

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 150190-U

NO. 4-15-0190

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 29, 2016

Carla Bender

4th District Appellate
Court, IL

VERNON TOLBERT,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
THE ILLINOIS STATE POLICE, BRUCE)	No. 14MR691
BIALORUCKI, and STEVEN LYDDON,)	
Defendants-Appellees.)	Honorable
)	John W. Belz,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing plaintiff's complaint, in which he argued defendants were improperly withholding records he requested pursuant to FOIA, where, *inter alia*, he failed to allege sufficient facts to survive dismissal.

¶ 2 In September 2014, plaintiff, Vernon Tolbert, an inmate at the Menard Correctional Center, filed an amended *pro se* complaint pursuant to the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 to 11.5 (West 2012)), alleging defendants, the Illinois State Police (ISP), Steven Lyddon (ISP's FOIA officer), and Bruce Bialorucki (ISP's legal counsel) (collectively, ISP), were improperly withholding records he had requested. Thereafter, ISP filed a motion to dismiss plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615 (West 2012)), which the trial court granted.

¶ 3 Plaintiff, proceeding *pro se*, appeals, arguing the trial court erred in granting ISP's motion to dismiss. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff is an inmate at the Menard Correctional Center currently serving a 65-year sentence for first degree murder.

¶ 6 On March 25, 2012, plaintiff sent two FOIA requests to ISP, seeking the criminal history reports of five witnesses for the State from his criminal trial.

¶ 7 On March 27, 2012, plaintiff sent a third FOIA request to ISP, requesting "[a]ll information that came over police radio's [*sic*] concerning the incident that occurred on August 27, 2000, time 03:10 a.m., Bar or Tavern, 939 N. Pulaski Rd, Chicago, Illinois, 60651, any and all computer printouts of police radio recordings and all calls, tapes, etc."

¶ 8 Thereafter, ISP denied plaintiff's requests. With regard to the police radio recordings, ISP indicated it did not have any responsive documents. Regarding plaintiff's request for criminal history records, ISP responded portions of the request were exempt from disclosure under sections 2.15(b) and 7(1)(a) of FOIA (5 ILCS 140/2.15(b), 7(1)(a) (West 2012)). ISP explained "criminal history records" under FOIA are not the records held by ISP but rather "(i) court records that are public; (ii) records that are otherwise available under State or local law; and (iii) records in which the requesting party is the individual identified, except as provided under Section 7(1)(d)(vi)." ISP maintained the records plaintiff sought were exempt pursuant to section 7(1)(a) of FOIA because plaintiff is not the individual named in the information requested and the information is not public information but held by the Law Enforcement Agencies Data System.

¶ 9 In its letter, ISP informed plaintiff he had the right to seek administrative review of the denial by the Attorney General's Public Access Counselor (AG Counselor) or seek judicial review in the courts. ISP's letter also stated it would provide plaintiff with nonexempt conviction information responsive to his request if he would complete the enclosed form and pay the statutorily required \$16 fee. However, plaintiff did not complete the form. Instead, he requested the AG Counselor review ISP's denial of his FOIA requests.

¶ 10 In a May 10, 2012, letter to ISP, the AG Counselor requested the documents responsive to plaintiff's requests as well as a detailed factual basis for its claimed exemptions.

¶ 11 In its July 20, 2012, response to the AG Counselor, ISP indicated it had conducted a search and found no records responsive to plaintiff's request for information relating to police radios.

¶ 12 In a July 27, 2012, letter to plaintiff, the AG Counselor determined ISP's response to its inquiry resolved plaintiff's allegation ISP failed to respond to his request.

¶ 13 On November 26, 2012, plaintiff sent another FOIA request to ISP, seeking "the photomicrograph[s of] latent impressions lifted off the Corona Extra beer bottle, Exhibit [No.] 4, Laboratory case number C00-039076[, RD [No.] F0526973 examination conducted by forensic scientist Jennifer Barrett or copies of whatever photographs that exist of the latent impressions lifted off [Exhibit No.] 4."

¶ 14 In its December 28, 2012, response, ISP denied plaintiff's request on the basis it had no additional responsive documents. The letter also stated, "You have now asked for the same information multiple times, and we have given you the same response. Therefore, *** any further request from you regarding this subject will not receive a response."

¶ 15 On February 7, 2013, plaintiff *pro se* filed a complaint against ISP pursuant to FOIA for injunctive and declaratory relief, arguing he was entitled to the requested documents and alleging ISP failed to conduct a diligent search for those documents.

¶ 16 On February 7, 2014, plaintiff sent another FOIA request to ISP, seeking "all available information concerning the swab or swabs used by forensic scientist Kenneth Pfoer in his January 9, 2001[,] examination of Exhibit [No.] 4, [a] 12 ounce Corona Extra brand glass beer bottle." ISP did not respond to this request.

¶ 17 On August 21, 2014, ISP filed a section 2-615 motion to dismiss plaintiff's complaint (735 ILCS 5/2-615 (West 2014)). ISP argued plaintiff's complaint failed to set forth sufficient facts to entitle him to relief. ISP contended its denial of plaintiff's request for the criminal history reports was proper based on section 7(1)(a) of FOIA, which covers "[i]nformation specifically prohibited from disclosure by federal or State law" (5 ILCS 140/7(1)(a) (West 2012)). ISP maintained plaintiff's March 27, 2012, request was properly denied because it was not in possession of any such information. Plaintiff did not respond to ISP's motion. Instead, he filed a motion for leave to file an amended complaint.

¶ 18 On September 10, 2014, plaintiff filed his amended *pro se* complaint. In his amended complaint, plaintiff added the February 7, 2014, request for information regarding the swabs to his list of records he argued were improperly withheld. Plaintiff stated he had a liberty interest in the information and reiterated his claim ISP's search was insufficient.

¶ 19 On September 24, 2014, ISP filed a section 2-615 motion to dismiss the amended complaint (735 ILCS 5/2-615 (West 2014)), arguing it informed plaintiff on multiple occasions it did not have possession of the requested documents.

¶ 20 In his October 23, 2014, response to ISP's motion to dismiss, plaintiff argued ISP failed to present clear and convincing evidence it had conducted an adequate search for the requested information because it had not submitted sworn affidavits stating it did so. Plaintiff also argued any exception asserted by ISP was outweighed by his liberty interest in the requested information.

¶ 21 On October 30, 2014, the trial court held a telephone hearing on ISP's motion to dismiss plaintiff's complaint. (We note no report of the proceedings or bystander's report for this hearing is included in the record on appeal.)

¶ 22 On December 3, 2014, the trial court granted ISP's motion to dismiss, finding plaintiff failed to state a claim for relief because ISP did not maintain or possess the documents and ISP properly responded to plaintiff's FOIA requests.

¶ 23 On December 15, 2014, plaintiff filed a motion to reconsider, arguing ISP failed to meet its burden of proof by not submitting sworn affidavits to show it conducted an adequate search for the requested information.

¶ 24 Following a February 24, 2015, phone conference with the parties, the trial court denied plaintiff's motion to reconsider. (As with the initial hearing, no report of the proceedings for this conference is contained in the record.)

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, plaintiff, proceeding *pro se*, argues the trial court erred in dismissing his complaint. We disagree.

¶ 28 A section 2-615 motion to dismiss attacks "the legal sufficiency of a complaint based on defects apparent on its face." *Pooh-Bah Enterprises, Inc. v. The County of Cook*, 232 Ill. 2d 463, 473, 905 N.E.2d 781, 788 (2009). When ruling on a section 2-615 motion, the relevant question is whether the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317, 818 N.E.2d 311, 317 (2004). We review an order granting a section 2-615 motion to dismiss *de novo*. *Beacham v. Walker*, 231 Ill. 2d 51, 57, 896 N.E.2d 327, 331 (2008).

¶ 29 The purpose of FOIA "is to open governmental records to the light of public scrutiny." *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378, 538 N.E.2d 557, 559 (1989). Accordingly, under FOIA, "public records are presumed to be open and accessible." *Lieber v. The Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407, 680 N.E.2d 374, 377 (1997). However, as this court has previously observed, FOIA " 'is not designed to compel the compilation of data the governmental body does not ordinarily keep' " and " 'does not compel the agency to provide answers to questions posed by the inquirer.' " *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427, ¶ 34, 8 N.E.3d 11 (quoting *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32, 540 N.E.2d 11, 13 (1989)).

¶ 30 In his brief on appeal, plaintiff's sole contention is ISP was required to submit affidavits to prove it conducted an adequate search for the documents he requested. We note plaintiff does not cite any provision in FOIA in support of his position. Rather, plaintiff relies on *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 871 N.E.2d

880 (2007), for the proposition a defendant agency has the burden of showing its search was adequate with affidavits. However, *BlueStar* is distinguishable from the instant case.

¶ 31 In *BlueStar*, the plaintiff requested specific documents related to the Illinois Commerce Commission's (ICC) acquisition of a utility. *BlueStar*, 374 Ill. App. 3d at 992, 871 N.E.2d at 883. The ICC denied the plaintiff's request on the basis the document identified as responsive was exempt under section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g) (West 2004)) because it contained confidential trade secrets and commercial financial information. *BlueStar*, 374 Ill. App. 3d at 992, 871 N.E.2d at 883. The trial court granted summary judgment in favor of ICC. *BlueStar*, 374 Ill. App. 3d at 993, 871 N.E.2d at 884.

¶ 32 In affirming the trial court's judgment, the First District Appellate Court observed " 'in order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.' " *BlueStar*, 374 Ill. App. 3d at 996-97, 871 N.E.2d at 887 (quoting *Carney v. United States Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). The First District also noted, in summary judgment proceedings, " '[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden' " of showing the search was adequate. *BlueStar*, 374 Ill. App. 3d at 996-97, 871 N.E.2d at 887 (quoting *Carney*, 19 F.3d at 812).

¶ 33 In this case, however, summary judgment is not at issue. Plaintiff's complaint was dismissed for failure to state a cause of action pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2012)). Thus, the First District's statements regarding summary

judgment proceedings have no applicability here. Further, in ruling on a section 2-615 motion, a trial court may consider only facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions. *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 291, 938 N.E.2d 471, 477 (2010). A trial court "may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings as exhibits, testimonial evidence, or other evidentiary materials." *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14, 13 N.E.3d 350. As a result, plaintiff's argument on appeal fails.

¶ 34 Moreover, Illinois is a fact-pleading state. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408, 667 N.E.2d 1296, 1300 (1996). As such, conclusory allegations unsupported by specific facts are insufficient to survive a section 2-615 motion to dismiss. *Anderson*, 172 Ill. 2d at 408, 667 N.E.2d at 1300. Here, plaintiff's complaint fails to allege facts to show the requested documents were in ISP's possession or ISP was required to maintain those documents. Instead, the complaint simply recounts what documents plaintiff requested and states, in a conclusory fashion, ISP's search was insufficient. Accordingly, the trial court did not err in dismissing plaintiff's complaint.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment.

¶ 37 Affirmed.