2015 IL App (5th) 140357-U

NO. 5-14-0357

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAMES PERDUE, Plaintiff-Appellant and Cross-Appellee, v. VILLAGE OF TOWER HILL, Defendant-Appellee and Cross-Appellant.	)))))))))	Appeal from the Circuit Court of Shelby County. No. 10-MR-12 Honorable Kimberly G. Koester, Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court correctly interpreted the Freedom of Information Act to authorize an attorney fees award when the Village of Tower Hill voluntarily produced records sought by James Perdue, we affirm. Where the amount of attorney fees awarded was consistent with the requirements of the statute, we affirm the award.

¶ 2 This case involves a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2010)) request made by James Perdue and directed to the Village of Tower Hill (Village). The Village timely responded and proposed an agreement limiting the scope of Perdue's records request. Perdue refused the Village's proposal and filed suit. Ultimately, the parties

came to an agreement that the Village would provide some of the records Perdue sought. Perdue sought approximately $17,000 in attorney fees. The court awarded attorney fees, but only $6,500. Both sides appeal. At issue is whether Perdue "prevailed" in his FOIA request since the trial court did not formally order the Village to produce the records. A party must "prevail" in order to be awarded attorney fees. 5 ILCS 140/11(i) (West 2012). In addition, Perdue asks this court to conclude that a prevailing party is entitled to 100% of the fees sought. For the reasons stated in this order, we affirm.

¶ 3 FACTS

¶ 4 James Perdue is a former resident of the Village of Tower Hill, a community of approximately 650 residents. James Perdue and members of his family have filed multiple requests with the Village pursuant to the FOIA (5 ILCS 140/1 *et seq.* (West 2010)). According to information contained in the Village's brief on appeal, the Village has been involved in 42 different FOIA requests filed by Perdue and his family. The Village claims that Perdue often asked for records that the Village had already produced pursuant to previous requests.

¶ 5 In a FOIA request dated February 25, 2010, Perdue requested:

> "A copy of the contract for services and any extensions thereof between the Village of Tower Hill and Michael Antoline, Attorney at Law; a copy of all billings received from Michael Antoline, Attorney at Law; and a copy of all disbursements of funds by the Village of Tower Hill to Michael Antoline, Attorney at Law."

The Village received this request on March 5, 2010, and responded on March 12, 2010, by acknowledging receipt of Perdue's request. The Village informed Perdue that there was no contract for services with its attorney, and indicated that it would be extending the five-day deadline for response as to the billings and payments. The Village also requested clarification of Perdue's use of the word "disbursements." Finally, the Village suggested that its representatives confer with Perdue in an effort to make the request more manageable than what could potentially be 11 years of records.

¶ 6 The Village followed up in a letter dated March 19, 2010, denying Perdue's request as being unduly burdensome. The Village also indicated that the denial was based in part upon concerns that Perdue would attempt to embarrass Village officials by circulating anonymous letters, as he had previously done.

¶ 7 Perdue did not file a response to the Village's request for clarification of the term "disbursements," and did not confer with the Village officials about potentially limiting the scope of his records request that spanned 11 years. Instead, Perdue filed a petition for judicial review on May 18, 2010. Twice, Perdue's service of process on the Village attorney was completed improperly. A third attempt at serving the Village treasurer was likewise improper. Finally, on August 31, 2010, Perdue's petition was properly served upon the Village president. The Village filed an amended answer and response on March 10, 2011, alleging that production of the requested records would unduly burden the Village because of the volume of the records requested.

¶ 8 The court held a pretrial hearing on November 21, 2013. After an extensive hearing, the Village agreed to produce six years of billing records to the trial court. The Village produced the documents to the court in January 2014, and the court conducted an *in camera* review. By having the court review the records, the Village was hoping that the court would deny the release of some documents and would redact other documents to protect the attorney-client privilege. The court set a March 7, 2014, hearing date on all remaining matters. At that hearing, the court advised the Village that it intended to disclose the records requested to Perdue. The Village protested and asked for the records to be redacted. The court ordered the Village to present its proposed redacted records to the court before March 24, 2014.

¶ 9 On April 15, 2014, Perdue filed his motion seeking attorney fees and costs, alleging that the Village had no lawful justification for its failure to produce the requested records. Perdue alleged that he had paid approximately $17,000 in attorney fees to two attorneys since the inception of this FOIA request. The Village responded that Perdue was not entitled to indemnification because his requests were unduly burdensome, that Perdue engaged in gross misconduct during the course of the proceedings, that he delayed the process by not identifying specific documents as the subjects of his request, and that Perdue abused the FOIA in order to disrupt Village functions.

¶ 10 At the hearing, the trial court announced its decision to redact the records, and then gave the redacted records to Perdue. The court then turned to the request for attorney fees.

Perdue introduced affidavits from his attorneys. The Village did not argue that the amount of hours billed or the hourly billing rates were unreasonable.

¶ 11 On June 17, 2014, the trial court issued its order awarding Perdue $6,500 of the $17,000 he sought. The court found that the award was appropriate because only a portion of the records originally requested were released, that the records released were by agreement of Perdue and the Village, and that the litigation could have been resolved in less time, which would have resulted in lower legal fees.

¶ 12 Perdue appeals from this order arguing that the trial court abused its discretion in not awarding all of the requested fees as mandated by the FOIA, because he "prevailed" with his request. The Village cross-appeals arguing that Perdue did not respond to its affirmative defenses, and thus, the court should deem those defenses admitted. The Village also argues that the trial court abused its discretion in awarding any attorney fees because the court did not consider that Perdue's abusive tactics were designed to disrupt the Village's ordinary work, and also did not consider Perdue's misconduct during the litigation.

¶ 13 LAW AND ANALYSIS

¶ 14 We first consider an issue raised by the Village in its cross-appeal, as the issue could be dispositive. The Village argues that Perdue failed to respond to its affirmative defenses, and thus, he admitted all defenses pled. During the course of the case's procedural history, the Village filed a motion to deem facts admitted and for judgment on the pleadings. As settlement approached, the Village withdrew the motion. From our review of the record, we find that Perdue did respond to the affirmative defenses. The record contains a document,

entitled "Plaintiff's Response to the Defendant's Affirmative Defenses." Perdue filed his response on November 12, 2013. Accordingly, we deny the Village's request that we consider its defenses as admitted.

¶ 15 At issue in this case is whether Perdue "prevailed" in his FOIA suit and is therefore entitled to attorney fees. Assuming that Perdue "prevailed," we must also determine whether the court was required to award all attorney fees that Perdue sought. Section 11(i) of the FOIA (5 ILCS 140/11(i) (West 2012)) was amended effective January 1, 2010. This section currently provides:

> "If a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorneys' fees and costs. In determining what amount of attorney's fees is reasonable, the court shall consider the degree to which the relief obtained relates to the relief sought." 5 ILCS 140/11(i) (West 2012).

Prior to the amendment, an attorney fees award was allowed if the requester "substantially prevailed" in his FOIA request. 5 ILCS 140/11(i) (West 2008). The statutory language now mandates an award of attorney fees if the requester "prevails." We must first determine whether Perdue "prevailed" in his requests to the Village, as contemplated by the FOIA.

¶ 16 The State of Illinois enacted the FOIA as a matter of public policy tied to the "fundamental philosophy of the American constitutional form of government *** that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public

employees." 5 ILCS 140/1 (West 2012). The purpose of allowing document requests is to promote the people's fulfillment of their duties to converse about public officials, to make informed political judgments, and to monitor our government to ascertain if the government is conducting itself in the public's best interests. *Id.* "It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act." *Id.*

¶ 17 After a requester files his or her request for records, the public body must promptly respond by either complying with the request, denying the request pursuant to specific statutory reasons, or extending the time for response. 5 ILCS 140/3(d) (West 2012). The applicable time limit by which the public body must comply, deny, or extend the time to respond is five days. *Id.* The public body may extend the production deadline due to difficulties that it encounters in finding and producing the documents. 5 ILCS 140/3(e) (West 2012). Additionally, the public body could be exempt from producing the records if the request is considered "unduly burdensome," with no method by which the public body could narrow the request "and the burden on the public body outweighs the public interest in the information." 5 ILCS 140/3(g) (West 2012). Before invoking this exemption, the public body is required to offer the requester an opportunity to confer in an effort to mutually agree upon the records to be produced. *Id.* If the public body denies the request, the public body must notify the requester and provide specific reasons for its denial. 5 ILCS 140/9(a) (West 2012). Any person who is denied access to the records may file suit for injunctive or declaratory relief. 5 ILCS 140/11(a) (West 2012).

¶ 18 In this case, the parties came to an agreement that limited the records request from 11 years of records to 6 years of records. This agreement occurred after Perdue filed his petition in the circuit court. Perdue takes the position that because the agreement occurred after suit was filed, he "prevailed" in his suit, and therefore, the court must award him all of the attorney fees he requested.

¶ 19 As stated earlier in this order, the language in this statutory section was amended from "substantially prevails" to "prevails." Subsequent to the amendment, two cases have interpreted the meaning of the word "prevails." Perdue argues that the latter of the two cases supports his interpretation–that he "prevailed" because the Village produced the records only after he filed suit. The Village argues that because aspects of the records Perdue requested were protected by the attorney-client privilege or otherwise required redaction, Perdue did not "prevail" even though the Village ultimately agreed to produce the records. The Village also argues that the cases cited by Perdue are distinguishable because the Village never admitted that it wrongfully withheld the records from Perdue as the public bodies did in the cited cases.

¶ 20 *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, 977 N.E.2d 1216, was the first case to tackle the issue of what it means to "prevail" in a FOIA suit subsequent to the statutory amendment. The case of *Rock River Times* involved the newspaper's efforts to obtain a copy of a letter written by a school principal to the school superintendent. *Id.* ¶ 1, 977 N.E.2d 1216. The principal wrote the letter to the superintendent in response to a reprimand. *Id.* The newspaper filed a FOIA request for the

letter. *Id.* At first, the school refused to release the letter, citing two exemptions–personal privacy and violation of a statute regarding personnel records. *Id.* ¶¶ 1, 4, 977 N.E.2d 1216. Later, the school cited to a third exemption, claiming that it could not release the letter because it related to adjudication of an employee grievance or a disciplinary case. The newspaper then filed suit against the school pursuant to the FOIA. *Id.* ¶ 1, 977 N.E.2d 1216. Before the court issued its ruling, the school released the letter and filed a motion to dismiss the newspaper's complaint. *Id.* ¶ 1, 10, 977 N.E.2d 1216. The newspaper asked the court to deny the school's motion to dismiss and filed a petition seeking attorney fees and a civil penalty. *Id.* ¶¶ 10-11, 977 N.E.2d 1216. In response, the school filed a motion for summary judgment on the basis that the newspaper had not prevailed in its FOIA suit, and thus was not entitled to attorney fees. *Id.* ¶ 15, 977 N.E.2d 1216. The court granted the school's summary judgment motion and granted the newspaper's request for a civil penalty, but denied the newspaper's request for attorney fees. *Id.* ¶ 1, 977 N.E.2d 1216. Both sides appealed. *Id.*

¶ 21 Prior to the statutory amendment, the court could award attorney fees and conclude that the requester "substantially prevailed," even in cases where the production occurred without a court order directing the public body to release the records. *Id.* ¶ 18, 977 N.E.2d 1216. Illinois courts broadly interpreted this section to allow attorney fees in cases where the public body produced the records before the court ordered their production. *Id.* The trial court stated that it presumed the legislature was aware of these cases and thus by deleting the term "substantially," the legislature intended to effect a change in the law. *Id.* Because of this amendment, the court believed that the school district's voluntary compliance was

insufficient to establish that the newspaper "prevailed." *Id.* The trial court concluded that the newspaper did not receive "judicially sanctioned relief," and therefore, the newspaper did not prevail in its suit and was not entitled to attorney fees. *Id.*

¶ 22 On appeal, the court detailed the federal and state history of the FOIA sections on attorney fees and the deletion of the word "substantially," noting, "the normal presumption is that an amendment is intended to change the law as it formerly existed, rather than to reaffirm it." *Id.* ¶ 38, 977 N.E.2d 1216 (citing *Board of Trustees of the University of Illinois v. Illinois Education Labor Relations Board,* 2012 IL App (4th) 110836, ¶ 32, 966 N.E.2d 1239). The appellate court agreed with the trial court's reasoning and held that "[b]y deleting the word 'substantially,' which modified the verb 'prevail,' the legislature evinced an intent to require nothing less than court-ordered relief in order for a party to be entitled to attorney fees under the FOIA." *Id.* ¶ 40, 977 N.E.2d 1216. Accordingly, the court found that the newspaper was not a "prevailing party" and was not entitled to attorney fees. *Id.* ¶ 41, 977 N.E.2d 1216.

¶ 23 The more recent case, *Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, 7 N.E.3d 102, disagreed with the holding of *Rock River Times*, and held that a court order is not a prerequisite to an award of attorney fees under the FOIA. *Id.* ¶ 27, 7 N.E.3d 102. Uptown People's Law Center is a not-for-profit organization representing prisoners on issues of conditions of confinement. *Id.* ¶ 3, 7 N.E.3d 102. Uptown requested records from the Illinois Department of Corrections relating to prison conditions, facility maintenance, and sanitation. *Id.* The Department of Corrections did not

respond to the requests and later denied receiving the requests. *Id.* Uptown filed its complaint to obtain a judgment declaring that the IDOC violated the FOIA, to obtain the requested records, and to obtain an attorney fees award. *Id.* Later, Uptown filed a specific petition for attorney fees. *Id.* ¶ 4, 7 N.E.3d 102. Two months later, the IDOC produced the records. *Id.* Relying upon *Rock River Times*, the trial court denied Uptown's petition for attorney fees because the IDOC tendered the requested documents without a court order. *Id.* ¶ 5, 7 N.E.3d 102.

¶ 24 On appeal, the court disagreed with the *Rock River Times* and concluded that the term "prevails" is ambiguous. *Id.* ¶ 12, 7 N.E.3d 102. The court noted that the term "prevails" was not defined within the FOIA. *Id.* The court stated that the term could mean that the court must enter an order directing the public body to release the requested records, but that courts could also interpret the term to mean that the public body released the records without a court order. *Id.* "Either interpretation would arguably further FOIA's goals, albeit in varying degrees, of expeditiously disclosing information to the public and encouraging the public to seek judicial relief." *Id.*

¶ 25 The *Uptown People's Law Center* court reviewed the history of the Illinois FOIA's attorney fees provision as well its federal equivalent. Prior to the 2010 amendment of the Illinois FOIA, there was no doubt that court-ordered relief was not a mandatory prerequisite for an attorney fees award. See *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201-02, 689 N.E.2d 319, 325-26 (1997); *Duncan Publishing Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 786-87, 709 N.E.2d 1281, 1287-88 (1999). Thereafter, the United States Supreme Court

construed the term "prevailing party," which is used in the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 *et seq.* (2000)) and the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.* (2000)). The Supreme Court held that "prevailing party" required a judicially sanctioned change in the relative positions of the parties–that voluntary production of the desired records was not enough. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 605 (2001). The Court noted that following a rule that allowed attorney fees simply because the public body changed its position and voluntarily produced the records could make a defendant less likely to change positions. *Id.* at 608.

¶ 26 Congress then amended the FOIA to ensure that the *Buckhannon* decision would not apply. The amendment states "a complainant has *substantially prevailed* if the complainant has obtained relief through either–(I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency." (Emphasis added.) 5 U.S.C. § 552(a)(4)(E)(ii)(I), (II) (2012).

¶ 27 The Illinois legislature then amended the FOIA, but did so without using the definitional strategy employed by the federal government. Instead, the Illinois legislature removed the term "substantially," and removed the court's discretion by changing the verb from "may" to "shall." Looking at the legislative history of this amendment, the *Uptown* court found that the Illinois legislature did not intend to apply the *Buckhannon* holding to the Illinois FOIA, and did not intend to narrow the prevailing party's access to attorney fees. *Uptown People's Law Center*, 2014 IL App (1st) 130161, ¶ 18, 7 N.E.3d 102. "[T]he

legislative history reflects an intention to be more favorable to individuals who make meritorious FOIA requests." *Id.* (citing 96th Ill. Gen. Assem., House Proceedings, May 27, 2009, at 92). The *Uptown* court quoted Representative Madigan, who stated, " 'There will be mandatory attorney fees to FOIA requesters who prevail in court. The current law is only permissive.' " *Id.* (quoting 96th Ill. Gen. Assem., House Proceedings, May 27, 2009, at 93 (statements of Representative Madigan)). Additionally, the *Uptown* court quoted Senator Harmon, who stated, " '[T]here have been many court decisions that have defined the scope of FOIA, and we do not intend to overturn or otherwise interfere with these decisions, as I understand it.' " *Id.* (quoting 96th Ill. Gen. Assem., Senate Proceedings, May 28, 2009, at 42 (statements of Senator Harmon)).

¶ 28 In *Uptown People's Law Center*, the court noted that the *Rock River Times* court did not find the term "prevails" to be ambiguous, and therefore did not consider the legislative history of the amendment. *Id.* ¶ 20, 7 N.E.3d 102. After reviewing the legislative history, the court agreed that the legislature deliberately intended to effect change with application of the statute in FOIA cases. *Id.* "[W]e find the modification was intended to ensure that successful plaintiffs could obtain attorney fees regardless of the extent to which they had prevailed, no matter how slight." *Id.* The court found that removal of the word "substantially" was intended to increase the instances in which the requester could obtain attorney fees after receiving a requested document–not to decrease those instances. *Id.*

¶ 29 We agree with the legislative interpretation advanced by the appellate court in *Uptown People's Law Center*. This interpretation is expansive and in keeping with a stated purpose

of the FOIA–"to operate openly and provide public records as expediently and efficiently as possible." 5 ILCS 140/1 (West 2012). The term "prevail" is subject to more than one possible interpretation. The term "prevail" could mean that the requester "prevailed" after trial on the merits or the term could mean that the requester succeeded in obtaining at least some of the requested documents because the public body elected to provide the documents rather than go to trial. Because of this ambiguity, we must consult the legislative history. Based upon statements made by legislators, we agree with the *Uptown People's Law Center* court that the legislature intended to mandate an attorney fees award if the requester prevailed.

¶ 30 In addition, the legislature expressed its intent that the amendment would not change the case law already decided. In other words, a requester should still be able to obtain an award of attorney fees even if the public body produced the records without the court's ordering it to do so. We hold that in order to "prevail" in a FOIA suit, a court order is not required and a requester may be entitled to attorney fees if the requester prevails by obtaining the records after filing a suit.

¶ 31 However, we conclude that, contrary to Perdue's argument, the statute does not mandate that the court award *all* of the attorney fees incurred. Although a party "prevails" when a public body releases records after the requester files a FOIA suit, that does not necessarily mean that the requester is entitled to an unlimited award of attorney fees. The statute contemplates situations where the court could award less than the full amount of attorney fees incurred by the requester. The statutory language directs the court to look at the

original request and to compare that request with what records were ultimately produced–"the degree to which the relief obtained relates to the relief sought." 5 ILCS 140/11(i) (West 2012). Although the legislature removed the court's discretion to award or not award attorney fees, the trial court's ultimate ruling requires an assessment of the particular request and production. Furthermore, the legislature's use of the word "reasonable" ("the court shall award *** reasonable attorneys' fees and costs" *id.*) implies discretion in the amount of an award. When we consider the term "reasonable" in conjunction with the direction to consider "the degree to which the relief obtained relates to the relief sought," we find that the legislature intended the courts to consider the facts of each case relative to these statutory factors.

¶ 32 We note that the attorney fees provision within the FOIA is not meant as a punishment or as a reward. *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 786, 709 N.E.2d 1281, 1289 (1999) (citing *Hamer v. Lentz*, 132 Ill. 2d 49, 59, 547 N.E.2d 191, 196 (1989)). "Its purpose, largely, is to prevent the sometimes insurmountable barriers presented by attorney's fees from hindering an individual's request for information and from enabling the government to escape compliance with the law." *Id.* (citing *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1363-64 (D.C. Cir. 1977)).

¶ 33 In this case, we find that the trial court's award of approximately one-third of Perdue's attorney fees was not an abuse of discretion. We note that the Village reached out to Perdue in an effort to reach an understanding before Perdue filed his claim in court. As the trial court noted, this case could have been resolved in far less time. Perdue could have incurred

far less attorney fees. Perdue chose to file this suit in lieu of working out an agreement with the Village. In doing so, access to the records was delayed and Perdue incurred more fees. We find that the court's award struck an appropriate balance between the relief sought and the relief obtained.

¶ 34 We also find that the attorney fee award was reasonable. Although Perdue was successful in obtaining approximately 55% of the records requested, his attorney fees award only amounted to about 38% of the total amount he incurred. In determining what would be a reasonable attorney fees award, the trial court clearly considered all of the facts of this case–not just the percentage of records produced by the Village. In its cross-appeal, the Village argues that the trial court did not consider the rationale behind Perdue's requests and his misconduct in not responding to discovery requests. As this was a bench trial, Judge Koester was the trier of fact. In Illinois, there is a presumption that the judge considered all competent evidence. *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 597, 740 N.E.2d 501, 508-09 (2000). In her order, Judge Koester specifically stated that the Village claimed exemptions to Perdue's requests and maintained that the requests were unduly burdensome. Although the order does not contain the exact words argued by the Village on appeal, the Village's arguments were part of the record considered by the court. Accordingly, we affirm the attorney fees award.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, we affirm the judgment of the Shelby County circuit court.

¶ 37 Affirmed.