No. 10-0632

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KILROY WATKINS,

Plaintiff-Appellant,

v.

GARRY McCARTHY,

Defendant-Appellee.

Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
No. 09 CH 09105
The Honorable Dorothy Kirie Kinnaird, Judge Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLEE GARRY McCARTHY

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NATURE OF THE CASE

Kilroy Watkins ("Watkins") brought an action for declaratory judgment and *mandamus* under the Illinois Freedom of Information Act ("FOIA") against Jody P. Weis, former Superintendent of Police for the Chicago Police Department ("CPD"), to obtain copies of documents relating to disciplinary actions involving CPD Detectives John Halloran ("Halloran") and Kenneth Boudreau ("Boudreau"), who worked under CPD Commander Jon Burge, between 1990 and 1994. Watkins seeks a declaration of his rights and an order compelling production of the requested documents.

The Superintendent filed a motion to dismiss, pursuant to 735 ILCS 5/2-619 (2008), which the court granted with prejudice.[1] Watkins appeals. The question whether Watkins has stated a clear right to declaratory relief and an order of *mandamus* is raised on the pleadings.

ISSUES PRESENTED

1. Whether the circuit court correctly determined that the complaint register files maintained by CPD were exempt from disclosure under FOIA, where the records requested are disciplinary and the subjects of the investigations are defendants in a civil case awaiting trial.

2. Whether the circuit court committed reversible error by failing

[1] Garry McCarthy is the current Superintendent of CPD. We have filed a motion to substitute Superintendent McCarthy as the defendant-appellee in this case.

to conduct an *in camera* inspection of the complaint register files before dismissing Watkins's declaratory judgment and *mandamus* actions.

JURISDICTION

On October 9, 2009, Superintendent Weis filed his motion to dismiss Watkins's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure. C. 87.[2] Watkins filed his notice of appeal, indicating he was appealing the "order entered on January 14, 2010, in which [the court] dismissed [his] complaint for Declaratory Judgment and Mandamus Relief," on February 25, 2010.[3] C. 292. On April 1, 2010, Watkins filed a late notice of appeal from the January 13, 2010 judgment. C. 293; Brief of Plaintiff-Appellant, Kilroy Watkins vi [hereafter "Watkins Br."]. On October 22, 2010, the circuit court issued its opinion and judgment granting Superintendent Weis's motion to dismiss and dismissing Watkins's complaint with prejudice in its entirety. Supp. C. 6. This court has jurisdiction over this appeal from a final judgment of the circuit court pursuant to Ill. Sup. Ct. R. 303(a)(1), which provides "[a] notice of appeal filed after the court announces a decision, but before the entry of the judgment or order, is treated as filed on the date of

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[2] Volumes I and II of the record on appeal are cited as "C. __." The supplemental record on appeal is cited as "Supp. C. __."

[3] The record on appeal does not contain a court order dated January 14, 2010. The Superintendent represents that on January 13, 2010, the circuit court ruled from the bench that his motion to dismiss was granted and stated that a written order would follow. The record does not contain that order either.

and after the entry of the judgment or order."

STATUTES INVOLVED

Illinois FOIA section 7, 5 ILCS 140/7 (2008), in relevant part:

> (1) The following shall be exempt from inspection and copying:
>
> (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.
>
> (b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:
>
> * * * *
>
> (ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions;
>
> * * * *
>
> (v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies; provided, however, that identification of witnesses to traffic accidents, traffic accident reports, and rescue reports may be provided by agencies of local government, except in a case for which a criminal investigation is ongoing, without constituting a clearly unwarranted per se invasion of personal privacy under this subsection[.]
>
> * * * *
>
> (f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record

> shall not be exempt when the record is publically cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

Illinois FOIA section 11, 5 ILCS 140/11 (2008), in relevant part:

* * * *

> (f) In any action considered by the court, the court shall consider the matter de novo, and shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act. The burden shall be on the public body to establish that its refusal to permit public inspection or copying is in accordance with the provisions of this Act.

Personnel Record Review Act section 2, 820 ILCS 40/2 (2008), in relevant part:

> Every employer shall, upon an employee's request[,] . . . permit the employee to inspect any personnel documents which are, have been or are intended to be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action . . . .

Personnel Record Review Act section 8, 820 ILCS 40/8 (2008):

> An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered to a third party in a legal action or arbitration, delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

STATEMENT OF FACTS

Watkins is currently an inmate of the Illinois Department of Corrections at Lawrence Correctional Center in Sumner, Illinois. C. 49. He alleges that CPD officers coerced him into confessing to a crime that he did

not commit. C. 49.[4]

In a FOIA request addressed to the "Mayor's Office," dated July 26, 2008, and stamped as received on August 21, 2008, Watkins stated the following:

> I am requesting copies of documents relating to Chicago Police Officers John Halloran, star #20453[,] and Kenneth Boudreau, star #20435, seeking all records, including personnel files between 1990 to present, relating to disciplinary actions taken against the above noted officers as well as records relating to investigations of complaints made against the officers regarding their actions as police officers. Those records would include citizens' complaints, and FBI investigations regarding the officers' conduct.

C. 110.

CPD responded to Watkins's FOIA request, indicating it was being denied pursuant to FOIA section 7(1)(b), C. 57; Watkins Br. 2, which exempts "[i]nformation that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy," 5 ILCS 140/7(1)(b) (2008). CPD also cited section 7(1)(c), C. 57; Watkins Br. 2, which exempts "[r]ecords compiled by any public body . . . for law enforcement purposes or for internal matters . . . to the extent that disclosure would: . . . (ii) interfere with pending administrative enforcement proceedings . . . ; (iii) deprive a person of a fair

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[4] Watkins was convicted of first-degree murder and two counts of armed robbery and was sentenced to consecutive terms of imprisonment of 30 years for the first degree murder, 15 years for one of the armed robberies and 10 years for the other. Watkins v. Page, 322 Ill. App. 3d 360, 361-62 (3d Dist. 2001). Watkins's challenges to his convictions, sentences, and the denial of a post-conviction petition were consolidated and affirmed on appeal. People v. Watkins, Nos. 1-93-0326, 1-93-0683, 1-93-1281 & 1-93-2889 (cons.), 277 Ill. App. 3d 1108 (1st Dist. 1995) (unpublished order under Ill. Sup. Ct. R. 23).

trial or an impartial hearing . . . ; [or] (vi) constitute an invasion of personal privacy," 5 ILCS 140/7(1)(c)(ii), (iii), (vi) (2008). C. 57; Watkins Br. 2.

After learning that his FOIA request had been denied, Watkins appealed the denial to Superintendent Weis, advising that the appeal concerned "all records, including personnel files between 1990 to 1994[,] relating to disciplinary actions taken against" Halloran and Boudreau. C. 60; Watkins Br. 2. On October 8, 2008, CPD denied the appeal based upon section 7(1)(c)(vi) of FOIA and advised Watkins of his statutory right to file suit for injunctive or declaratory relief. C. 59; Watkins Br. 2.

On February 27, 2009, Watkins filed his complaint against Superintendent Weis in his capacity as the "Superintendent of the Chicago Police Department, a Public Body." C. 3. Watkins alleged that as the Superintendent of Police, Superintendent Weis "is responsible for the overall administration and operation of the Chicago Police Department . . . including . . . the maintenance and production of all records concerning investigations and proceedings involving allegations of police misconduct . . . ." C. 3-4. Watkins also alleged that Superintendent Weis owed "a duty to comply with [Watkins's] request for copies of public records" pursuant to section 3(a) of FOIA and that Superintendent Weis "has, and continues to, refuse[d] to perform his duty under section [3(a)] . . . ." C. 6.

Watkins further alleged that on July 14, 2005, he filed an amended post-conviction petition, which was set for an evidentiary hearing. C. 4.

Regarding the content of the petition, Watkins alleged that prior to trial, he had testified at a suppression hearing that his statement to police resulted from coercion applied by Halloran and Boudreau. C. 4.[5] Watkins also alleged that in connection with his post-conviction petition, he "must examine and present documents, already in existence, that chronicle and verify" the alleged misconduct. C. 5. According to Watkins, he asked the attorney appointed to represent him in his post-conviction proceedings to obtain all records of misconduct against Halloran and Boudreau "between 1990 and 1994," but his attorney refused to do so. C. 5.

According to Watkins's complaint, the denial of his requests violated FOIA. C. 7-8. Watkins requested as relief an "[o]rder of mandamus directing [Superintendent Weis] to immediately produce and provide the requested records." C. 8. In the alternative, Watkins requested that the court conduct an *in camera* inspection of the requested records for the purpose of determining whether withholding any of the documents is "appropriate and necessary." C. 6-7.

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[5] For purposes of his motion to dismiss, the Superintendent, as he must, accepts this allegation as true. See Feltmeier v. Feltmeier, 207 Ill. 2d 263, 277 (2003). We note, however, that while Watkins raised a litany of arguments both in his direct appeal and his post-conviction petition, see generally People v. Watkins, Nos. 1-93-0326, 1-93-0683, 1-93-1281 & 1-93-2889 (cons.), he did not claim that his confession was involuntary. Moreover, this court, in affirming Watkins's conviction and sentence, noted that even if the trial court had erred by denying Watkins's request for a continuance, no prejudice resulted "in view of his written confession admitting his involvement." Id. at 27-28.

On October 9, 2009, Superintendent Weis moved to dismiss the complaint pursuant to section 2-619(a)(9), 735 ILCS 5/2-619(a)(9) (2008). The motion first noted that, pursuant to section 10(a) of FOIA, 140 ILCS 140/10(a) (2008), Watkins was limited, on administrative review, to challenging the denial of disciplinary records maintained by CPD in complaint register ("CR") files for 1990 through 1994, which were dates included in his appeal to Superintendent Weis. C. 87-91, 95-96. On the merits, Superintendent Weis argued that the CR files were exempt from production pursuant to section 7(1)(c)(iii), because disclosure would deprive Halloran and Boudreau, who are defendants in a civil lawsuit, of a fair trial; section 7(1)(f), because the records are used in and reflect the expression of opinions and/or the formulation of actions; section 7(1)(b), because release of the information would constitute an invasion of personal privacy; section 7(1)(b)(ii), because the documents are personnel files and contain personal information of employees; and section 7(1)(b)(v), because the records reveal the identity of persons filing complaints or providing information to investigative or law enforcement agencies. C. 90-91, 98-108.

Superintendent Weis included the affidavit of Sergeant Phyllis Muzupappa, commanding officer of the Records Section of CPD's Internal Affairs Division ("IAD"). C. 112-18. Her affidavit explained that one of IAD's functions is to investigate certain types of complaints of officer misconduct and to retain the files generated during the investigations into those

complaints. C. 112. CR files contain "[r]ecords of complaints made by citizens against officers, investigations of those complaints, and any disciplinary actions" taken against CPD officers stemming from investigations of complaints of officer misconduct. C. 112-13.

Sergeant Muzupappa also explained that before a final decision is made whether to discipline an officer, and what the discipline will be, the investigator issues a Summary Report Digest containing the investigator's findings and recommendations about what discipline, if any, is appropriate. C. 114. After the investigator makes his recommendations, the CR file, pursuant to the relevant collective bargaining agreement, is reviewed by senior CPD officers in the accused officer's chain of command, each of whom states whether he concurs with the findings and any recommendations for discipline made by the investigator. C. 115. The recommendations issued by those reviewing the investigator's findings, which is known as the Command Channel Review Summary, and the recommendations in the Summary Report Digest form the basis of whether discipline should be imposed on the accused officer, and if so what discipline. C. 115-16. IAD is in custody of CR files relating to allegations of misconduct against Halloran and Boudreau for the years 1990 through 1994. C. 113.

In further support of his motion to dismiss, Superintendent Weis attached a copy of the amended complaint filed by Harold Hill in the United States District Court for the Northern District of Illinois on January 30,

2007. C. 120-55. Hill's suit names as defendants the City of Chicago; multiple CPD officers, including Halloran and Boudreau; and an Assistant State's Attorney. C. 120.

Hill alleged that as a teenager in the early 1990s, he was wrongfully convicted and imprisoned for crimes he did not commit because of police misconduct. C. 120-21. According to Hill's complaint, "Hill and his co-defendants were victimized by . . . Chicago Police Detectives, led by Defendants Boudreau and Halloran." C. 121. Hill alleged that Halloran and/or Boudreau had engaged in misconduct during criminal investigations involving suspects, including Watkins. C. 134-35.

On August 16, 2007, Federal District Judge Amy St. Eve entered a "Qualified HIPAA and Confidential Matter Protective Order" in the Hill case. C. 223, 226. The parties subject to the protective order are "defendant City of Chicago [and] the individual defendants . . . ." C. 223. The protective order provides in relevant part:

> A. The following words and terms are defined for purposes of this qualified protective order:
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> * * * *
>
> 6. "Confidential Matter" shall mean employment, disciplinary, financial, medical, or other information that is of a sensitive or non-public nature regarding plaintiff, defendant[s], non-party witnesses and non-party employees of the City of Chicago that may be subject to discovery in this action. "Confidential matter" includes, but is not limited to, personnel files, disciplinary actions, histories, *files generated by the investigation of complaints of misconduct by Chicago police officers (generally referred*

to as "Complaint Register" files) and related information as well as personal and family information of police officers, including residential information.

B. This Order governs all discovery related to the exchange or dissemination of information or the production of documents designated as . . . Confidential Matter.

* * * *

2. The Parties recognize that it may be necessary during the course of this proceeding to produce, disclose, receive, obtain, subpoena, and/or transmit . . . Confidential Matter of Parties and non-Parties to or from other Parties and non-Parties.

C. The Parties will abide by the following terms and conditions:

1. The Parties will not use or disclose the . . . Confidential Matter released in this proceeding for any other purpose or in any other proceeding.

* * * *

8. By this Protective Order, the discovering Party *or a member of the public* may apply to the Court, with proper notice, under the procedure set out by the [C]ourt or under applicable rules, to the producing Party and other Parties to the litigation, for a determination that any document designated as Confidential Matter produced by the producing party does not contain confidential information, or that in certain circumstances the information should be released from the provisions of this Protective Order.

C. 223-26 (emphasis added).[6] A jury trial in Hill is currently scheduled to

[6] Watkins has never challenged the Superintendent's reliance on copies of complaints filed in other cases naming Halloran and/or Boudreau as defendants or on orders entered in Hill. Such an assertion would be without merit because "public documents which are included in the records of other courts and administrative tribunals" are proper subjects of judicial notice. May Department Stores Co. v. Teamsters Union Local No. 743, 64 Ill. 2d 153,

begin September 12, 2011, and Watkins has been identified by the plaintiff as a "may call" witness at trial. February 3, 2011, order entered in Hill v. City of Chicago, No. 06-cv-6772, App., infra, at A1; Excerpt from Final Pretrial Order entered in Hill, No. 06-cv-6772, App., infra, at A4.[7]

On October 22, 2010, after the parties submitted response, C. 237-49, and reply, C. 267-79, memoranda, the circuit court entered a written order granting Superintendent Weis's motion to dismiss, Supp. C. 2-6. The court agreed that its scope of review was limited to documents for the period 1990 through 1994. Supp. C. 3. Regarding the exemptions, the court ruled that "[a]ny one of the three exemptions claimed by [the Superintendent] is sufficient to support dismissal of the Complaint in this case, and all of them apply in this case." Supp. C. 5.

Watkins appeals. Supp. C. 2-6.

ARGUMENT

Once a public body has satisfied its burden of demonstrating that a

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159 (1976). See also Fender v. St. Louis Southwestern Railway Co., 49 Ill. 2d 1, 6 (1971) ("The condition of the docket of the circuit court of St. Clair County . . . was not a fact difficult of ascertainment and was a matter which the circuit court could properly take judicial notice."); Boston v. Rockford Memorial Hospital, 140 Ill. App. 3d 969, 972 (1st Dist. 1986) ("[A]n appellate court may take judicial notice of matters not previously presented to the trial court when the matters are capable of instant and unquestionable demonstration.").

[7] For the court's convenience, we have included these documents in our Appendix. As we explain above, these documents are subject to judicial notice.

document falls within one of the exemptions listed in section 7 of FOIA, "the document shall be *per se* exempt from inspection and copying and 'no further inquiry by the court is necessary.'" Chicago Alliance for Neighborhood Safety v. City of Chicago, 348 Ill. App. 3d 188, 199 (1st Dist. 2004) ("CANS") (quoting Lieber v. Board of Trustees, 176 Ill. 2d 401, 408 (1997)). Here, four exemptions apply, including the three the circuit court ruled on, so Watkins's complaint was properly dismissed. Indeed, even a single exemption is sufficient for affirmance. Moreover, because dismissal was proper, the circuit court was not required to conduct an *in camera* inspection of the documents Watkins requested. The circuit court's order should therefore be affirmed in its entirety.

I. THE REQUESTED DOCUMENTS ARE EXEMPT FROM DISCLOSURE.

The circuit court correctly granted the Superintendent's motion to dismiss Watkins's complaint under section 2-619(a)(9). "A motion for involuntary dismissal under section 2-619 admits the legal sufficiency of the plaintiff's claim but asserts 'affirmative matter' outside of the pleading that defeats the claim." Czarobski v. Lata, 227 Ill. 2d 364, 369 (2008). "The phrase 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." Kedzie & 103rd Currency Exchange, Inc. v. Hodge, 156 Ill. 2d 112, 115 (1993). This court reviews dismissal under section 2-619 *de novo*, see, e.g., King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 12 (2005), and may affirm on any

ground supported by the record, see, e.g., Messenger v. Edgar, 157 Ill. 2d 162, 177 (1993). Under these standards, the circuit court's dismissal of Watkins's complaint should be affirmed. Below, we show first what documents are at issue and then explain why they are exempt.

A. Under FOIA Section 10(b), Review Of The Superintendent's Denial Is Limited To Documents From 1990 To 1994.

Watkins notes that his initial FOIA request sought documents from 1990 to the present. See Watkins Br. 1. While that is true, in his appeal to Superintendent Weis, Watkins limited the time frame to documents for the years 1990 through 1994. The Superintendent raised this issue below, see C. 95, and the circuit court agreed, Supp. C. 3, that as a result Watkins could not challenge the denial of other documents.

Watkins does not contest this ruling. That omission means that he has waived any arguments regarding CR files created after 1994. "Points not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. Sup. Ct. R. 341(h)(7). See also, e.g., Liberty Mutual Fire Insurance Co. v. Woodfield Mall, L.L.C., 407 Ill. App. 3d 372, 395 (1st Dist. 2010) (pursuant to Rule 341(h)(7), disregarding arguments raised for the first time in the reply brief). And this rule applies to *pro se* litigants like Watkins. A party's status as a *pro se* litigant "affords him no special dispensation" from the requirements of the Illinois Supreme Court Rules and established rules of procedure.

Bielecki v. Painting Plus, Inc., 264 Ill. App. 3d 344, 354 (1st Dist. 1994) (citing Biggs v. Spader, 411 Ill. 42, 46 (1951), cert. denied, 343 U.S. 956 (1952)).

Waiver aside, it is clear that review of the denial of Watkins's FOIA request is limited to CR files from 1990 to 1994. Exhaustion of administrative remedies is required prior to filing a lawsuit under FOIA. See, e.g., Southern Illinoisan v. Illinois Department of Public Health, 218 Ill. 2d 390, 417 (2006); Trent v. Office of the Coroner of Peoria County, 349 Ill. App. 3d 276, 278 (3d Dist. 2004). Under Section 10(b) of FOIA in effect at the time Watkins filed his lawsuit:

> Any person making a request for public records shall be deemed to have exhausted his administrative remedies with respect to such request if the head of the public body affirms the denial or fails to act within the time limit provided in subsection (a) of this Section.

5 ILCS 140/10(b) (2008). Of these two ways in which a request can be denied, Watkins does not allege that Superintendent Weis failed to timely act after Watkins appealed the denial of his FOIA request. Thus, to establish the exhaustion of administrative remedies, Watkins must demonstrate that Superintendent Weis affirmed "the denial" of Watkins's FOIA request. Id.

As we explain, although Watkins's initial FOIA request sought documents "between 1990 to present," C. 110, his appeal to the Superintendent was restricted to the years "between 1990 to 1994," C. 60. In turn, when the Superintendent denied Watkins's appeal, the Superintendent affirmed the denial of only the records Watkins continued to seek in his

appeal to the Superintendent, namely those from 1990 to 1994. C. 59-60. For this reason, Watkins has not exhausted his administrative remedies on his request for documents after 1994, and the only issue properly before this court in this appeal is the denial of documents from 1990 to 1994. Where the plaintiff "did not meet his burden of showing the exhaustion of administrative remedies," the appellate court should refuse to reach the issue. See Ford v. Walker, 377 Ill. App. 3d 1120, 1124 (4th Dist. 2007) (refusing to review inmate disciplinary report). With the scope of the documents at issue thus established, we turn to the four provisions under FOIA that exempt the documents from production.

B. The Documents Are Exempt Under Section 7(1)(a).

The records Watkins requested are exempt from production under section 7(1)(a) of FOIA, which exempts from inspection and copying "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law." 5 ILCS 140/7(1)(a) (2008). In this case, the "law" precluding production of the responsive documents includes both section 8 of the Personnel Record Review Act, 820 ILCS 40/8 (2008), and the protective order in Hill.

1. The Personnel Record Review Act prohibits production of the documents.

Section 8 of the Personnel Record Review Act provides:

> An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered to a third party in a legal action or arbitration, delete disciplinary

> reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old.

820 ILCS 40/8 (2008). In this case, Sergeant Muzupappa's affidavit establishes that the CR files Watkins seeks are "records of disciplinary action" under the Personnel Record Review Act. As her affidavit explains, "[r]ecords of complaints made by citizens against officers, investigations of those complaints, and any disciplinary actions" taken against CPD officers stemming from investigations of citizen complaints are maintained in CR files. C. 112-13. Once the investigation into the alleged misconduct is completed by the assigned investigator, the CR file, in compliance with the relevant collective bargaining agreement, is reviewed by senior CPD officials, who determine whether they concur with the findings and any recommendations for discipline. C. 115. On appeal from the motion to dismiss, this uncontracted affidavit is taken as true. See 1324 W. Pratt Condominium Association v. Platt Construction Group, Inc., 404 Ill. App. 3d 611, 615 (1st Dist. 2010) ("We review an order of dismissal pursuant to section 2-619(a)(9) *de novo*, accepting as true all well-pled facts contained in the complaint and in any uncontradicted affidavits attached to the motion.").

Indeed, in Watkins's appeal to Superintendent Weis, Watkins described the records he was requesting as "all records, including personnel files between 1990 to 1994 relating to disciplinary actions[,]" taken against Halloran and Boudreau. C. 60. Thereafter, in an affidavit Watkins submitted to the circuit court in connection with this lawsuit, he averred that

he had sought "records pertaining to any disciplinary actions taken against" Halloran and Boudreau. C. 252. Thus it is clear that the documents, if any, that are responsive to Watkins's FOIA request are "records of disciplinary action" under section 8 of the Personnel Record Review Act.

That section is quite clear that, before personnel records are produced to a third party, such as Watkins in connection with his FOIA request, all "disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than 4 years old" are to be deleted by the employer. 820 ILCS 40/8 (2008). And because disclosure of the records is precluded under the Personnel Record Review Act, disclosure is likewise precluded under section 7(1)(a) of FOIA, which as we explain exempts "[i]nformation specifically prohibited from disclosure by federal or State law." 5 ILCS 140/7(1)(a) (2008). See Copley Press v. Board of Education for Peoria School District No. 150, 359 Ill. App. 3d 321, 325 n.2 (3d Dist. 2005) (documents exempt from production under Personnel Record Review Act are also "exempt from disclosure under the FOIA").

To the extent Watkins may argue on reply that this reliance on the Personnel Record Review Act is waived, Watkins would be mistaken. "While an appellant who fails to raise an issue in the trial court waives that issue, an appellee may raise an issue on review that was not presented to the trial court in order to sustain the judgment, as long as the factual basis for the issue was before the trial court." DOD Technologies v. Mesirow Insurance

Services, Inc., 381 Ill. App. 3d 1042, 1050 (1st Dist. 2008). Moreover, it is well established that waiver is a limitation on the parties, not on the appellate court. See, e.g., Baird & Warner Residential Sales, Inc. v. Mazzone, 384 Ill. App. 3d 586, 592 (1st Dist. 2008). Thus, "[t]here is no reversible error where a court's judgment is 'justified in the law for any reason or ground appearing in the record regardless of whether the particular reasons given by the trial judge, or his specific findings, are correct or sound.'" American National Trust Co. of Chicago v. Kentucky Fried Chicken of Southern California, Inc., 308 Ill. App. 3d 106, 116 (1st Dist. 1999) (quoting Thornton v. Williams, 89 Ill. App. 3d 544, 549 (1st Dist. 1980)). Because the factual basis was before the circuit court, it is available to this court to rule that the requested documents are exempt from production under section 7(1)(a) of FOIA because they are disciplinary records that cannot be disclosed under the Personal Record Review Act.

2. The federal court's protective order in Hill also bars production of the documents.

Section 7(1)(a) equally exempts documents "prohibited from disclosure by federal . . . rules." 5 ILCS 140/7(1)(a) 2008). The CR files involving Halloran and Boudreau are covered by a protective order in the Hill litigation, which prohibits disclosure of "Confidential Matter," which is expressly defined to include "Complaint Register" files. C. 224. The City of Chicago, along with Halloran and Boudreau, is a defendant in that lawsuit, bound by the protective order's injunction that "[t]he parties will not use or

disclose the . . . Confidential Matter released in this proceeding for any other purpose or in any other proceeding." C. 224. As we now explain, Watkins's suit against the Superintendent is in essence a suit against the City, so the protective order bars disclosure here.

"If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities, he should expressly state so in the complaint." Kolar v. County of Sangamon, 756 F.2d 564, 568-69 (7th Cir. 1985) (citation omitted). Here, Watkins does not expressly state in his complaint whether he is suing the Superintendent is his official or individual capacity, but both the allegations of his complaint and applicable law make clear that his suit is against the Superintendent in his official capacity.

Courts use a three-part test to determine whether a government employee is being sued in his individual, as opposed to official, capacity. See City of Carbondale v. Bower, 332 Ill. App. 3d 928, 933-34 (5th Dist. 2002) (using a three-part test when deciding whether action was brought against State employee in his official or individual capacity). The test asks: (1) whether there is an allegation that the employee or agent of the government body acted beyond the scope of his authority through the wrongful acts; (2) whether the duty allegedly breached is owed to the public generally, independent of the fact of government employment; and (3) whether the complained-of matters are outside the employee's normal and official

functions of the government body. See, e.g., Sneed v. Howell, 306 Ill. App. 3d 1149, 1154-55 (5th Dist. 1999) (citing Healy v. Vaupel, 133 Ill. 2d 295, 308-09 (1990)).

The allegations in Watkins's complaint show that he sued Superintendent Weis in his official capacity. Watkins alleged that the Superintendent owed a "duty to comply with [Watkins's] request for copies of public records" pursuant to section 3(a) of FOIA and that the Superintendent "has, and continues to, refuse[d] to perform his duty under section [3(a)]." C. 6. The sole reason Superintendent Weis was named as a defendant in the instant lawsuit is because he held the position of Superintendent of Police, and in that capacity reviewed the denial of Watkins's FOIA request. Similarly, it is only because of the Superintendent's employment with the City that he was under any duty to comply with FOIA. Where "[t]he relationship between the plaintiff and the defendant[] would not have had a source outside the employment status of the defendant[]," the suit is against the defendant in his official capacity. Healy, 133 Ill. 2d at 313. Indeed, our motion to substitute Superintendent McCarthy reflects that the suit was against former Superintendent Weis in his official capacity and that the current officeholder is now the proper defendant. Watkins's allegations are therefore against the Superintendent in his official capacity.

If that were not enough to show that this is an official-capacity suit, the plain language of FOIA does not provide for individual-capacity suits

against employees of the public body. Although Watkins asserts that the Superintendent has a duty to produce records under section 3(a) of FOIA, see C. 6, the statute actually provides (in relevant part) that *"[e]ach public body* shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." 5 ILCS 140/3(a) (2008) (emphasis added). Additionally, regarding jurisdiction to hear cases brought under FOIA, section 11(d) states: "[t]he circuit court shall have the jurisdiction to *enjoin the public body* from withholding public records and to order the production of any public records improperly withheld from the person seeking access." Id. 140/11(d) (emphasis added). And FOIA defines "public body" as:

> [A]ny legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, and a School Finance Authority created under Article 1E of the School Code. "Public body" does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act.

Id. 140/2(a). Public officials themselves are not within this definition. In short, under both Watkins's complaint and FOIA itself, it is clear that the Superintendent was sued in his official capacity as head of CPD.

In turn, an official-capacity claim against the Superintendent is in effect a suit against the City itself. "An official capacity suit against an

individual is to be treated as another form of a suit against the governmental entity of which the individual is a part." Schlicher v. Board of Fire and Police Commissioners of the Village of Westmont, 363 Ill. App. 3d 869, 883 (2d Dist. 2006) (citing Kentucky v. Graham, 473 U.S. 159, 167 (1985)).[8] But the City is also subject to the protective order in Hill, which prohibits production of the CR files Watkins seeks. C. 223-24. That order triggers the exemption under section 7(1)(a) for "[i]nformation specifically prohibited from disclosure by . . . rules . . . adopted under federal . . . law." 5 ILCS 140/7(1)(a) (2008).

The Federal Rules of Civil Procedure "govern the procedure in all civil actions in proceedings in the United States district courts," Fed. R. Civ. P. 1, and are "'as binding as any statute duly enacted by Congress,'" Chambers v. NASCO, Inc., 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988)). See also Winsor v. Daumit, 179 F.2d 475, 477 (7th Cir. 1950) (the Federal Rules of Civil Procedure "have the force and effect of statutes"). Federal Rule of Civil Procedure 26(c)(1)(A) provides in relevant part:

> The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden

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[8] An official-capacity suit against the Superintendent should not be considered a suit against CPD, but rather against the City itself. CPD "is not a suable entity, but merely a department of the City of Chicago which does not have a separate legal existence." Gray v. City of Chicago, 159 F. Supp. 2d 1086, 1089 (N.D. Ill. 2001); see also West v. Waymire, 114 F.3d 646, 646-47 (7th Cir. 1997) ("The naming of the Town's Police Department as a defendant adds nothing; it is almost certainly not a suable entity separate from the Town.").

or expense, including one or more of the following:

A. forbidding the disclosure or discovery[.]

Fed. R. Civ. P. 26(c)(1)(A). The entry of a protective order "depends on the facts of the particular case," Avery v. Sabbia, 301 Ill. App. 3d 839, 845 (1st Dist. 1998), and "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery," Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984). See also In re Medical Malpractice Cases Pending in the Law Division, 337 Ill. App. 3d 1016, 1025 (1st Dist. 2003) (noting "the power of the circuit court to regulate the discovery process during litigation and to enter protective orders when, under the particular circumstances of any given case, justice may so require"). The protective order in Hill was entered "[p]ursuant to Federal Rule[] of Civil Procedure 26(c)" and "governs all discovery related to the exchange or dissemination of information or the production of documents designated as . . . Confidential Matter." C. 223-24. That order, which has the force and effect of law, prohibits disclosure of the CR files relating to Halloran and Boudreau, and in turn triggers the exemption under section 7(1)(a).

Avery v. Sabbia, 301 Ill. App. 3d 839 (1st Dist. 1998), supports the Superintendent's contention that the Hill protective order precludes release of the CR files Watkins requested. In Avery, a doctor was deposed in connection with the treatment he had provided to the plaintiffs, who had filed a lawsuit in the circuit court of Cook County. Near that time, the insurance

carrier for the defendant in the state court case filed a RICO lawsuit in federal court naming the doctor as a defendant. The doctor filed a series of motions in the state court case seeking a protective order limiting use of his testimony to only that case on the ground that the attorneys for the insurance company were attempting to obtain discovery for use in the federal case, rather than the state court case. See id. at 842. The state court judge granted the doctor's motion for protective order and sealed the doctor's testimony. See id. at 843. On appeal, this court affirmed the order, noting that "the trial court is in the best position to weigh fairly the competing interests and needs of the parties affected by discovery." Id. at 847. This court further stated that the trial court was "allowed the flexibility to use its own knowledge and experience in deciding whether justice requires the prevention of abuses to the discovery process through the imposition of the proposed protective order." Id.

Protective orders like the ones in Hill and Avery serve important purposes. "In civil cases as in criminal cases, the parties have a right to a fair trial, guaranteed by the due process clauses, of the fifth and fourteenth amendments of the United States constitution[.]" People v. Kelly, 397 Ill. App. 3d 232, 254-55 (1st Dist. 2009). There are allegations in Hill that Halloran and Boudreau coerced confessions from arrestees, including Watkins. C. 134-35. Trial in Hill is scheduled for September 12, 2011, App. A1, and Watkins is identified as a "may call" witness by the plaintiff, App.

A4.. Thus, it is particularly important to follow the Hill protective order now, because otherwise Watkins may be allowed to review the CR files at issue prior to testifying at the trial. Even subtle influence from material in the file on Watkins's testimony in Hill could disrupt the fairness of that trial.

To be sure, Watkins seeks the requested CR files for use in connection with his post-conviction petition. C. 5. But there is no exception in the protective order for other litigants also suing the City. Instead, it plainly provides that the parties subject to the protective order, one of which is the City of Chicago, "will not use or disclose" the Confidential Matter, including CR files, "for any other purpose or in any other proceeding." C. 224. This prohibition against release of CR files for use in "any other proceeding" was in place on August 16, 2007, C. 223-24, more than a year before Watkins first requested the documents in his letter received on August 21, 2008, C. 110.

Moreover, although the CR files are not available to Watkins under FOIA, given the statutory exemption and the clear language of the protective order, there is a process available to him to petition the court for release of the documents. Members of the public, such as Watkins, can request access to the CR files by "apply[ing] to the [District] Court . . . under the procedure set out by the [C]ourt or under applicable rules, . . . for a determination that any document designated as Confidential Matter produced by the producing party does not contain confidential information, or that in certain circumstances the information should be released from the provisions of th[e]

Protective Order." C. 225-26. In similar cases, the federal courts have made clear that the only way to obtain documents covered by a protective order is through a petition to the federal district court issuing the protective order, not a FOIA request. See Wager v. U.S. Department of Justice, 846 F.2d 1040, 1047 (6th Cir. 1988) (refusing to require production of documents under federal FOIA where requester sought to contest the consent order barring disclosure of the records and noting that the proper forum to challenge the validity of the order is the district court issuing it); see also Lykins v. U.S. Department of Justice, 725 F.2d 1455, 1460-61 (D.C. Cir. 1984) ("those who object to a court order are expected to make their objection by means of the rules and procedures in accord with which the judicial system operates, for a court's ability to command adherence to its procedures and to resolve disputes depends on its ability to compel obedience to orders properly issued").

Carbondale Convention Center, Inc. v. City of Carbondale, 245 Ill. App. 3d 474 (5th Dist. 1993), addressed some related issues. There, Carbondale was sued for breach of contract. The parties agreed to settle the case and sought an order of dismissal, but before that order was entered, a newspaper asked Carbondale for a copy of the settlement agreement. See id. at 475. The circuit court subsequently entered the dismissal order with a provision that neither of the parties "may disclose to anyone the terms or conditions constituting the resolution of the dispute between the parties." Id. at 475-76.

Carbondale then denied the newspaper's FOIA request. See id. at 475.

After filing a petition to intervene and trying and failing to obtain an order from the circuit court, the newspaper appealed. See 245 Ill. App. 3d at 476. Carbondale argued that the circuit court's "gag order" was "State law" prohibiting disclosure for purposes of section 7(1)(a) of FOIA. The appellate court rejected that contention and reversed the dismissal of the newspaper's complaint. In doing so, the appellate court assumed, without deciding, that the court's order constituted "State law." Id. at 477. Nonetheless, because the dismissal order resulted in part from Carbondale's efforts to prevent disclosure of the agreement, which contradicted the purpose and intent of FOIA, section 7(1)(a) did not "apply as a possible exemption in this case." Id.

The instant case is easily distinguishable. Initially, there is no indication that the bar on disclosure contained in the Hill protective order was intended to circumvent the requirements of FOIA, as was the case in Carbondale Convention Center. As we explain above, the protective order limiting dissemination of the CR files was entered more than a year before Watkins's initial FOIA request was received. C. 110, 223-24. Additionally, the types of documents are markedly different. Unlike the settlement agreement requested in Carbondale Convention Center, which the legislature has made clear should be subject to public scrutiny, disciplinary records, such as the ones at issue here, are specifically exempt. Thus, section 2.20 of FOIA, which became effective January 1, 2010, provides that "[a]ll settlement

agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public . . . ." 5 ILCS 140/2.20 (2010). By contrast, section 8 of the Personnel Record Review Act states the legislature's intent to prohibit disclosure of disciplinary records such as those requested by Watkins. See 820 ILCS 40/8 (2008). Finally, the court in Carbondale Convention Center did not rule that a protective order could never serve to trigger the exemption under section 7(1)(a). To the contrary, the court assumed the order was state law and ruled only that "section 7(1)(a) does not apply as a possible exemption *in this case.*" Carbondale Convention Center, 245 Ill. App. 3d at 477 (emphasis added).

In fact, under federal law, a properly entered court order standing alone provides a sufficient basis for withholding documents under FOIA. Thus, the federal courts have long held that public bodies are not required to produce documents where court orders have been entered barring production of the records, even when those same records are not otherwise exempt under FOIA. See, e.g., GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980). See also Alley v. U.S. Department of Health and Human Services, 590 F.3d 1195, 1198 (11th Cir. 2009) ("an agency that complies with a court order forbidding disclosure does not violate the FOIA"). These cases are persuasive here because "[t]he legislature patterned the Illinois law after the Federal Freedom of Information Act and case law construing the Federal statute should be used in Illinois to interpret our own

FOIA." BlueStar Energy Services, Inc. v. Illinois Commerce Commission, 374 Ill. App. 3d 990, 996 (1st Dist. 2007) (citation omitted). Accord Harwood v. McDonough, 344 Ill. App. 3d 242, 248 (1st Dist. 2003).

In GTE, the Supreme Court was called upon to determine whether the Consumer Products Safety Commission "improperly" withheld information under the federal FOIA where the non-disclosure was based solely on injunctive orders entered by a federal district court. After noting that the federal FOIA "was intended 'to establish a general philosophy of full agency disclosure,' and to close 'the loopholes which allow agencies to deny legitimate information to the public,'" the Supreme Court ruled that because of the district court's orders barring release, the documents were properly withheld because "[t]here simply ha[d] been no discretion for the agency to exercise." 445 U.S. at 385-86 (citation omitted). The Supreme Court further stated that:

> There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know. To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" and would extend the Act well beyond the intent of Congress.

Id. at 387.

This court should likewise conclude that local governments are not

required to produce documents in response to a FOIA request where production is precluded under a properly entered court order. As with federal law, there is nothing in the legislative history of Illinois FOIA suggesting that the General Assembly expects a public body to commit contempt of court in order to comply with a FOIA request. Thus, the City should not be ordered by this court to violate the protective order entered in Hill.

C. The Documents Are Exempt Under Section 7(1)(f).

The Superintendent's motion to dismiss also argued that the CR files relating to Halloran and Boudreau were *per se* exempt under section 7(1)(f), 5 ILCS 140/7(1)(f) (2008), because the documents contain the expression of opinions and are used in the formulation of actions. C. 102-03. Accepting this submission, the circuit court noted that the affidavit submitted in support of the motion to dismiss "provides that each complaint was investigated, and a recommendation given" and accordingly held that "all of the documents requested would necessarily be used to form and express an opinion as to whether the officer should be disciplined." Supp. C. 5.

On appeal, Watkins barely mentions section 7(1)(f). He notes the Superintendent's argument, see Watkins Br. 4, and then simply states that the Superintendent "failed to satisfy [his] burden in showing the requested documents [are] actually exempt from disclosure under section 7 of FOIA," id. at 5. This is insufficient to present this issue for review. "A court of review is entitled to have the issues clearly defined with pertinent authority cited,"

City of Granite City v. House of Prayers, Inc., 333 Ill. App. 3d 452, 462 (5th Dist. 2002), and "need not sift through the record to find support" for an appellant's claim of error, Wilbourn v. Cavalenes, 398 Ill. App. 3d 837, 852 (1st Dist. 2010). Watkins's bare assertion that the Superintendent did not "satisfy [his] burden," with no argument, explanation, or citation to authority, means the argument is waived. This court has found waiver based on similar treatment in the appellant's brief. See Wilbourn, 398 Ill. App. 3d at 851-52 (claim of error consisting of statement that "[t]he trial court's erroneous evidentiary ruling could have, and most likely did, affect the outcome of the trial" was waived). See also Del Real v. Northeast Illinois Regional Commuter Railroad Corp., 404 Ill. App. 3d 65, 74 (1st Dist. 2010) (argument waived where the plaintiff's claim of error consisted of "two cursory paragraphs"). And, as we explain above, arguments waived in the opening brief may not be asserted in reply. See Ill. Sup. Ct. R. 341(h)(7).

Waiver aside, the circuit court correctly ruled that the CR files at issue are exempt under section 7(1)(f). In relevant part, that section provides that the following are exempt from production under FOIA:

> Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.

5 ILCS 140/7(1)(f) (2008). This court addressed the scope of section 7(1)(f) in Harwood. That case concerned a report, created by an outside vendor

providing recommendations to the State on the Boeing Corporation's relocation to Chicago. See 344 Ill. App. 3d at 244. This court likened the exemption to the deliberative process privilege found in the federal FOIA, "which exempts from disclosure inter- and intra-agency predecisional and deliberative material." Id. at 247. After noting that the privilege "is intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made," the court ruled that the report was exempt under section 7(1)(f). Id. at 248.

In this case, Sergeant Muzupappa's uncontroverted affidavit establishes that before a final decision is made whether to discipline an officer, and what the discipline will be, the investigator issues a Summary Report Digest containing the investigator's findings and recommendations about what discipline, if any, is appropriate. C. 114. The CR file is then reviewed by senior CPD officers in the accused officer's chain of command, each of whom gives his opinion in a Command Channel Review Summary whether he concurs with the findings and any recommendations made by the investigator. C. 115. Other documents are also included in the CR files, such as the complaint against the accused officer, C. 113; arrest, case, and criminal history reports, and interview summaries, may also be included, C. 115-16. The affidavit shows that senior CPD officials rely on the entire CR file when formulating the ultimate decision about discipline. C. 115. That is a basis to exempt the entire file under section 7(1)(f) of FOIA. Indeed, the

circuit court made this finding below:

> [T]he requested documents are used to formulate an opinion as to whether the officers should be disciplined for misconduct. Defendant's Affidavit provides that each complaint was investigated, and a recommendation given. Thus, all of the documents requested would necessarily be used to form and express an opinion as to whether the officer should be disciplined. Such documents are clearly exempt from disclosure under FOIA.

Supp. C. 5. As Harwood makes clear, "the materials on which [the public body] relied in formulating its ultimate decision" are exempt under section 7(1)(f).[9] 344 Ill. App. 3d at 248.

D. The Documents Are Exempt Under Section 7(1)(b)(ii).

The CR files involving Halloran and Boudreau are also "personnel files," which section 7(1)(b)(ii) makes *per se* exempt from disclosure. Section 7(1)(b)(ii) exempts:

> [i]nformation that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless that disclosure is consented to in writing by the individual subjects of that information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:
>
> * * * *
>
> (ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions[.]

[9] Watkins does not contend that the CR files he requested are not exempt because portions of them have been "publicly cited and identified by the head of the public body." 5 ILCS 140/7(1)(f) (2008).

5 ILCS 140/7(1)(b)(ii) (2008).

In Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401 (1997), the Illinois Supreme Court held that records within one of the categories enumerated under section 7(1)(b) are *per se* exempt. Specifically, Lieber explained that "[w]here the public body claims that a requested document falls within one of these specifically enumerated categories, and is able to prove that claim, no further inquiry by the court is necessary." Id. at 408. On this basis, Lieber held that the appellate court had erred in proceeding to "make an independent determination as to whether disclosure would amount to 'a clearly unwarranted invasion of personal privacy,'" for documents that fall within a specific exemption under section 7(1)(b). Id. Instead, as the supreme court explained, documents "covered by the express terms of section 7(1)(b)(i) . . . [are] automatically exempt from disclosure." Id. at 409. The same is plainly true of section 7(1)(b)(ii), which is at issue here. The question, then, is whether the CR files should be considered "personnel files," for if so they are *per se* exempt under FOIA as interpreted in Lieber.

In Copley Press, the court noted that FOIA does not define the term "personnel file"; to fill that void, the court looked to the definition of "personnel record" in section 2 of the Personnel Record Review Act. See 359 Ill. App. 3d at 324. The court concluded that "[g]iven its plain and ordinary meaning, a 'personnel file' can reasonably be expected to include documents such as a resume or application, . . . performance evaluations and

disciplinary records." Id. Regarding a letter explaining the employer's reasons for terminating an employee, the court ruled that the document was "both a summary of the performance evaluations and a record of disciplinary action." Id. at 325. Indeed, the documents at issue were "precisely what one would expect to find in a personnel file" and were therefore "*per se* exempt from disclosure" by section 7(1)(b)(ii) of FOIA. Id. Given Copley Press's definition of "personnel file" and Lieber's *per se* approach to information that is specifically exempt under section 7(1)(b)(ii), the CR files are likewise *per se* exempt, since they contain "precisely what one would expect to find in a personnel file." Copley Press, 359 Ill. App. 3d at 325. See also CANS, 348 Ill. App. 3d at 199 (noting *per se* exemptions when construing section 7(1)(b)(v)); Chicago Tribune Co. v. Board of Education of the City of Chicago, 332 Ill. App. 3d 60, 65 (1st Dist. 2002) (Where "the requested information falls within a *per se* exemption, the court shall conduct no further inquiry and must uphold the body's decision not to disclose the information.").

Watkins relies on Gekas v. Williamson, 393 Ill. App. 3d 573 (4th Dist. 2009), see Watkins Br. 5, but Gekas should not be followed here. In Gekas, the appellate court ruled that section 7(1)(b)(ii) did not exempt from production internal investigations of alleged misconduct against a deputy sheriff, Gillette. See 393 Ill. App. 3d at 583. But the court's discussion reveals a profound error of statutory construction.

> The legislature exempted "personnel files and personal information," as if it considered personnel files to be a repository

> of personal information. Unlike a performance evaluation, the Division's records are not generated for Gillette's personal use, and they do not concern his personal affairs. What he does in his capacity as a deputy sheriff is not his private business. Whether he used excessive force or otherwise committed misconduct during an investigation or arrest is not his private business. Internal-affairs files that scrutinize what a police officer did by the authority of his or her badge do not have the personal connotations of an employment application, a tax form, or a request for medical leave. Not every scrap of paper that enters a personnel file necessarily is personal information.

Id. (citations omitted). But of course all documents in a personnel file do not have to be personal information. Section 7(1)(b)(ii) exempts both "personnel files and personal information," and under general principles of statutory construction, that language must be honored as written. See, e.g., Bonaguro v. County Officers Electoral Board, 158 Ill. 2d 391, 397 (1994) ("Statutes should be construed, if possible, so that no term is rendered superfluous or meaningless."). And Lieber makes clear that it is possible to construe FOIA without creating these problems: information "covered by the express terms of" an exemption is "automatically exempt from disclosure." 176 Ill. 2d at 409. Ironically, Gekas claimed to be "following the lead of the supreme court in Lieber," 393 Ill. App. 3d at 583, but plainly the court did no such thing. If the court had, it would not have detoured into "whether records of internal-affairs investigations of alleged misconduct by Gillette in the performance of his public duties are his own 'personal information,'" id., since that issue is irrelevant for information expressly exempt as a personnel file.

The court in Gekas also believed that Stern v. Wheaton-Warrenville Community Unit School District 200, 233 Ill. 3d 396 (2009), "confirm[ed] the correctness of [its] interpretation of section 7(1)(b)." 393 Ill. App. 3d at 589. But Stern arose in a different context and thus does not support the result in Gekas, either. Stern held that an employment contract maintained in a school superintendent's personnel file was not exempt from disclosure, in part because FOIA explicitly identifies a "contract dealing with the . . . expenditure of public or other funds of public bodies" as a public record under FOIA. 233 Ill. 2d at 413. The court in Stern was quite clear that the reason the analysis was different from Lieber is that "Lieber did not involve a FOIA request for an employment contract." Id. at 407-08. Moreover, Stern reaffirmed the holding in Lieber that "[t]he *per se* rule still has general applicability where the information requested falls within one of the six specific exemptions to disclosure set forth in section 7(1)(b)." Id. at 413.

In short, Lieber and Copley Press control here. Stern is not to the contrary, and Gekas displays a profound error.[10] Because the CR files at issue are "personnel files" under section 7(1)(b)(ii), they are *per se* exempt.

E. The Documents Are Exempt Under Section 7(1)(b)(v).

The Superintendent also argued in his motion to dismiss that information contained in the CR files identifying people who filed complaints

[10] The Seventh Circuit Court of Appeals has noted that Gekas and Stern "are difficult to reconcile with Lieber and Copley Press." Bond v. Utreras, 585 F.3d 1061, 1076 n.10 (7th Cir. 2009).

or provided information to law enforcement in connection with the complaints against Halloran and Boudreau were exempt under section 7(1)(b)(v) of FOIA. C. 104-05. In granting the Superintendent's motion to dismiss, the circuit court ruled that "there would be a significant amount of information in the documents disclosed relating to witnesses and the individuals who filed the complaints. These documents are *per se* exempt under [s]ection 7(1)(b)(v)." Supp. C. 5.

On appeal, Watkins does not articulate any argument or cite authority in connection with this exemption. That means the issue is waived. See, e.g., Liberty Mutual, 407 Ill. App. 3d at 395 (pursuant to Rule 341(h)(7), disregarding arguments raised for the first time in the reply brief).

Waiver aside, section 7(1)(b)(v) of FOIA provides:

> (1) The following shall be exempt from inspection and copying:
>
> * * * *
>
> (b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:
>
> * * * *
>
> (v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies[.]

5 ILCS 140/7(1)(b)(v) (2008).

In this case, Sergeant Muzupappa's affidavit establishes that IAD is responsible for investigating certain complaints of misconduct by members of CPD. C. 112. The CR files generated during the investigations into allegations of misconduct include the complaint, which contains the name, address, and telephone numbers of each complainant and victim of the alleged misconduct. C. 114. The Summary Report Digest, which is prepared by the investigator and is part of the CR file, contains the name, address, telephone number, sex, race, and date of birth of the complainants, victims, and witnesses. C. 114-15. Additionally, the Summary Report Digest may also state whether the complainants, victims, or witnesses cooperated with the investigation and whether they gave statements to the investigator. C. 115.

Section 7(1)(b)(v) expressly exempts "information revealing the identity of persons who file complaints with or provide information to" IAD in connection with its investigations. And again, this is a *per se* exemption under the statute. This court, in CANS, considered a similar issue and held that the names and addresses of individuals providing information to CPD at "beat meetings" is *per se* exempt under section 7(1)(b)(v). See CANS, 348 Ill. App. 3d at 200-01. Here, the information contained in the CR files requested by Watkins includes not only names and addresses of complainants, victims and witnesses, but also their telephone numbers and dates of birth, which is

likewise *per se* exempt under section 7(1)(v).

II. THE CIRCUIT COURT WAS NOT REQUIRED TO CONDUCT AN *IN CAMERA* INSPECTION OF EXEMPT DOCUMENTS.

Watkins's final contention is that the circuit court erred in failing to conduct an *in camera* inspection pursuant to section 11(f) of FOIA, 5 ILCS 140/11(f) (2008), of the documents he requested. See Watkins Br. 10-11. Watkins claims that the *in camera* inspection was required because the Muzupappa affidavit included with the motion to dismiss was "too vague and inadequate" to sustain the Superintendent's burden of establishing that the CR files were exempt. Id. at 10.

According to Watkins, Sergeant Muzupappa's affidavit is insufficient to establish the requested documents are exempt because it: 1) does not explain why documents cannot be disclosed once private and sensitive information is redacted; 2) does not describe "the exact nature of each complaint lodged against" Halloran and Boudreau; and 3) does not identify "when the [CR] files [were] started, for what purpose and at what period did complaints stop being filed under 'CR' files." Watkins Br. 10. Citing Day v. City of Chicago, 388 Ill. App. 3d 70 (1st Dist. 2009), Watkins further argues that any information exempt under section 7(1)(f) should be redacted and the remaining portions of the documents produced. Watkins Br. 10-11.

This argument ignores that sections 7(1)(a), 7(1)(b)(ii), and 7(1)(f) serve to exempt the CR files in their entirety. Section 11(f) of FOIA, on which Watkins relies, must be read in context with those provisions as

interpreted by the supreme court. Section 11(f) provides that:

> In any action considered by the court, the court shall consider the matter de novo, and shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act. The burden shall be on the public body to establish that its refusal to permit public inspection or copying is in accordance with the provisions of this Act.

5 ILCS 140/11(f) (2008).

As Stern itself recognizes, the court should "view all provisions of a statutory enactment as a whole." 233 Ill. 2d at 410 (internal citations omitted). And Lieber holds that once a public body establishes that records fall within one of the express exemptions, the records are *per se* exempt: "[w]here a public body claims that a requested document falls within one of these specifically enumerated categories, and is able to prove that claim, no further analysis is necessary." 176 Ill. 2d at 408. In that circumstance, an "appropriate" *in camera* review is no review at all. See also Williams v. Klincar, 237 Ill. App. 3d 569, 572-73 (3d Dist. 1992) ("When an agency meets its burden by means of affidavits, *in camera* review is not necessary."). Accordingly there is no basis for *in camera* review of any of the documents in the CR files Watkins seeks.

Nor is there any basis to require redaction of the files and disclosure of the files subject to redactions. While that requirement is imposed for files and documents that are not entirely exempt, see Day, 388 Ill. App. 3d at 79, it is not required – or even possible – when the entire file or document is

exempt, see Harwood, 344 Ill. App. 3d at 250.

Watkins's two other claims regarding the affidavit, see Watkins Br. 10, also fail. As for the failure to describe the "exact nature of each complaint" against Halloran and Boudreau, since Watkins is not entitled to the documents, he is plainly not entitled to a detailed description of the nature and contents of the documents. And his request for information about when the CR files were started and why runs right into the express prohibition under the Personnel Record Review Act of information relating to the imposition of discipline "more than 4 years old." 820 ILCS 40/8 (2008).[11] The affidavit in this case establishes that there are CR files relating to both Halloran and Boudreau for the years 1990 through 1994, C. 113, which as we explain is all that is on review. Clearly, all of these CR files are over 4 years old. There is no basis under FOIA to require detailed information about information that is itself exempt from production.[12]

CONCLUSION

For all of the above reasons, the court should affirm the circuit court's dismissal of Watkins's complaint.

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[11] We do not address Watkins's assertion that Sergeant Muzupappa's affidavit is insufficient on the basis that it does not identify "at what period did complaints stop being filed under 'CR' files." Watkins Br. 10. We are unsure of the meaning of this statement or how it is grounded in FOIA.

[12] In this regard, it is notable that Watkins does not contend the additional fact of the exact year each CR file was "started" would assist in determining whether the file is exempt from production.

Respectfully submitted,

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