurance Portability and Accountability Act of 1996, 45 CFR 160-16 HIPPA [*sic*]." (Emphasis omitted.)

¶ 22 The Bureau remarked the Department's "refusal to comply with its statutory obligation to cooperate with the [p]ublic [a]ccess [c]ounselor ha[d] hindered the [p]ublic [a]ccess [c]ounselor's ability to undertake a meaningful review of this matter" and, "[o]n this basis alone," the Bureau would have been "justified in concluding that [the Department] ha[d] not sustained its burden of demonstrating[,] by clear and convincing evidence[,] that any of the records [were] exempt from disclosure." Even so, "to the extent possible based on [the Department's] limited response," the Bureau considered the Department's reliance on the exemptions in sections 7(1)(a) and (1)(f) of the Act (5 ILCS 140/7(1)(a), (1)(f) (West 2012)).

¶ 23 The Bureau interpreted the Department's invocation of the federal privacy rule (45 C.F.R. § 164.502 (2012)) as an invocation of section 7(1)(a) of the Act 5 ILCS 140/7(1)(a) (West 2012)), which exempted "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Bureau previously had determined, in other cases, the federal privacy rule did not prohibit the Department from disclosing to an inmate his or her own medical records. And by seeking the Bureau's assistance in obtaining access to his own medical records, plaintiff had given "his tacit permission for copies of records containing his medical information to be furnished to this office for purposes of resolving this matter."

¶ 24 As for section 7(1)(f), it applied to "inter- and intra-agency predecisional and deliberative material," the Bureau explained, and if a record contained "both preliminary recommendations and factual material, the deliberative process privilege [did] not exempt the segregable factual material from disclosure." (Internal quotation marks omitted.) Because of the

Department's refusal to provide copies for the Bureau's confidential review, the Bureau was "unable to determine the extent to which these communications contain[ed] segregable, and therefore nonexempt, factual information." Consequently, the Bureau decided the Department had "failed to sustain its burden of proving[,] by clear and convincing evidence[,] that these records [were] exempt from disclosure pursuant to section 7(1)(f)."

¶ 25 Under the heading "CONCLUSION," the Bureau stated, in its letter of April 2, 2014: "In accordance with the conclusions set forth in this letter, we direct [the Department] to provide [plaintiff] with the records responsive to his July 30, 2013, *** request."

¶ 26 Except for conclusory allegations (see *Cole Taylor Bank v. Cole Taylor Bank*, 224 Ill. App. 3d 696, 710, 586 N.E.2d 775, 784 (1992)), the Department admitted paragraphs 8, 12, and 13 of count II (see 735 ILCS 5/2-610 (West 2014)), which alleged as follows:

> "8. The [Department] [b]latantly refused the [A]ttorney [G]eneral office many times the responsive records in question for confidential view *** for a detailed legal and factual basis for the asserted exemptions as required under section 9.5(c) of [the Act] [citation] within [seven] days of the [public access officer's] request. (Ex. C[.])
>
> * * *
>
> 12. The [A]ttorney [G]eneral['s] office determined and directed the [Department] to turn over the requested records to [plaintiff]. Ex. C here[.]

13. In addition to the aforementioned *** violations [of the Act,] [p]laintiff continues to be denied access to these public records[,] which subject matter is [plaintiff]."

¶ 27 B. Plaintiff's Request for a "*Vaughn* Index"

¶ 28 On September 29, 2014, plaintiff filed a motion entitled "Motion Respectfully Petitioning This Court To Approve a Vaughn Request." In the motion, he proposed he "be allowed to make a Vaughn Request[,] or the state equivalent thereof[,] with the goal of eliminating future litigation, or making a single future request[,] which will serve the public interest and judicial economy."

¶ 29 In support of this proposal, plaintiff alleged as follows:

"1. Plaintiff has made various requests via the freedom of information officer regarding his illness from the time he became ill in or about 2009-2010 [until the] present regarding communications which discuss his condition ***.

* * *

4. In the [d]istrict court[,] there is such a thing as [a *Vaughn*] request[,] designed after the case of *Vaughn v. Rosen*[,] 484 F.2d 820 (D.C. Cir. 1973)[,] which requires a detailed indexing of requested documents and the rational[e] for applying exemptions. ***

WHEREFORE, [p]laintiff respectfully requests this [h]onorable [c]ourt to [g]rant a hearing to discover all files or documents that contain information about plaintiff or his condition

since 2009 until [the] present, or direct the [Department,] its agents[,] or attorney to conduct a search and provide such to the plaintiff."

¶ 30 In the docket entry dated November 18, 2014, the trial court granted plaintiff's motion for a *Vaughn* index. See 5 ILCS 140/11(e) (West 2014) (the statutory equivalent of a *Vaughn* index). The docket entry reads:

"The [d]efendants are ordered to provide all requested documents to the [c]ourt on or before January 1, 2015. The court shall conduct an in camera examination of the requested records to determine if such records or any part thereof may be withheld under any provision of the Freedom of Information Act. The [d]efendants are further ordered to provide an index of the records to which access has previously been denied. The index shall include a description of the nature or contents of each document withheld, or each deletion from a released document; and a statement of the exemptions claimed for each such deletion or withheld document."

¶ 31 The Department filed an index on January 2, 2015. Among the withheld documents were plaintiff's medical records dating from July 20 to October 2, 2012. The Department stated it had withheld them pursuant to section 7(1)(e-7) (5 ILCS 140/7(1)(e-7) (West 2014)), which exempted "[r]ecords requested by persons committed to the Department of Corrections if those materials are available through an administrative request to the Department of Corrections." The index also listed 13 e-mails, which the Department claimed were exempt

under section 7(1)(f) (5 ILCS 140/7(1)(f) (West 2014)) because they "contain[ed] opinions regarding treatment decisions" and, in some instances, "suggested actions regarding treatment decisions."

¶ 32 C. The Trial Court's Decision

¶ 33 On February 18, 2015, after its *in camera* review of the withheld documents, the trial court arrived at four conclusions in its written order.

¶ 34 First, the trial court concluded plaintiff was entitled to his own medical records and mental-health records but because these records were available to him through an administrative request to the Department (see 20 Ill. Adm. Code § 107.310(b) (2013)), section 7(1)(e-7) of the Act (5 ILCS 140/7(1)(e-7) (West 2014)) exempted them from disclosure.

¶ 35 Second, the trial court concluded the e-mails, memoranda, and correspondence between the Department's staff members, in which they discussed plaintiff's medical and mental health, were exempt under section 7(1)(f) (5 ILCS 140/7(1)(f) (West 2014)) because "opinions [were] expressed, or treatment options or actions [were] formulated" in these documents. The court explained: "This exemption expresses the public policy favoring the confidentiality of inter- and intra-agency pre-decisional and deliberative materials. This exemption is intended to protect the communication process and encourage frank and open discussion among agency employees before a final decision is made." (Internal quotation marks omitted.)

¶ 36 Third, the trial court concluded that section 7(1)(a) (5 ILCS 140/7(1)(a) (West 2014)) exempted plaintiff's inmate master file from disclosure. Again, section 7(1)(a) exempted "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a) (West 2014). The court noted under section 3-5-1(b) of the Unified Code of Corrections (730 ILCS 5/3-5-1(b) (West

2014)), all master record files of committed persons were to "be confidential and [that] access [was to be] limited to authorized personnel."

¶ 37 Fourth, the trial court found no evidence of the existence of any correspondence, e-mails, documents, or memoranda from Heyl, Royster, Voelker & Allen, P.C., to wardens, health care unit administrators, doctors, or psychologists regarding plaintiff's medical or legal issues, but the court concluded if (contrary to the Department's representation) such documents existed, they likely would be exempt under section 7(1)(m) (5 ILCS 140/7(1)(m) (West 2014)).

¶ 38 Therefore, the trial court entered judgment in favor of the Department and against plaintiff.

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. The Procedure in the Trial Court

¶ 42 Typically, cases under the Act are resolved by summary judgment. *Yonemoto v. Department of Veteran Affairs*, 686 F.3d 681, 688 (9th Cir. 2011); *Miscavige v. Internal Revenue Service*, 2 F.3d 366, 369 (11th Cir. 1993); *Struth v. Federal Bureau of Investigation*, 673 F. Supp. 949, 953 (E.D. Wis. 1987). In this case, however, no motion for summary judgment ever was filed, and plaintiff has not objected, on appeal, to the lack of such a motion.

¶ 43 B. Our Standard of Review

¶ 44 Under the Act, the Attorney General can issue, *inter alia*, a binding opinion, an informal determination letter, or find a request unfounded. 5 ILCS 140/9.5(c)(f) (West 2012). If the Attorney General's letter of April 2, 2014, constituted a binding opinion, the Department would have had to either immediately comply with the opinion or initiate administrative review under section 11.5 of the Act. 5 ILCS 140/11.5 (West 2012). An advisory opinion/informal

determination is not subject to administrative review because the Act provides it is not a final decision. 5 ILCS 40/11.5 (West 2012). See also *Brown v. Grosskopf*, 2013 IL App (4th) 120402, ¶ 11, 984 N.E.2d 1167.

¶ 45 Section 11 of the Act provides "any person denied access to *** any public record by a public body may file suit for injunctive or declaratory relief." 5 ILCS 140/11 (West 2012). Here, plaintiff filed for injunctive and declaratory relief. Consequently, this is not an administrative review proceeding under the Act, but an original action under section 11. As noted above, plaintiff failed to attach the complete opinion letter from the Attorney General. A signatory page is lacking, as well as any designation of the opinion as binding or advisory. Further, defendant points out the Attorney General is required, pursuant to section 7(g) of the Act (15 ILCS 205/7(g) (West 2012)), to publish all binding opinions on her website. According to the Department, the April 2, 2014, letter is not posted as a binding opinion on the Attorney General's website.

¶ 46 Because plaintiff has the burden of providing a complete record on appeal, "any doubts which may arise from the incompleteness of the record will be resolved against the [plaintiff]." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 959 (1984). This principle, coupled with the fact plaintiff filed for injunctive and declaratory relief (rather than the Department filing for administrative review), and the fact the April 2, 2014, letter does not appear on the Attorney General's website, all support our determination this is not an administrative-review proceeding.

¶ 47 Instead, this case was tried on the documents by the trial court. "Where the only evidence presented was documentary and thus the trial court was not engaged in credibility determinations, *** we review the trial court's decisions *de novo*." *Danada Square, LLC v. KFC*

National Management Co., 392 Ill. App. 3d 598, 608, 913 N.E.2d 33, 41 (2009). Unless the trial court had to evaluate the credibility of witnesses (*id.),* weigh evidence (*Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, 939, 445 N.E2d 901, 908 (1983)), or draw inferences from the evidence (*American Food Management, Inc. v. Henson*, 105 Ill. App. 3d 141, 147, 434 N.E.2d 59, 64 (1982))—and we see no indication the trial court had to do any of those things in this case—our standard of review is *de novo* as to the applicability of an exemption.

¶ 48 Although not originally contained in the record on appeal, we directed the trial court to supplement the record with the documents it reviewed *in camera*, and those documents are now available for this court's review.

¶ 49 Having reviewed the documents, and in keeping with our *de novo* standard of review, it is clear the statutory exemptions asserted by the Department apply in this case. First, the trial court correctly concluded plaintiff's medical and mental-health records are exempt from disclosure under section 7(1)(e)(7) of the Act because a Department regulation makes those records available through an administrative request to the Department. See 20 Ill. Adm. Code 107.310(b) (amended at 37 Ill. Reg. 1598, eff. Feb. 1, 2013).

¶ 50 Second, plaintiff's master file is exempt from disclosure under section (7)(1)(a) of the Act because a statute exempts the master file from disclosure. See 730 ILCS 5/3-5-1 (West 2012) ("all [master record] files shall be confidential and access shall be limited to authorized personnel").

¶ 51 Third, the email and correspondence between the Department's staff members discussing plaintiff's medical and mental health clearly discuss treatment options and express opinions. The trial court correctly decided the exemption found in section 7(1)(f) (5 ILCS

140/7(1)(f) (West 2014)), protecting from disclosure notes and memoranda in which opinions are expressed or policies or actions are formulated, applied here.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment.

¶ 54 Affirmed.

JUSTICE APPLETON, specially concurring:

I agree with the majority that we should affirm the trial court's judgment because the documents plaintiff requested fall within the statutory exceptions the Department has invoked. I am writing this special concurrence, however, because the majority finds it to be unproven that the letter of April 2, 2014, from the Bureau to the Department was binding. I think the letter unquestionably was binding under section 11.5 of the Act (5 ILCS 140/11.5 (West 2012))—and that it would be binding to this very day if plaintiff had not forfeited its binding effect by requesting the trial court to order a *Vaughn* index, thereby inviting the court to do the Bureau's job all over again. See *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000).

The majority gives essentially two reasons for thinking the letter from the Bureau might not have been binding in the first place. As I will explain, neither of those reasons strikes me as convincing.

First, the majority says that plaintiff "failed to attach the complete opinion letter from the Attorney General": "[a] signatory page is lacking, as well as any designation of the opinion as binding or advisory." The majority cites *Foutch* for the rule that any doubts arising from the incompleteness of the record should be resolved against the appellant. *Foutch* is distinguishable, though, because the omitted item in *Foutch* was the transcript of an evidentiary hearing. See *Foutch*, 99 Ill. 2d at 392. The letter from the Bureau, by contrast, is an exhibit to plaintiff's complaint, and section 2-606 of the Code of Civil Procedure (735 ILCS 5/2-606 (West 2014)) provides: "If a claim or defense is founded upon a written instrument, a copy thereof, *or of so much of the same as is relevant*, must be attached to the pleading as an exhibit or recited therein ***." (Emphasis added.) It is pretty clear, from the emphasized phrase, that a plaintiff cannot be faulted for attaching only excerpts of the instrument to the complaint. Plaintiff

attached the "relevant" page of the letter, the page stating: "In accordance with the conclusions set forth in this letter, we direct [the Department] to provide [plaintiff] with the records responsive to his July 30, 2013, FOIA request." *Id.* In its answer to plaintiff's complaint, the Department admitted that, in the letter attached to the complaint as exhibit C, "[t]he [A]ttorney [G]eneral['s] office determined and directed the [Department] to turn over the requested records to [plaintiff]."

To "direct" means to "give an official order or authoritative instruction," not to make a recommendation. The New Oxford American Dictionary 483 (2001). The dictionary provides two examples. One is: "the judge directed him to perform community service." (Emphasis omitted.) *Id.* If the defendant knows what is good for him, he will not respond to the judge: "Thank you, Your Honor, for that nonbinding recommendation to perform community service. I will do so if I feel like it." The other example is: "he directed that no picture from his collection could be sold." (Emphasis omitted.) *Id.* The recipient of that authoritative instruction could not reasonably respond: "Thank you for your suggestion. I'll give it due consideration and sell your pictures or not sell them, as I see fit."

Let us not abuse the English language in the same manner. To "direct" the Department to do something means to "order" the Department to do it. In its answer to the complaint, the Department admitted that, in the letter of April 2, 2014, a portion of which was attached to the complaint as exhibit C, the Attorney General (or the Bureau, which is part of the Attorney General's office) "directed" the Department to turn over to plaintiff all the documents he requested on July 30, 2013, pursuant to the Act. "It is axiomatic that an admission in an answer constitutes a formal judicial admission and is conclusive on the person making it." *Board of Education of Township High School District No. 205 v. Faculty Ass'n of District 205*,

120 Ill. App. 3d 930, 934 (1983). By making that judicial admission, the Department assured plaintiff that it would be unnecessary for him to prove the authenticity and import of the letter. A judicial admission has "the [function] of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. [Citations.] In other words, if a fact is judicially admitted, the adverse party has no need to submit any evidence on that point. The admission serves as a substitute for proof at trial." (Internal quotation marks omitted.) *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 102. To me, it makes no sense to speak of an incomplete record of facts that the Department, by its answer, formally removed from issue.

Second, the majority observes that, under section 7(g) of the Act (15 ILCS 205/7(g) (West 2014)), binding opinions of the Bureau are to be published online and that, "[a]ccording to the Department, the April 2, 2014, letter is not posted as a binding opinion on the Attorney General's website." I have a different assessment of the significance of publication. In my view, it is the language of the Bureau's letter that makes it binding or recommendatory and that if a letter is, by its terms, an order, non-publication cannot make it a recommendation any more than if the letter is, by its terms, a recommendation, publication can make it an order. If a binding letter is unpublished, that has no effect on the letter. It just means that section 7(g) is unfulfilled. And again (more to the point) the Department is bound by its judicial admission—publication or no publication.

That is, the Department would be bound but for plaintiff's request that the trial court redetermine the exemptions. See *McMath*, 191 Ill. 2d at 255. Why, then, am I taking such pains to establish *what would have been*? The reason is this. I am a little troubled that the Attorney General, in her representation of the Department in this case, is undercutting her own

public access counselor. The Attorney General brushes off, as a mere "recommendation," a letter from the Bureau that, by its terms, is binding ("we direct [the Department] to provide [plaintiff] the records"). If the Attorney General comes across as not taking her own Bureau seriously, I am worried that agencies might feel tempted to follow suit and that the Act, with its objective of "transparency and accountability of public bodies at all levels of government," will be weakened. 5 ILCS 140/1 (West 2014).