2017 IL App (2d) 160994-U
No. 2-16-0994
Order filed June 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WARREN R. GARLICK,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 16-MR-501
	)	
BLOOMINGDALE TOWNSHIP and	)	
MILTON TOWNSHIP,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiff's FOIA complaint as moot, where the requested data was provided to plaintiff in the format he requested. Affirmed.

¶ 2 Plaintiff, Warren R. Garlick, *pro se*, appeals from the trial court's dismissal of his complaint (735 ILCS 5/2-619(a)(9) (West 2016)), filed pursuant to the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) against defendants, Bloomingdale Township and Milton Township. Plaintiff argues that his claim is not moot and, alternatively, that certain FOIA exemptions do not apply. We affirm on mootness grounds.

¶ 3 I. BACKGROUND

¶ 4 On November 16, 2015, plaintiff submitted his FOIA request to Bloomingdale Township. He noted that the township "maintains a database of parcel property information used to access property tax. The township also makes available to the public a web portal where individual property parcel records can be retrieved." Plaintiff listed the link to the portal: http://www.bloomingdaletownshipassessor.com/SD/BT/AssessorDB/Search.aspx. He requested "a copy of the database containing *this data* in its native file format. Please advise as to the cost of providing the same." (Emphasis added.)

¶ 5 On November 20, 2015, the township responded that, because the data plaintiff sought was available online, it was not required to provide a copy of it to him. The township noted that the information plaintiff sought was available at www.blomingdaletownshipassessor.com and that the link in his requesting email was correct to access the data "a couple pages in." The township also notified plaintiff that, in the event its response could be construed as a denial under FOIA, plaintiff had the right to review by the Attorney General's public-access counselor or that he could seek judicial review.

¶ 6 In a January 6, 2016, email to the township, plaintiff stated that he interpreted the township's response as a denial because the directions to utilize the website, where data could be retrieved one record at a time, was a "very laborious" process that failed the reasonable-access requirement under section 8.5(a) of FOIA. 5 ILCS 140/8.5(a) (West 2016). Plaintiff invited the township to reconsider its denial, and he also requested the name of the entity's attorney who had prepared the township's original response. Finally, plaintiff proposed that his request could be re-framed as one seeking all internal emails and documents concerning his original FOIA request and the township's legal invoices for the preceding three months.

¶ 7 On January 19, 2016, the township responded:

> "Prior to the 140/8.5 amendment of the FOIA act to allow governments to point a requester to their website when records were already available online, the Township had denied similar requests for more malleable spreadsheet versions of the Assessor's software as unduly burdensome under 5 ILCS 140/3(g). The reasons for these denials were many, including that the proprietary software that is behind the data as is visible on our website at www.bloomingdaletownshipassessor.com contains proprietary formulae, preliminary notes, and personal information that cannot be manipulated by our staff to be redacted out of the data. It would not be feasible for Assessor staff to attempt to create these records in such requested formats."

The township also stated that, in addition to "infeasibility and undue burden," plaintiff's request appeared to be for commercial purposes. Further, the township's software provider had in the past noted that it would cost $350 and take about three weeks to provide an electronic copy of the database. It invited plaintiff to make such a request if he desired.

¶ 8 As to Milton Township, plaintiff's November 16, 2015, request noted that the township maintained a database of parcel property information and has made available to the public a web portal where individual property parcel records can be retrieved. Plaintiff requested, pursuant to section 6(a) of FOIA, "a copy of the database containing *this data* in its native file format. Please advise as to the cost of providing the same." (Emphasis added.) The township replied, on November 17, 2015, that it was not feasible for it to provide the records because the information plaintiff requested consisted of over 37,000 individual property records and its "property records software, as currently constituted, [wa]s incapable of generating assessment records on a Township-wide basis." Milton Township directed plaintiff to access the information on its website, where it could be retrieved on a parcel-by-parcel basis.

¶ 9 In a reply, dated January 6, 2016, plaintiff stated that he sought only "a copy of an existing database file" in the township's possession, not that it create a new file/report. He maintained that his request involved simply copying the "database file from its source on a computer hard drive onto a portable media such as a flash drive," which "should only take a few minutes." Plaintiff asserted that retrieving the information from the website did not constitute "reasonable access," and he considered the township's response as an outright denial of his FOIA request. Similar to the Bloomingdale Township correspondence, he requested the names of the townships attorneys and suggested that he could re-frame his request as one seeking: (1) internal emails and documentation relating to his original request; and (2) legal invoices for the last three months. The township stated in response that it had already "made it very clear" in its November 17, 2015, letter that plaintiff's request "had been denied."

¶ 10 On April 18, 2016, plaintiff filed a two-count complaint against the townships for declaratory judgment and injunctive relief. In each count (directed to each township, respectively), he alleged that his FOIA letters "requested a copy of the entire database containing the data *that was being made available online* in its native file format." (Emphasis added.) Plaintiff further alleged that the townships' directions that he retrieve the data from their web portals was very laborious and did not constitute reasonable access under FOIA. 5 ILCS 140/8.5(a) (West 2016) (a public body is not required to copy records that are published on its website where they can be reasonably accessed). He prayed for an order enjoining the townships to provide him the material he requested in the format—native file format—that he requested. Plaintiff also sought civil penalties, costs, and attorney fees.

¶ 11 On May 9, 2016, defendants' attorneys wrote to plaintiff, stating that, pursuant to federal copyright law and proprietary claims, the townships were prohibited from providing the

requested data in its native file format. However, they offered to provide the data in the form of an Excel database file for $350 per township. The letter noted that the data is maintained in the "Assessors IMS – Computer Aided Mass Appraisal" (CAMA software) owned by JRM Consulting, Inc., which maintains and updates the assessment information on defendants' behalf. The letter stated that defendants were prohibited from providing the data in its native file format because their software-license agreement with JRM prohibits unlicensed disclosure of data in its native file format. Such disclosure would violate JRM's proprietary interest in the CAMA software and "enable the recipient to reverse engineer the CAMA software program." FOIA sections 7(1)(a) and 7(1)(g), which exempt from disclosure copyrighted information and information subject to proprietary claims, applied.

¶ 12 Plaintiff inquired why the townships would charge a fee for the Excel file, and the townships responded that they are allowed to recoup their costs for commercial requests. (Plaintiff had *not* affirmatively represented that his request was *not* for commercial purposes.) In response, plaintiff encouraged counsel to file their appearance and responsive pleadings. He did not directly answer the question whether his request was for commercial purposes.

¶ 13 On May 26, 2016, defendants moved, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)), to dismiss plaintiff's complaint, with prejudice. They argued that: (1) pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)), plaintiff's complaint should be dismissed because the information requested in its native file format is exempt from disclosure under FOIA (5 ILCS 140/7(1)(g), 7(1)(i), 7(1)(a) (West 2016) (proprietary information; could produce private gain; and protected by federal copyright and state trade secrets statutes); and (2) alternatively, pursuant to section 2-

615 of the Code (735 ILCS 5/2-615 (West 2016)), plaintiff's request for attorney fees and a civil penalty should be stricken for failure to make sufficient allegations in support of this relief.

¶ 14 On July 8 and 9, 2016, townships waived the $350 fee "in the interest of bringing the pending litigation to a close." They enclosed in their letters "a copy of the data you requested in your November 16, 2015[,] FOIA request in an electronic sortable Excel database file." In their letters, the townships stated that plaintiff had verbally represented that his FOIA request was not for a commercial purpose and that he was simply engaged in the process as a " 'hobby,' " but plaintiff had not provided written confirmation of such.

¶ 15 In a May 20, 2016, affidavit, Jerry Marquardt, president of JRM Consulting, averred that the Assessors IMS is a computer-aided mass appraisal software system, of which JRM is the sole and exclusive owner. The software is used to maintain, sort, and organize real property characteristics, data, values, and other information associated with real properties located within the assessment jurisdictions. According to Marquardt, the software and its data files, in their native file format, are subject to copyright protection and contain proprietary information, trade secrets, and valuable formulae, including, among others, "information on program code, database fields, database names, database schemas and table layouts." The foregoing, he averred, "are sufficiently secret to derive economic value, actual or potential, from not being generally known to other unauthorized persons who can obtain economic value from [their] disclosure or use."

¶ 16 Marquardt further stated that JRM granted the townships a license to use the software. Pursuant to the license agreement, the townships are prohibited from disclosing the information from the software in its native file format. He noted that the data contained in the software "is translated to the Townships' internet web pages for public reference and inspection and the webpages do not contain the copyrighted, proprietary[,] and trade secret information contained in

the" software. Marquardt further averred that he reviewed plaintiff's FOIA requests and determined that the disclosure of all of the requested information in its native file format would require the townships to disclose JRM's protected software, intellectual property, trade secrets, and proprietary information. JRM does not consent to such disclosure in its native file format because it would infringe on its intellectual property rights and consist of an unauthorized disclosure of JRM's trade secrets and proprietary information. The unauthorized and unlicensed disclosure of the requested information in its native file format will cause substantial competitive harm to JRM, where plaintiff or others could use it for commercial gain or to create competing software. Marquardt offered to transfer the requested data maintained in the software to a single sortable electronic database file such as Excel for the actual cost thereof, or $350.

¶ 17 At a June 22, 2016, deposition, Marquardt testified that the native file format is SQL server database, and he asserted copyright over the program code, table layouts, and database fields, names, and schema. He could not estimate the economic value that could be derived if the information plaintiff requested was open to the public because it "depends on how widely it was abused." Marquardt stated that someone could deduce how his application works from having access to the database. As for exporting data pursuant to the townships' request, his company removes all proprietary information (*i.e.*, schemas and databases, descriptions, relationships, etc.) and dumps it into an Excel file. The process is manual and takes between two to three hours. In response to plaintiff's questions concerning a Department of Revenue publication called "Illinois Computer Assisted Appraisal System," Marquardt responded that he was not familiar with the document. As to questions related to the Real Property Appraisal Manual, he refused to answer questions on the grounds that his answers would reveal proprietary information.

¶ 18 In a July 15, 2016, email, plaintiff wrote to defendants' counsel that its provision of data in an Excel spreadsheet, as opposed to an "SQL Server database, as requested," was not responsive to plaintiff's FOIA request. (Apparently, this was the first time that plaintiff referred to the native file format as being synonymous with an SQL server database-formatted file.)

¶ 19 In his response to defendants' motion to dismiss, dated July 28, 2016, plaintiff argued that: (1) there is no trade secrecy applicable to the database in its native file format because there is no secrecy attached to the functionality of JRM's software, where the basis for the property taxation is so widely known to the public; (2) there is no copyright of the database in its native file format because, in this controversy, which concerns databases and not software, the data follow standard industry-wide database-design procedures that constitute ideas, which cannot be copyrighted (in contrast to expressions of ideas, which can be copyrighted); and (3) civil penalties can be awarded because defendants have abandoned FOIA section 8.5's exemption.

¶ 20 On July 28, 2016, plaintiff moved for an evidentiary hearing to be heard contemporaneously with his response to defendant's motion to dismiss. He argued that: (1) Marquardt's affidavit was conclusory; (2) Marquardt's deposition was "an exercise in futility" because most of the questions were objected to by Marquardt's attorney or the townships' attorneys on the grounds that answering them would reveal proprietary information; and (3) documentation obtained after the deposition, *i.e.*, documents concerning plaintiff's FOIA request to Wheatland Township, which also uses the JRM software, "have a significant bearing on the Marquardt" deposition. Plaintiff attached a copy of several emails between him and the Wheatland Assessor, along with the Wheatland Assessor and Marquardt. As to the latter, Marquardt responded to the assessor in one email that he would be able to provide a copy of certain data in several days.

¶ 21 On August 1, 2016, defendants transferred the data (*i.e.*, "the information you requested *** in your November 16, 2015," FOIA requests, namely, an electronic database file, in its native file format, "of the parcel property information that is made available to the public on the [townships' assessors'] web portals") to plaintiff in SQL Server file format. Counsel asked plaintiff to "let me know if you will voluntarily dismiss this litigation by tomorrow" and, otherwise, defendants would seek leave to file an amended motion to dismiss based on plaintiff's possession of the requested records in the requested format.

¶ 22 Defendants filed an amended motion to dismiss on August 5, 2016. 735 ILCS 5/2-619.1 (West 2016). They argued that: (1) plaintiff's request for injunctive relief, attorney fees, and costs should be stricken as moot under section 2-619(a)(9) of the Code because plaintiff was in possession of the requested records (*i.e.*, "the individual property parcel records made available to the public on the Townships' web portals in SQL Server database formatted files"); (2) alternatively, to the extent that plaintiff sought data intermixed with JRM's proprietary data, the complaint should be dismissed because the proprietary data was exempt from disclosure under FOIA: (a) pursuant to JRM's claim that it contains proprietary information, the disclosure of which would cause competitive harm to JRM; (b) pursuant to JRM's claim that the data contains valuable formulae and designs, the disclosure of which could reasonably be expected to produce private gain; and (c) because the townships were prohibited, under federal copyright and state trade secrets statutes, from providing the data intermixed with JRM's proprietary information; and (3) plaintiff's request for a civil penalty and attorney fees should be stricken under section 2-615 of the Code for plaintiff's failure to make sufficient allegations in support thereof.

¶ 23 On August 10, 2016, plaintiff moved for leave to conduct additional discovery. Relying on documents relating to another requestor's FOIA request, plaintiff sought to re-depose

Marquardt in order to challenge Marquardt's deposition testimony that the data-extraction process was a manual process that takes two to three hours each time it is performed and justifies a $350 cost. Plaintiff's position was that the computer or SQL query program takes only a few minutes to launch to automatically export data. The trial court, on August 19, 2016, stayed plaintiff's motion, pending defendants' amended motion to dismiss.

¶ 24 On November 22, 2016, the trial court granted defendants' motion to dismiss, finding that plaintiff received the information in the format that "was ultimately requested and that anything that was not provided was subject to the exemptions" as set forth by defendants. Also, the court denied, as moot, the motion for an evidentiary hearing.

¶ 25 II. ANALYSIS

¶ 26 Plaintiff argues that the trial court erred in dismissing his complaint. He contends that his claim is not moot because the townships did not provide him with the data he requested and that certain exemptions do not apply. We conclude that the complaint was properly dismissed.

¶ 27 Section 2-619(a)(9) of the Code allows for dismissal of an action on the ground that "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016). A motion to dismiss under section 2-619 admits well-pleaded facts, but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. In considering a dismissal under section 2-619(a)(9), we consider whether "the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). We review *de novo* a section 2-619 dismissal. *Moon v. Rhode*, 2016 IL 119572, ¶ 15.

¶ 28 Under FOIA, Illinois has established a public policy 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. 5 ILCS 140/1 (West 2016). "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.* FOIA also provides that "[r]estraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." *Id.*

¶ 29 Defendants argue that the trial court properly dismissed plaintiff's complaint as moot, where they produced the data plaintiff requested and in the format he requested: the individual property parcel data made available to the public on the townships' web portals in SQL Server database-formatted files. Plaintiff, they point out, concedes that he is in possession of these files. Addressing plaintiff's claim that he requested more information than what is made publicly available on the townships' websites, defendants contend that plaintiff's letter belies his claim. We agree.

¶ 30 In his November 16, 2015, letter to each township, plaintiff noted that the township "maintains a database of parcel property information used to access property tax. The township also makes available to the public a web portal where individual property parcel records can be retrieved." Plaintiff listed the link to the respective township's portal, and he requested "a copy of the database containing *this data* in its native file format. Please advise as to the cost of providing the same." (Emphasis added.)

¶ 31 Defendants maintain that plaintiff's request for a database containing "this data" immediately follows his express reference to the townships' web portals where the data can be retrieved and his citation to defendants' web addresses for the requested information clearly reflects that the request for "this data" refers to the data available on the web portals. Furthermore, defendants assert that, after they provided plaintiff the *same* data in electronic Excel file format, he responded that the townships' disclosure was inadequate *only* because the data was in an Excel format, as opposed to SQL Server file format "as requested." He raised no issue, they maintain, concerning the scope of the information the townships provided in the Excel file disclosure. Thus, his argument that he requested *more* information than what is made publicly available on the townships' websites in his FOIA requests is unsupported by the plain language of the requests. Moreover, his argument, defendants assert, is inconsistent with his response to the townships after he was provided with the requested data in an Excel format.

¶ 32 We agree with defendants' argument that plaintiff's claim was properly dismissed as moot because he received the data he requested in his FOIA letter and, as he clarified shortly thereafter, in the format he requested. See *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984) (an issue is moot where an actual controversy no longer exists between the parties or where events have occurred that make it impossible for the court to grant effectual relief). Plaintiff's letter to each township clearly referred to the data made available on each township's web portal as being the desired data, not their entire databases of property parcel information. To the extent the letter was ambiguous, plaintiff's subsequent communications did not clarify that his request was for anything other than the web portal data, and the communications addressed either the format in which he desired to receive the requested data, or the reasonable-access issue. Indeed, in his complaint, plaintiff alleged only

that the information he sought was "a copy of the entire database containing the data that was being made available *online* in its native file format." He argued only that defendants' directions to retrieve that data from their websites did not constitute *reasonable access* under FOIA because it would be too laborious a process. Further, in his response to defendants' amended motion to dismiss, plaintiff acknowledged that he referenced the records on the townships' website portals and that, "granted, much of the subsequent discussion between the [defendants and plaintiffs] focused on whether, pursuant to the [Act's provision concerning situations where public records are available online] *** [.] *** [and] whether Plaintiff could reasonably retrieve" (emphasis omitted) the online information. Nevertheless, without citing, then or now, to any supporting record evidence up to the time of the motion-to-dismiss filings, he maintains that the focal point of his FOIA request has always been a copy of the townships' *entire* property assessment databases. We reject this argument because the record belies it. What is clear is that plaintiff's request broadened at the time of the motion-to-dismiss filings to encompass all data maintained by defendants. Defendants' obligation was to sufficiently and timely respond to the original request, as clarified shortly thereafter to specify the desired format. See 5 ILCS 140/3(b), (c), (e) (West 2016) (for non-commercial-purposes requests, public body must "promptly provide" a copy of the requested public record required to be disclosed; it must either comply with or deny a request within five business days, unless extended under certain circumstances); 5 ILCS 140/3.1(a), (b) (West 2016) (public body shall respond to a request for commercial purposes within 21 days and comply with the request within a reasonable period).

¶ 33 Because plaintiff's original request was for the web portal data in its native file format (a point reiterated in his complaint, wherein he raised only reasonable-access claims), and because it is undisputed that defendants provided plaintiff this data, we conclude that the trial court did

not err in dismissing plaintiff's complaint on mootness grounds. As we affirm on this basis, we need not reach the issue whether any exemptions apply.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 36 Affirmed.