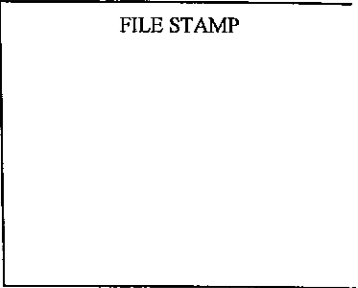


**STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO**

ILLINOIS PRESS ASSOCIATION, et al.,)
)
Plaintiffs,)
)
vs.) No. 2010-MR-768
ROCKFORD PUBLIC SCHOOL DISTRICT 205, et al.,)
)
Defendants.)



MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the final remaining matter at issue: Plaintiffs' request to impose a civil penalty on Defendant Rockford Public School District 205 ("District") for failing to comply with the Illinois Freedom of Information Act, ("FOIA"), 5 ILCS 140/1 *et seq.* The statutory provision at issue is Subsection 11(j) of FOIA, which provides as follows:

If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence. In assessing the civil penalty, the court shall consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations of this Act. The changes contained in this subsection apply to an action filed on or after the effective date of this amendatory Act of the 96th General Assembly.

5 ILCS 140/11(j). Unlike FOIA's provision regarding attorney fees, Subsection 11(j) does not require that a party "prevail" in order to request that a civil penalty be imposed.

Subject to certain exceptions, FOIA provides that a public body must respond for a request for records within five business days of its receipt. 5 ILCS 140/3(d). When that response is a denial, the denial is to specify "the reasons for denial, including a detailed factual basis for the application of any exemption claimed." 5 ILCS 140/9(a). Where, as here, an exemption under Section 7(1)(c) is claimed, the public body must give written notice to the Public Access Counselor ("PAC") of its exercise of such exemption and the reasons for it. 5 ILCS 14/9.5(b).

The District complied with these initial requirements, and in the process it invoked two exemptions: Section 7(1)(c) (disclosure constituting an "unwarranted invasion of personal privacy"); and Section 7.5(q) ("Information prohibited from being disclosed by the Personnel Records Review Act"). When the PAC issued the opinion that Section 7(1)(c) was not properly invoked here, the District no longer relied on that exception. However, in her letter of September 20, 2010, the District's FOIA Officer stated that the District continued to rely on the other exception, Section 7.5(q) (based on the Personnel Records Review Act).

A Request for Review by the PAC followed, and on September 29, 2010, the PAC determined that the Personnel Records Review Act did not prohibit disclosure of the document in question (i.e., that Section 7.5(q) of FOIA did not prevent disclosure). The PAC stated that the District “should disclose the requested letter to Mr. McGehee after giving Dr. Hardy written notice.” The PAC concluded that her “letter shall serve to close this matter.” The record supports the District’s assertion that it did not receive proper notice of the Request for Review prior to the issuance of the decision. The Court agrees that the district should have received notice of the Request for Review concerning the Section 7.5(q) exemption. However, the District conceded that Section 7.5(q) was not validly invoked here, so this procedural misstep is of no consequence in assessing the propriety of the District’s actions.

As of October 8, 2010, the District had acted in accordance with the law, but was simply incorrect about the exemptions it invoked. Indeed, as of that date, the District had conceded that *both* of the exemptions it initially cited in response to the request were inapplicable. However, instead of simply turning over the document in question, the District’s attorney asserted a *third* basis for exemption, Section 7(1)(n), which applies to records of disciplinary matters.

There is nothing in FOIA to suggest that a public body may continue to assert new bases for nondisclosure of a public record after its original position is determined to be incorrect. Indeed, the fact that the public body must respond to a request within five days (or an appropriate extended date) and state its *reasons* for withholding a document clearly indicates that additional bases for non-disclosure cannot be added afterwards. FOIA requires a public body to designate a Freedom of Information Officer to ensure that appropriate and timely responses to document requests are given.

Perhaps most troubling is the District’s contention that it had the right to articulate additional bases for nondisclosure due to the fact that it agreed to the Illinois Press Association’s request to reconsider its earlier denial. The October 8 letter from counsel appears to indicate that this request somehow triggers a new response period under FOIA, but the statute contains no hint of any such provision. The same document was being sought. The District’s facially untenable position is, in essence, that it might have been limited to the two exemptions originally claimed if the IPA had *not* asked for reconsideration, but that the request to reconsider somehow opened the door to additional exceptions.

Furthermore, the new exemption claimed was, once again, inapplicable, as the District itself ultimately conceded by releasing the document. The District’s attempt to explain its change of heart as being the result of a supposed “oral” opinion from the PAC is resoundingly unconvincing. The record gives a clear impression that the District understood that it was wrong on all three claimed exemptions, but was looking for a way to save face rather than simply admitting it was wrong and disclosing the document.

The Court will not penalize the District simply for being wrong in its legal judgment of what was protected from disclosure. However, the entire course of events here strongly suggests that the District first decided that it would not release a document which it did not want to release, and only then did it begin looking for reasons to support a decision it had already made. The

invocation of a new (and equally unfounded) basis for exemption after the first reasons had been proven incorrect is an indication of the District's intransigence. Only when the requesting party filed suit was the District finally compelled to concede that its position was indefensible.

The continued withholding of the document after conceding that the original two bases for exemption were incorrect constitutes a willful and intentional violation of FOIA, and the District's course of conduct, viewed in its totality, reflects a lack of good faith in responding to the request. Thus, the Court will impose a civil penalty under Section 11(j) of FOIA. The Court is unaware of any other FOIA violation by the District. Under these circumstances, the Court will impose a fine of \$2,500.

The final question is, to whom is this civil fine payable? "The General Assembly has the power to impose penalties and the power to dispose of them." *People v. Handzik*, 410 Ill. 295, 304, 102 N.E.2d 340, 345 (1951) (upholding penalty for violation of Medical Practice Act to be paid to the Department of Registration and Education). Accordingly, some statutes make clear the entity to which prescribed civil fines are to be paid. See, e.g., 750 ILCS 28/35 (penalty for failure to honor a child support withholding order "may be collected in a civil action which may be brought against the payor in favor of the obligee or public office"); 415 ILCS 5/42 (civil penalty for violation of Environmental Protection Act payable to Environmental Protection Trust Fund); 29 U.S.C. §659 (1988) (civil penalty for violation of OSHA payable to the Federal government). Here, however, the legislature has not "disposed of" the civil penalty, i.e., it has not indicated the person or entity to whom a FOIA civil penalty is to be paid.

Neither the Court nor the Circuit Clerk's office is in a position to receive or administer a civil penalty. Moneys received by public bodies must be strictly accounted for and, simply put, it is unclear where money paid to the Court or the Clerk would ultimately go.

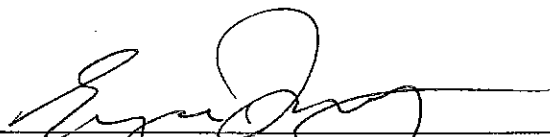
Under these circumstances, the Court finds that the civil penalty should be payable to the requesting parties, the Rock River Times and Mr. McGehee. There are other situations in which a civil penalty is recoverable by a private plaintiff. See, e.g., *Merchandise Nat. Bank of Chicago v. Scanlon*, 86 Ill.App.3d 719, 725, 408 N.E.2d 248, 252 (1st Dist. 1980) (interest act providing for double interest recoverable by the plaintiff is effectively a civil penalty).

Conclusion

The Court imposes a civil penalty against Rockford Public School District 205 in the amount of \$2,500, payable to the Rock River Times and Joe McGehee. This Order stands as the final judgment of the Court. As all pending matters are now resolved, the September 29, 2011, status date is hereby stricken. This is a final, appealable Order.

8/16/11

Date



Hon. Eugene G. Doherty, Circuit Judge