Judicial Watch vs Office of Mayor

16 CH 462

Report of Proceeding

Taken on: September 23, 2016

1

2   STATE OF ILLINOIS   )
) SS.
3   COUNTY OF COOK   )

4

          IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
5   COUNTY DEPARTMENT, CHANCERY DIVISION

6

      JUDICIAL WATCH, INC.,   )
7   )
                        Plaintiff,   )
8   )
            vs.   ) No. 16 CH 00462
9   )
      THE OFFICE OF THE MAYOR OF   )
10   THE CITY OF CHICAGO   )
)
11   and   )
)
12   RAHM EMANUEL, in his   )
      official capacity as Mayor   )
13   of the city of Chicago   )
)
14   Defendant.   )

15   Report of proceedings had at the hearing in

16   the above-entitled cause before the HONORABLE ANNA HELEN

17   DEMACOPOULOS, Judge of said Court, commencing at 10:43

18   a.m. on September 23, 2016.

19

      APPEARANCES:
20

          SVENSON LAW OFFICES, by
21   MS. A. CHRISTINE SVENSON
              On behalf of the Plaintiff;
22

          CITY OF CHICAGO, LEGAL INFORMATION, INVESTIGATIONS
23   & PROSECUTIONS, by
          MR. PHILLIP SANTELL
24   On behalf of the Defendant.

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 1          THE COURT:  Good morning, CounseL.

 2          MR. SANTELL:  Good morning, your Honor.  My name is

 3   Phillip Santell, S A N T E L L.  This is corporation

 4   counsel for the City of Chicago representing defendant

 5   in this matter.

 6          THE COURT:  Good morning.

 7          MS. SVENSON:  Good morning, your Honor.  Christine

 8   Svenson, S V E N S O N, on behalf of plaintiff, Judicial

 9   Watch, Inc.

10          THE COURT:  You may be seated.  I'm going to ask

11   that you all argue from counsel table.  I just ask that

12   you stand so that you can be clearly heard.  I know it's

13   easier to spread out your paperwork at the table.  We're

14   here today on defendant's motion to dismiss.

15          MR. SANTELL:  That's correct, your Honor.

16          THE COURT:  I have read -- I have the amended

17   complaint, the defendant's motion, plaintiff's response,

18   defendant's reply in supporting affidavit, and then

19   plaintiff's sur-reply.  I just have a question before we

20   begin.

21             In the defendant's reply in supporting

22   affidavit, there is a mention that in June of 2016,

23   there was a subsequent response to the FOIA request.

24   Does the plaintiff have that?
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1   MS. SVENSON: No. I'm glad you brought that up,

2   your Honor, because we are not in possession of that.

3   So I was surprised to see that in the affidavit.

4   Counsel did produce to me yesterday a response, and it

5   is dated with yesterday's date.

6   MR. SANTELL: Your Honor, if I may.

7   THE COURT: Please.

8   MR. SANTELL: This is a matter that I discussed

9   with my supervisor who handled --

10   THE COURT: You need to be clearer.

11   MR. SANTELL: This is matter that I discussed with

12   my supervisor, Amber Ritter, and this is a matter that

13   came to my attention, and I wasn't sure whether or not

14   there was a subsequent response that went out -- a

15   clarified response that went out. It is true that in

16   the reply it is mentioned. I looked for it. I could

17   not find it. Therefore, I reached out to counsel to

18   ensure she had it. She indicated to me that she

19   couldn't find it.

20   Therefore, to ensure that everything was taken

21   care of, I sent the one dated yesterday to her. It is

22   exactly the same as the reply that went out on

23   January 7th. The only thing that is different is that

24   it is addressed from the Mayor's office as opposed to

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1   from the Chicago Police Department. All the exemptions

2   are the same. The records that were produced are the

3   same. It is exactly the same.

4   THE COURT: Except for the cover letter, the words,

5   Chicago Police Department are replaced with Office of

6   the Mayor.

7   MR. SANTELL: That is correct, your Honor.

8   THE COURT: And is it dated July 14th?

9   MR. SANTELL: Well, I'm not entirely sure if there

10   was one dated July 14th that was sent out. I would not

11   have sent it out, but I did send one to counsel

12   yesterday, and I have a copy of it with me today.

13   THE COURT: Do you have it now?

14   MS. SVENSON: I do.

15   THE COURT: Does that change anything for today?

16   MS. SVENSON: I don't think that it does.

17   THE COURT: Okay. At least we're clear that you

18   have a second response to the FOIA request.

19   MS. SVENSON: As of yesterday, yes.

20   THE COURT: All right. Counsel, go ahead.

21   MR. SANTELL: Thank you.

22   Your Honor, today we're up on defendant's

23   motion to dismiss plaintiff's amended complaint pursuant

24   to Section 2619.1, which combines both Section 2615 and

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 1   2619. Here it's the defendant's contention that

 2   plaintiff's complaint fails under both 2615 and 2619

 3   because it is excessively vague and without specific

 4   factual allegations. And looking at the face of the

 5   complaint, it is clear that the city has met its

 6   obligation under FOIA, which therefore both of these

 7   defeat the plaintiff's claim.

 8   Starting with Section 2615, generally

 9   Section 2615 deals with the legal sufficiency of the

10   complaint based upon defects that are apparent on the

11   face. It is important to note that Illinois is a fact

12   pleading jurisdiction. Therefore, a plaintiff must

13   allege specific facts not mere conclusions or

14   conjecture. Legal conclusions and factual conclusions

15   that are unsupported by allegations and specific fact

16   will be disregarded in ruling on a motion to dismiss.

17   That was in the case of Cummings versus City of

18   Waterloo, which is available at 289 Ill. App 3rd, which

19   I believe was the First District appellate case.

20   Generally speaking, the plaintiff must allege

21   specific facts that allow a defendant to be essentially

22   placed on notice of the claims that are against them and

23   allow them to form a defense to those claims. Here in

24   this case after amending their pleadings, plaintiffs

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1   still have not alleged specific facts that would enable

2   them to survive a 2615 motion to dismiss.

3   Specifically, in Count 1, plaintiff alleges

4   that they did not receive a response to the FOIA

5   request. Looking at the face of the complaint and the

6   documents that are attached to the subsequent findings,

7   it is clear that this is simply not supported by the

8   defendant's complaint. Plaintiff acknowledges in

9   Paragraph 10 of their amended complaint that they

10 received a response from the city dated January 7, 2016,

11 and they have attached that response to their filings

12 with this Court.

13   Now, plaintiff is arguing that this is somehow

14 nonresponsive, but that's not the case, your Honor.

15 It's simply the fact that this was a simple clerical

16 error, that Chicago Police Department was listed when it

17 should have been the Mayor's office.

18   THE COURT: But, counsel, everything that has been

19 attached --

20   MR. SANTELL: Yes, your Honor.

21   THE COURT: -- and even the question that the Court

22 had before we even began today and even your own

23 admission that you yourself were unclear whether or not

24 there was a specific response from the Mayor's office to

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 1   this FOIA was unclear even as of yesterday.

 2       MR. SANTELL:  Now, my response to that, Judge,

 3   would be essentially -- it's not to be dismissive -- but

 4   I believe that it's a distinction without indifference.

 5   And the reason that I say that is because the FOIA

 6   response that went out to the plaintiff, I believe it

 7   was just over 3,000 documents, including documents from

 8   the City Law Department, from the Mayor's office, from

 9   CPD.  It was a city wide search.  I believe there are

10   more than 20 e-mail inboxes that were searched.

11            Therefore, whether or not it's entitled from

12   the Mayor's office or from CPD or from the Law

13   Department or whatever it is, that's unimportant because

14   if you look at the substance of the letter, it's clear

15   that the Mayor's office inbox -- the Mayor's office --

16   the Mayor's e-mail, his personal e-mail, was searched as

17   well as his staff.

18       THE COURT:  That's not clear.  And the Mayor's

19   office website itself -- and I'm going to quote it.

20   "Each city department is a separate agency responsible

21   for maintaining its own records.  Requests should be

22   submitted to the department that maintains the records

23   you want."

24       MR. SANTELL:  Yes.  That's entirely true.
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 1   THE COURT: So if you're demanding as a city that

 2 the requester make a request of the specific department,

 3 why is it okay then for the city to respond generically?

 4   MR. SANTELL: Well, the city's position, Judge, is

 5 that this was a special instance. We had more than 30

 6 requests from the same material covering the

 7 October 2014 shooting of Laquan McDonald. We had

 8 numerous different requesters asking for different

 9 things.

10   Therefore, in order to conserve resources and

11 try to answer everyone's FOIA request in the truncated

12 period of time that's required by FOIA, the city did

13 something that might be unusual. What the city did is

14 that we tried to come up with search terms and search --

15 and places to search that would essentially cover all of

16 the requests and provide, in many cases, like this one,

17 a lot more information than would have been provided if

18 the individual searches were run.

19   For instance, if we would have simply searched

20 the Mayor's office, all the information that was

21 provided to plaintiff from the CPD, from the Law

22 Department, that would have been excluded. So in this

23 case, we kind of -- to deal with the exigency that's

24 required by FOIA and to try to get the response out

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1   since there were so many in demand, we kind of -- for

2   lack of a better term -- we try to come up with a group

3   of search terms and inboxes in which to search to get

4   these communications that would cover all of the

5   requests. Given the fact that there's such a limited

6   time and given the fact city resources were limited,

7   this is a solution that was come up with.

8   THE COURT: Collectively.

9   MR. SANTELL: Essentially, yes.

10   THE COURT: And doesn't that defeat the whole

11   purpose of individual public bodies under FOIA?

12   MR. SANTELL: No. We don't believe it does. We

13   believe that this situation is different than your usual

14   FOIA request. The usual FOIA request, if I may, let's

15   say --

16   THE COURT: There is no usual in FOIA.

17   MR. SANTELL: That's correct, your Honor. Maybe a

18   more typical FOIA request is a better way to put it.

19   A more typical FOIA request would say to the

20   Department of Revenue, please, you know, tell me -- give

21   me documentation related to how many boots the

22   department maintains.

23   In this instance, this FOIA request and all

24   these other requests were for documents from different

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1   city departments involving the same item. So

2   essentially, all these FOIA requests taken together it

3   kind of forced us to look beyond just one department in

4   order to try to fulfill the request, and that's what we

5   tried to do, your Honor. We tried to fulfill the

6   requests and tried to provide everyone with the

7   documentation that is needed and documentation that they

8   are asking for.

9   THE COURT: Look, I understand that in hindsight

10 now when we're talking in a courtroom it's different

11 than the time constraints as a public relations issue

12 that the city was managing at the time to answer and

13 respond to all of these FOIA requests. This may have

14 been the expeditious and cost effective way to respond

15 to the multiple FOIA requests. I get that, but now when

16 we're in court and we're looking at the law

17 specifically, it's very clear that the Mayor's office is

18 different than the Chicago Police Department and the Law

19 Department.

20   MR. SANTELL: Yes, absolutely. That's true.

21   THE COURT: So up until yesterday when it was very

22 clear that the response was coming from the Mayor's

23 office, Count No. 1 was -- you did not respond. The

24 Mayor's office did not respond.

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1   MR. SANTELL: Well, your Honor, again, without

2   being dismissive --

3   THE COURT: I understand.

4   MR. SANTELL: -- I would argue.

5   THE COURT: You're in a difficult position standing

6   here in this courtroom having to answer this question

7   for other people that made that decision.

8   MR. SANTELL: Well, the reason I would say that

9   that's perhaps a distinction without indifference is

10 because the Mayor's staff, the Mayor's e-mail,

11 everything was searched in response to her request. And

12 it is not the instance where Judicial Watch in this case

13 is alleging that they sent a request to CPD, they sent a

14 request to the Chicago Fire Department, they sent a

15 request to the office of Emergency Management &

16 Communications, and they only received this one request

17 back. There are no other requests. They didn't make a

18 request of CPD. So when they received the request, it

19 should have been clear that it was simply an error that

20 Chicago Police Department was listed at the top.

21   THE COURT: Then there's the subsequent e-mails to

22 Ms. Ritter identifying it specifically. And I

23 understand that in her position at the time I'm sure

24 that it was chaos. I totally understand that, that it

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1   must have been chaos with all of the requests the

2   various city departments were being inundated. But at

3   some point in time, now that things have kind of

4   settled, we still have to -- I'm still kind of

5   restricted to what the FOIA statute says, and each

6   individual agency in which each individual department of

7   the city is an individual entity -- public body.

8   MR. SANTELL: Yes, absolutely. That's entirely

9   true, your Honor, but the city's position is that

10 although -- Let me phrase this another way.

11   That although each individual entity is its

12 own body that in this particular instance, the request

13 would have not been answered fully if these other bodies

14 weren't involved.

15   THE COURT: So, in other words, the response still

16 would have been the same. In other words, the documents

17 that were turned over would still be the same.

18   MR. SANTELL: The documents from the Mayor's office

19 would be exactly the same. Our position is that we

20 gave -- we essentially went above and beyond. We gave a

21 lot more documents in the interest of transparency to

22 the plaintiff than their request they requested. Given

23 the fact that the plaintiffs made no other requests of

24 any other city agency --

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 1          THE COURT:  I don't know that, though.  I don't

 2   know that based on these pleadings.

 3          MR. SANTELL:  Well, that's true, your Honor.  Their

 4   allegations are they submitted a FOIA request on

 5   December 2nd and that they subsequently received a

 6   response on January 7th, but the response was entitled

 7   from the Chicago Police Department.  Those are the

 8   allegations, if I'm not mistaken them.

 9              Therefore, the city feels that we did respond.

10   There was a clerical error in the response that had

11   subsequently been cleared up.  The responsive documents,

12   everything, all the e-mails are identical.  The

13   exemptions that are asserted are identical.  It's the

14   same response essentially.  It's just fashioned from the

15   Mayor's office as opposed to CPD.

16          THE COURT:  Let's move on to Count No. 2 as to the

17   sufficiency of the search terms.

18          MR. SANTELL:  Now, in the second count, plaintiff

19   is alleging that the search was insufficient.  As

20   explained in Amber Ritter's affidavit, there were many

21   requests for the same --

22          THE COURT:  We just lost that.  I want the record

23   clear.  Do you want to repeat that?

24          MR. SANTELL:  As explained in Amber Ritter's
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1   affidavit, which is attached to our reply, the city had

2   received many different requests for essentially the

3   same information. Therefore, what the city did is we

4   came up with inboxes to be searched and search terms to

5   be used. We use the terms Laquan, Van Dyke, Van Dyke

6   with a different spelling, and also LM, the abbreviation

7   for Laquan McDonald. So, therefore, we came up with the

8   terms that would be universally applicable and would

9   pick out the relevant information and the relevant

10 documents.

11   And, in addition, the responsive letter

12 clearly states that, quote, we believe this production

13 fulfills the terms of the FOIA request. To the extent

14 you are seeking additional material, please direct a

15 renewed FOIA request to the appropriate city department.

16   In this case, plaintiff did not submit a

17 subsequent FOIA request. Instead, they filed a lawsuit

18 against the city. They're arguing that the search was

19 inadequate because the terms, dash-camera and recording,

20 were not used in the terms that were searched. It's not

21 clear from their request, which is very general, and is

22 attached to their sur-reply. I believe it is Exhibit A.

23   Their request is for any and all records --

24   THE COURT: Counsel, slow down.

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 1   MR. SANTELL: Okay. I apologize.

 2   THE COURT: You want a clean record.

 3   MR. SANTELL: There request was for, quote, any and

 4   all records of communications sent to or from officials

 5   in the office of the Mayor, including but not limited

 6   to, Mayor Rahm Emanuel, regarding, concerning or

 7   relating to police dash-camera recording of the

 8   October 20, 2014 shooting of Laquan McDonald, including

 9   but not limited to the release of any such video

10   recordings to the public.

11   Now, plaintiff is attempting to argue that

12   since the terms camera, recording or dash were not used,

13   that the search is inadequate. Well, your Honor,

14   there's a couple problems with that. First being that

15   the generalized terms camera, dash, or recording would

16   not gather materials responsive to this request. The

17   generalized terms that were not set out as search terms

18   to be searched in the request -- there was no requests

19   basically saying that please search the Mayor's staff or

20   Mayor Rahm Emanuel's e-mail for these specific key

21   words. That was not done. This generalized request was

22   for material that dealt with the release of the material

23   related to the shooting of Laquan McDonald.

24   THE COURT: You skipped the words police

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 1   dash-camera.

 2   MR. SANTELL: Yes, your Honor, because that's what

 3   was released. The police dash-camera was released.

 4   That was the information that was released. So whether

 5   or not -- to gather responsive documents, the terms that

 6   were used were specific to this instance, Van Dyke, two

 7   spellings, Laquan, LM, those items. If we were to

 8   search CPD e-mails for dash or CPD e-mails for camera or

 9   recording or the Mayor's office, we would come up with

10   perhaps a lot of things that would be irrelevant to

11   these proceedings.

12   THE COURT: But there is more than one dash-cam

13   video recording in this instance of the October 20th

14   shooting; isn't there?

15   MR. SANTELL: I believe there were -- now I can't

16   remember an exact number.

17   THE COURT: And that's exactly the point. If you

18   limited the search to just Van Dyke, which is a officer,

19   and you limited the search to the victim, Laquan

20   McDonald or LM, and you limited the search to just

21   those, you are excluding all of those other possible

22   dash-cams that were involved.

23   MR. SANTELL: Well --

24   THE COURT: Because if those e-mails did not

1   contain the victim's name, a single officer's name, then

2   you are excluding all of those e-mails.

3   MR. SANTELL: Well, the e-mails that we excluded

4   were e-mails that are not related at all to this

5   proceeding. As your Honor can certainly imagine, there

6   are hundreds of dash-cams in different vehicles all

7   across the city of the Police Department. Whether or

8   not there are communications that deal with those, they

9   would have nothing at all to do with the Laquan McDonald

10 instance for the period of time it was searched.

11   By using these expansive, open-ended terms, we

12 would be bringing in perhaps -- I can't even guess as to

13 how many additional e-mails, but they would not be

14 relevant e-mails. The relevance would be Laquan

15 McDonald, LM, Van Dyke as was searched. Those would be

16 the relevant terms.

17   THE COURT: How did the terms -- The affidavit says

18 that we -- I want to use the exact words -- gleaned from

19 the many requests and then calculated to produce the

20 broader set of relevant records.

21   Who made that decision, and if that was the

22 case, were other requesters involved in making that

23 decision excluding Judicial Watch?

24   MR. SANTELL: I don't believe that other requesters

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 1 were involved. I think what occurred is that looking at

 2 the great number of requests the city received, that in

 3 order to answer them, perhaps terms were taken from

 4 certain letters. Again, I was not involved in that

 5 process. So I can't say definitively, but looking at

 6 the affidavit, I believe that's what it indicates, is

 7 that there wasn't necessarily a give and take so to

 8 speak with the requesters, but that looking at the

 9 request, these terms were used.

10   THE COURT: Okay. I understand, and I mean this

11 sincerely that you standing in front of me having to

12 answer these questions is very difficult, but these are

13 questions that I have to ask as required by the statute.

14 The statute is very specific that every single body must

15 have a FOIA officer.

16   Who is the FOIA officer for the Office of the

17 Mayor?

18   MR. SANTELL: At this time, I believe it was Chloe

19 Rasmas.

20   THE COURT: Who?

21   MR. SANTELL: Chloe Rasmas I believe it was.

22   THE COURT: And we don't have any documents from

23 her or him.

24   MR. SANTELL: What happened, your Honor, is the

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 1   City of Chicago Department of Law represents basically

 2   all the agencies that were involved here. So this

 3   was -- my understanding is that this was handled through

 4   the Department of Law given the large number of requests

 5   and the different bodies that were involved -- different

 6   city entities that were involved.

 7   THE COURT: Okay.

 8   MR. SANTELL: So going ahead with Count 3, failure

 9   to produce all nonexempt information. Here, the

10   plaintiff alleges that simply because there were

11   redactions, that the production is incomplete. In this

12   case, there were more than 3,000 e-mails that were

13   produced. There were, I believe, five or six different

14   exemptions that were cited.

15   Here, plaintiff doesn't allege any specifics

16   as to what they take issue with. There is no indication

17   that they take issue with, say, (d)(iv), for example, or

18   (c), for example -- I'm sorry -- 7(1)(c) or

19   (7)(1)(d)(iv) or any of the different FOIA exemptions.

20   They basically state that this production was incomplete

21   simply because it contained redactions. Judge, this

22   doesn't give the city anything to go on so to speak in

23   which to form a defense.

24   THE COURT: Has there ever been a request for an

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 1   index yet?

 2   MR. SANTELL: Not from Judicial Watch, your Honor,

 3   as far as I'm aware. I'm sure counsel will be able to

 4   correct that if it's incorrect.

 5   In addition, your Honor, Mayor Rahm Emanuel

 6   personally should be dismissed from the suit as well

 7   pursuant to Section 2615.

 8   THE COURT: Why?

 9   MR. SANTELL: Because looking at the authority to

10   sue, which is found in 5 ILCS 140/11, which indicates

11   denial of a request for public records injunctive or

12   declaratory relief. It indicates that any person denied

13   access to inspect or copy any public records by a public

14   body may file suit for injunctive or declaratory relief.

15   If you switch to the definition section, which

16   is found on 5ILCS140/2, public body is a defined term.

17   It's found under A. "Public body means all legislative,

18   executive, administrative or advisory bodies of the

19   State, State universities and colleges, counties,

20   townships, cities, villages, incorporated towns, school

21   districts or any other municipal corporations, boards,

22   bureaus, committees or commissions of the State and any

23   subsidiary bodies of any of the foregoing, et

24   cetera."

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 1   Your Honor, there is no -- given this

 2   definition and given the fact that the language that

 3   allows someone to bring a suit for declaratory

 4   injunctive relief specifically lists a public body. We

 5   don't believe that the Mayor as an individual is an

 6   appropriate defendant in this matter.

 7   Now, in opposition to this point --

 8   THE COURT: The suit is in Rahn Emanuel in his

 9   official capacity. It's not his unofficial capacity.

10   MR. SANTELL: That is correct. Our position is

11   that it should be simply against the Office of the

12   Mayor, not against Rahn Emanuel.

13   In support of their argument that the Mayor is

14   a proper party, counsel cites to an opinion from the

15   First District Appellate Court in the matter of Quincy

16   Stone (phonetic), which was decided in 1991. And I have

17   a copy for your Honor if your Honor does not have one.

18   This deals with the instance where --

19   THE COURT: Hold on just a second.

20   Go ahead

21   MR. SANTELL: This deals with the instance where

22   someone is trying to bring injunctive suit against an

23   alderman. And the issue before the Court is whether or

24   not that alderman can be sued, whether or not the

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1   individual alderman is a public body. And in this

2   lawsuit, the Court described FOIA as it used to be

3   before the 2010 amendment. Before 2010, if you were

4   denied anything from a public body, you had to appeal to

5   the head of that public body. And essentially after you

6   would receive a denial from the head of the public body,

7   you would receive -- to use a phrase -- key to the

8   courtroom, that essentially this was a prerequisite that

9   had to be met prior to the ability to bring a suit.

10   Now, in this matter, there is language that

11 indicates that this person should have brought suit

12 against the Mayor and the city counsel. Now, the Mayor

13 is the head of the city counsel, and they were together

14 as a public body. Given the fact that this opinion is

15 not as broad as the plaintiff's set it out to be, and we

16 believe that it's distinguishable being the fact that it

17 works with an older version of FOIA, and it's also

18 dealing with an entirely different set of facts, which

19 deals with alderman, city counsel and Mayor as head of

20 city counsel. We believe this case is distinguishable.

21   We believe the FOIA definition of public body

22 is clear under Section A as it was read and indicated

23 into the record as well as the authority to sue a public

24 body. We believe there is no authority to argue that

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1   the Mayor as an individual is an appropriate defendant

2   under FOIA. Thank you.

3   THE COURT: Counsel.

4   MS. SVENSON: Thank you, your Honor.

5   At the outset, I would point out that

6   defendant's motion to dismiss states plaintiff fails to

7   plead facts showing that the city failed to respond.

8   That's Argument A. Argument B, plaintiff has not pled

9   facts showing that the city failed to conduct a

10   sufficient search. Argument C, plaintiff has not pled

11   facts showing the city failed to produce all nonexempt

12   information.

13   So that's just false. We pled that the office

14   of the Mayor did not respond, that the office of the

15   Mayor failed to conduct a sufficient search, that the

16   office of the Mayor failed to produce all nonexempt

17   information. That was addressed in counsel's argument,

18   but I think it's important to note that they are trying

19   to mislead the Court in saying that it's the city that's

20   involved here. It's the Office of the Mayor. And

21   simply put, the Office of the Mayor did not respond to

22   our FOIA request.

23   The January 7th, 2016 letter by Ms. Ritter

24   clearly states that she was responding to a FOIA request

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1 directed to the Chicago Police Department. She also

2 states in your request you sought, quote, any and all

3 records of communication sent to or from officials in

4 the CPD, including but not limited to superintendant

5 Garry McCarthy, regarding, concerning or relating to

6 police dash-camera recording of the October 20, 2014

7 shooting of Laquan McDonald. That's false. That's not

8 what we were seeking at all. It's very clear from our

9 FOIA request what we were seeking.

10   So in our amended complaint, we specifically

11 note that --

12   THE COURT: So now having received yesterday's

13 response that clearly identifies the Office of the

14 Mayor, does that satisfy the request?

15   MS. SVENSON: It does not. It did not come from

16 the FOIA officer from the Office of the Mayor. We know

17 that now. It does not provide us with -- the search was

18 not accurate -- I'm sorry -- not complete.

19   THE COURT: Forget that. Let's stick with the

20 issue of whether or not the Office of the Mayor has

21 responded because that's a big issue.

22   MS. SVENSON: Right. We do not believe so.

23 There's no affidavit attached to the request, I don't

24 believe.

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 1   THE COURT: Do you have the request that was sent

 2   yesterday for the Court to view?

 3   MS. SVENSON: Yes.

 4   THE COURT: Or the response. I'm sorry. The

 5   response to the request.

 6   (Document tendered.)

 7   THE COURT: Can I have one minute to read it?

 8   MS. SVENSON: Sure.

 9   THE COURT: So the body of it is exactly the same.

10   The only difference is it now says the Office of the

11   Mayor.

12   MS. SVENSON: I believe that's correct.

13   THE COURT: Okay. And the letter is signed by

14   Mr. Santell as assistant corporation counsel.

15   MR. SANTELL: That is correct, your Honor. I sent

16   it to counsel yesterday.

17   THE COURT: Go ahead, Counsel.

18   MS. SVENSON: So, yes, we do not believe this was

19   properly responsive because there is -- it does not come

20   from the FOIA officer from the Office of the Mayor, and

21   there are no affidavits attached showing that they did a

22   complete search.

23   THE COURT: Go ahead.

24   MS. SVENSON: Relating to the actual search, the

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1   search was inadequate, and they are trying to change the

2   law or misread the law. It's not the requester's burden

3   to show that they conducted an accurate search. It's

4   their burden, and they just simply didn't do it. This

5   is not about the shooting of Laquan McDonald. This is

6   about the dash-cam recording. There was absolutely no

7   search as we know for the term, quote, dash, unquote,

8   quote, camera, unquote, quote, recording or any variance

9   thereof.

10   THE COURT: So you get this response in January

11 of 2016, and you see that it doesn't have those search

12 terms. Is there any subsequent follow-up request?

13   MS. SVENSON: Yes.

14   THE COURT: I get there were some e-mails to

15 Ms. Ritter that say, hey, we FOIA the Mayor's office,

16 not CPD. Was there any follow up saying we want dash,

17 slash, camera, dash-camera request? Was there ever,

18 ever a second request?

19   MS. SVENSON: Yes, via e-mail. Those were in my

20 client's e-mails to Ms. Ritter who specifically note

21 those search terms weren't used, and we requested that

22 they be used. I believe that those e-mails were

23 attached to one of the --

24   THE COURT: They are. Just give me one second.

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 1   MS. SVENSON: Sure.

 2   THE COURT: Go ahead.

 3   MS. SVENSON: We're alleging that the search was

 4   not adequate, there was no affidavit containing facts

 5   that they conducted a thorough search. We did get the

 6   affidavit from Ms. Ritter. However, there were

 7   inaccuracies because we never received the July 2016

 8   response that she claimed that she had sent. They

 9   failed to produce by clear and convincing evidence that

10   the information fell -- falls within the FOIA exemption.

11   The information was redacted. There's no index, and

12   there's no indication with the redacted information as

13   to which exemption applies to what was redacted to.

14   THE COURT: So I haven't seen the redactions, and

15   I'm not going to look at 3,000 e-mails. I'm telling you

16   right now. So my question to Judicial Watch is this:

17   The redactions that I have seen in other cases, when the

18   redaction appears, it actually identifies which section

19   it's being redacted under. In other words, personal

20   information, deliberative process, attorney/client

21   privilege, whatever. Do those redactions have the

22   section cites?

23   MS. SVENSON: I believe not. I should have double

24   checked that yesterday, but I'm certainly correct in

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 1 saying that. Maybe counsel knows the answer to that.

 2   MR. SANTELL: Judge, I don't believe -- To be

 3 totally honest with the Court --

 4   THE COURT: I don't want anyone lying.

 5   MR. SANTELL: -- I can't say. It's been so long

 6 since I looked at it, your Honor. I don't recall.

 7 Sorry.

 8   MS. SVENSON: I'm 80 percent sure I'm right about

 9 that.

10   THE COURT: All right.

11   MS. SVENSON: Again, I don't believe we had any

12 explanation for the redactions.

13   As I sit here today, we feel they have not

14 responded properly, that they are trying to put the

15 burden back on us, that they have disregarded the law.

16 The law is clear that they have to show they conducted

17 an exhaustive search pursuant to our FOIA request, and

18 they haven't done so.

19   THE COURT: When you say that they have not claimed

20 the appropriate exemption, but yet you can't tell me if

21 the redactions have that, I mean, are you going to be

22 objecting to a redaction when it relates to somebody's

23 date of birth or Social Security number or personal

24 information?

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 1   MS. SVENSON: No.

 2   THE COURT: Okay. So if the redactions are

 3   claiming an exemption that go to something specific,

 4   like a deliberative process or anything like that, that

 5   has to be specifically pled so that the Court can make a

 6   determination whether or not to do an in-camera

 7   inspection, which is probably more likely to happen, but

 8   if you're not going to be objecting to the exemption of

 9   some redactions, then we're just wasting our time. So

10   those need to be specifically pled.

11   Any other argument?

12   MS. SVENSON: No.

13   THE COURT: Mr. Santell.

14   MR. SANTELL: If I may follow up.

15   THE COURT: Sure.

16   MR. SANTELL: The city takes issue with the

17   characterization that anything the city has done has

18   made an attempt to mislead the Court. We believe that,

19   as your Honor said earlier, we've been entirely up front

20   with the Court at all times. And we will take -- we

21   take issue with the characterization that anything we've

22   done is intended to mislead.

23   In this case, your Honor, plaintiff takes

24   issue with the fact that there was no affidavit that was

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 1   attached to the FOIA response.  Your Honor, we never

 2   include affidavits as part of FOIA response.

 3        THE COURT:  But the statute says that the only

 4   person that can respond is the FOIA officer.

 5        MR. SANTELL:  Well, Judge, in this case,

 6   individuals with the Department of Law who are trained

 7   as FOIA officers with the Illinois Attorneys General's

 8   office responded to this request.  Therefore, FOIA

 9   officers working for the Department of Law responded to

10   the request, given the fact that the Department of Law

11   represents all the agencies whose emails were produced

12   with the request as part of the responsive documents.

13            Now, as to whether or not a subsequent FOIA

14   request was made, your Honor, we don't believe that the

15   attachment to the exhibit -- to the plaintiff's

16   sur-reply establishes that a subsequent FOIA request was

17   made.

18        THE COURT:  A what?  We can't hear you clearly when

19   you read looking down.

20        MR. SANTELL:  I'm sorry.

21            We don't believe that the attachments to

22   plaintiff's sur-reply establish that a subsequent FOIA

23   request was made.  This lawsuit was filed on January 20.

24   As of April 4, after the filing of the lawsuit, there is
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1 communications between a gentleman from Judicial Watch,

2 Michael Bekesha and Amber Ritter and Christine Svenson,

3 and it specifically references the lawsuit.

4   So, therefore, the lawsuit was already filed

5 and was ongoing at that point in time regarding the

6 response. Therefore, we don't believe there was a

7 subsequent FOIA request made.

8   THE COURT: But, Mr. Santell, again, I give you --

9 I know that this is difficult because you're standing

10 here having to answer for people who made decisions that

11 you may not have been a part of. I understand that.

12 And so, I don't mean any ill-feelings towards you

13 personally, but, again, I'm here to make a decision, all

14 right.

15   Somebody created the search terms, and those

16 search terms traditionally with FOIA requests, people

17 come together and it's the requester and the public body

18 that create what search terms are going to be used.

19 That's a common practice, isn't it?

20   MR. SANTELL: Absolutely.

21   THE COURT: And so, I understand that in January

22 of 2016 or in December of 2015 that the city was in a

23 crisis situation that is a public relation issue that

24 the Mayor's office, the city Law Department, the Chicago

 1   Police Department, everybody made a decision that, you

 2   know what, we're just going to give everything. But now

 3   that we're here in court in a lawsuit, I'm bound by the

 4   statute. And my question is is that in other cases,

 5   it's common that people get together, the requester and

 6   the public body, that come up with the search terms.

 7   That's what was done informally with these e-mails.

 8   It's not uncommon that that happens. So it doesn't

 9   require a second FOIA request.

10   MR. SANTELL: That's true. That is correct.

11   However, again, as your Honor has clearly said on the

12   record, this was a situation that didn't necessarily

13   afford the city time given the truncated -- given the

14   five-day requirements set up by FOIA that we necessarily

15   didn't have the luxury of time to do that with all the

16   requesters.

17   And, finally, a detail factual basis for all

18   the exemptions that were cited and relied upon is sent

19   out in the letters that were provided on January 7th and

20   yesterday to the plaintiff indicating what it was that

21   was redacted and the basis for it. Therefore, we

22   believe that we have shown in that correspondence the

23   applicability of all of the exemptions.

24   That's all I have. Thank you, your Honor.

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1   THE COURT: All right. This is a motion to dismiss

2   that has been filed by the Office of the Mayor. First

3   off, I want to address whether or not the Mayor himself,

4   Rahn Emanuel, is a proper party to the lawsuit. I do

5   believe that the FOIA statute requires that it's a

6   public body that can be the subject of a FOIA request,

7   and therefore any subsequent filings in a Circuit Court

8   to review the response to that FOIA response would name

9   the public body and the named official. In the case of

10   People versus Stone, although I believe that the city is

11   asking this Court to consider it as dicta, in that

12   particular case, it was a lawsuit filed against the

13   alderman. And in that specific case, it specifically

14   states that the plaintiff there pursued the request of

15   the records to the wrong person. Instead of suing the

16   defendant individually, she must pursue her remedy

17   against the head of the public body pursuant to the act.

18   The act defines head of the public body as the

19   president, mayor, chairman, president, officer and so

20   on.

21   Therefore, plaintiff must pursue her remedy in

22   the Circuit Court by filing an injunction, injunctive or

23   declaratory relief against the Mayor and against the

24   city counsel.

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1   MR. SANTELL: Yes your Honor.

2   THE COURT: I understand that is under the old

3   statute, but that specific part of the statute hasn't

4   changed. So I do believe that the Mayor is a proper

5   party.

6   MR. SANTELL: If I may interject. The requirement

7   that an individual who was therefore -- whose FOIA

8   request was denied appeal to the head of the public body

9   has been thrown away as of the 2010 amendment, so FOIA

10 has in fact changed.

11   THE COURT: I understand, but I still think that

12 the Mayor is a proper named party, so he will remain as

13 a named party.

14   This specific request was only to the Mayor's

15 office. I do not know if Judicial Watch issued a FOIA

16 request to other individuals or not or other bodies. I

17 don't know. The only one that's in front of me at this

18 time is the one that was sent to the Office of the Mayor

19 of the city of Chicago. As of three minutes before we

20 start this hearing, it was still unclear whether or not

21 a response from the Office of the Mayor has been sent to

22 Judicial Watch. And, again, I've said it repeatedly

23 through this hearing, I completely understand, and it's

24 understandable and it's reasonable how the city

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 1   collectively responded to the multitude of FOIA requests

 2   after the release of the Laquan McDonald video by

 3   Judge Valderrama.

 4   However, at this stage, we do have to look at

 5   the statute. So as it relates to Count No. 1, I do

 6   believe that the motion to dismiss under 2615 and 2619

 7   will be denied. It may be a proper motion for summary

 8   judgment now that that subsequent response has been

 9   filed, but at this stage of the proceedings, I believe

10   that they have stated a claim that the Office of the

11   Mayor has not responded.

12   As to Count No. 2, the sufficiency of the

13   search terms, again, collectively at that time, it may

14   have been appropriate or they thought public

15   relations-wise that's the way it should have been

16   responded. Again, the statute is very clear that every

17   single public body must have an officer. In this

18   specific case, the responses come from Mr. Santell, even

19   if we take the response that we're talking about that

20   was tendered yesterday. Specifically the -- Just give

21   me one second.

22   Each of the individual city departments are

23   subsidiary bodies of Chicago, and public bodies is

24   defined by FOIA. And the Court is citing Duncan Pub

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1   versus the City of Chicago at 709 N.E. 2d 1281, citing

2   the Board of Regents of Regency University System versus

3   Reynard, 292 Ill. App. 3d. Individual departments,

4   which are city funded and city controlled are public

5   bodies, and each individual is subject to the mandates

6   of FOIA.

7   In this specific case, the Court is also

8   looking at the attorney general's public access

9   counselor and their recommendation. There they

10 specifically define the FOIA officer and specifically

11 define public records and who is required to respond to

12 those public records. The response did not come from

13 the office of the Mayor's FOIA officer. It came from

14 the corporation counsel, which does represent the

15 Mayor's office and the Mayor, but the FOIA statute is

16 very clear that it must come from the FOIA officer.

17   In this specific case, there was multiple

18 communications between the parties about the specific

19 search term that was used. The Law Department through

20 the corporation counsel representing the Office of the

21 Mayor and the Mayor did not alter or change the requests

22 of the search terms, even though the plaintiff here,

23 Judicial Watch, had specifically asked them to do that.

24 It very well may be that the 3,000 pages of e-mails that

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 1   have already been tendered will include an additional --

 2   Strike that.  That was very unclear.

 3            It very well may be that the 3,000 e-mails

 4   that have already been tendered are all inclusive of

 5   everything that relates to the October 20, 2014

 6   shooting.  However, we all know that there's more than

 7   one dash-cam involved in the shooting that happened on

 8   October 20th of 2014 than just the one released by Judge

 9   Valderrama.  I don't know if the search was inclusive

10   enough as it relates to this specific request.  And so,

11   the defendant's motion to dismiss Count No. 2 is going

12   to be denied.

13            Usually in FOIA requests we're dealing with

14   motions for summary judgment.  Here we are dealing with

15   a motion to dismiss, which is different, but I think

16   it's one in the same.  So I think that the search is

17   insufficient just using the search terms Laquan

18   McDonald, Van Dyke spelled two different ways and LM.

19   I'm going to leave it up to the parties to decide how

20   they wish to define the search terms.  I am not going to

21   do that.  You all decide how the search terms -- because

22   I don't know what you're looking for.  However,

23   plaintiff, you are going to be limited to what your

24   original request was.  You cannot expand it anymore from
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1 today's date. So the motion to dismiss Count No. 2 is

2 going to be denied.

3   Count No. 3, I don't know what the new search

4 is going to reveal. If it's going to be the same

5 e-mails or different e-mails. So I'm going to not rule

6 on Count No. 3. You may want to amend your complaint

7 based on the new responses that you get. However, if

8 there's going to be a new amended complaint that is

9 going to allege that they haven't sufficiently claimed

10 nonexempt information, then it needs to be specifically

11 pled.

12   In other words, e-mail N0. 2055 claims an

13 exemption of deliberative process, and we don't think

14 that's true, then that will at least refine the search

15 for me to do an in-camera inspection. And I will be

16 willing to do the in-camera inspection at that time of

17 the unredacted e-mails to make that determination.

18   Mr. Santell, if you could please make sure --

19 and I can't imagine, unless the city is doing it

20 differently than any other case -- every other case that

21 I've done with a FOIA request and the city has redacted

22 information, on the redaction it gives the specific

23 section that is being used for that specific redaction.

24 So that would be sufficient. And if the plaintiff, I'm

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1   hoping that you're not going to be objecting to personal

2   information, because it will be an enormous task for me

3   to go through that, but you're getting to the substance,

4   and I think that's what you want.

5   So I'm going to not rule on Count No. 3 at

6   this point based on my ruling on Count No. 1 and 2

7   asking for a new search to be done.

8   MS. SVENSON: Your Honor, may I ask a question.

9   With respect to what you were saying about the plaintiff

10 is limited to the original request, are you speaking

11 about our request from our e -mails?

12   THE COURT: Your original FOIA request that was

13 filed in December of 2015 specifically states, any and

14 all records of communications sent to and from officials

15 in the Office of the Mayor, including but not limited to

16 Mayor Rahm Emanuel, comma, regarding, comma, concerning

17 or relating to police dash-camera recordings of the

18 October 20, 2014 shooting of Laquan McDonald, including

19 but not limited to the release of any video recordings

20 to the public.

21   Your subsequent e-mails specifically address

22 the search terms that were used and that it did not

23 include specific search terms.

24   MS. SVENSON: So my question is, are we relegated

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1   to just those search terms that we had suggested we use

2   because we probably have more that we would like to

3   submit?

4   THE COURT: No. But you're not going to get

5   anything more than what you've already asked for in the

6   original FOIA.

7   MS. SVENSON: Right. Okay. Thank you.

8   THE COURT: Is that clear?

9   MS. SVENSON: That answers my question.

10   THE COURT: You're not going to get anything more

11 than what your original request was. You're limited.

12 If you want more than that, then you have to file a new

13 FOIA.

14   MS. SVENSON: Right.

15   THE COURT: Have I addressed everything?

16   MS. SVENSON: I believe so.

17   MR. SANTELL: I believe so, your Honor.

18   THE COURT: Give me one minute to make sure I have

19 gone over my notes and addressed everything.

20   MS. SVENSON: Actually, I do have one more thing

21 once you're ready.

22   Are they going to be required to submit an

23 affidavit showing?

24   THE COURT: There's no requirement that they need

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1   to submit an affidavit, but the response, it's clear.

2   It should be coming from the FOIA officer.

3   Is there a problem with that?

4   MR. SANTELL: No.

5   THE COURT: At this stage now that we're tendering,

6   you know, almost a year later.

7   MR. SANTELL: No, your Honor. I don't believe

8   there's any sort of exigency involved here. I believe

9   we should be able to have the Mayor's FOIA officer

10 respond.

11   THE COURT: Since we're going to be doing a new

12 search at this point, they can file a new response from

13 the Office of the Mayor, from the Mayor's FOIA officer

14 with a new search terms.

15   Let me make sure I covered everything; I think

16 we have.

17   MS. SVENSON: Thank you, your Honor.

18   MR. SANTELL: Thank you, your Honor.

19   (Which were all the proceedings had

20   in the above-entitled cause.)

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 1    STATE OF ILLINOIS      )
                             )  SS.
 2    COUNTY OF COOK         )

 3

 4          Alexandra Szajna, being first duly sworn, on

 5    oath says that she is a Certified Shorthand Reporter and

 6    Registered Professional Reporter doing business in the

 7    City of Chicago, County of Cook and the State of

 8    Illinois;

 9          That she reported in shorthand the proceedings

10    had at the foregoing hearing;

11          And that the foregoing is a true and correct

12    transcript of her shorthand notes so taken as aforesaid

13    and contains all the proceedings had at the said

14    hearing.

15

16

17    _____
                 ALEXANDRA SZAJNA, CSR, RPR
18
      CSR No. 084-004778
19

20    SUBSCRIBED AND SWORN TO
      before me this 3rd day of
21    October, A.D., 2016.

22

23
      _____
24              NOTARY PUBLIC
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camera 15:12,15 16:8 26:8,17

capacity 21:9

care 3:21

case 5:17,19,24 6:14 8:23 11:12 14:16 17:22 19:12 22:20 29:23 30:5 33:9,12,13 35:18 36:7,17 38:20

cases 8:16 27:17 32:4

cetera 20:24

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