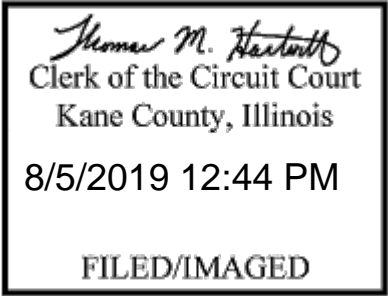


IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

JEFFREY N. WARD,)
)
Petitioner,)
)
v.)
)
THE KANE COUNTY STATE’S)
ATTORNEY’S OFFICE,)
)
Respondent.)

Case No. 2019 MR 833



**DEFENDANTS’ VERIFIED ANSWER TO PETITIONER’S COMPLAINT FOR
DECLARATORY JUDGMENT AND MANDATORY INJUNCTIVE RELIEF**

NOW COMES Joseph M. McMahon, Kane County State’s Attorney (“Joseph), by counsel of record, and for his Verified Answer to Petitioner’s Complaint, states as follows:

1. The Petitioner, JEFFREY N. WARD (“Jeff Ward”), is an individual residing at 189 Abbey Lane, Geneva, Kane County, Illinois.

ANSWER: Joseph admits the facts as stated in Paragraph 1.

2. The Respondent, THE KANE COUNTY STATE’S ATTORNEY’S OFFICE (the “KCSAO”), acting as attorneys for Kane County, is a county corporation with its principal place of business located at 37W777 IL-38, St. Charles, Kane County, Illinois.

ANSWER: Denies. The Office of the State’s Attorney is a constitutional office of the State of Illinois, duly elected to represent the People of the State of Illinois. Joseph holds that position and is an executive officer of the Illinois Government.

3. There has at all times relevant hereto been in full force and effect the Illinois Freedom of Information Act, 5 ILCS 140/1, et seq., (the “Act”).

ANSWER: Joseph admits the facts as stated in Paragraph 3.

4. The KCSAO is a “Public Body” within the meaning of Section 2 of the Act. 10 ILCS 140/2(a).

ANSWER: See response to Paragraph 2, supra.

5. The Act provides that all Public Records of a Public Body are presumed to be open to inspection or copying, and that a Public Body that asserts a record is exempt from disclosure has the burden of proving by clear and convincing evidence that the record is exempt. 10 ILCS 140/1.2.

ANSWER: The Act speaks for itself. The characteristics other than what the Act states, are denied. See Answer to Paragraph 2, supra.

6. The Act provides that Public Records include “all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.” 10 ILCS 140/2(c).

ANSWER: See Answer to Paragraph 5, supra.

7. On October 11, 2018, Jeff Ward submitted an email FOIA request to the KCSAO, pursuant to the Act requesting the following:

- a. All sexual harassment complaints - in any form - against former prosecutor Alex Bederka during his entire tenure with the KCSAO.
- b. All response and dispositions to those sexual harassment complaints in any form.
- c. An explanation and/or the paperwork detailing why Mr. Bederka continued to be paid by the KCSAO for up to 10 weeks after he was fired.

all of which are Public Records under the Act. A true and correct copy of that email is attached hereto as Exhibit “1” and is incorporated herein by this reference.

ANSWER: Joseph admits that an email FOIA request was submitted. He denies the records are Public Records.

8. On the same day, October 11, 2018, the KCSAO responded by granting question “c” but denying questions “a” and “b” as in Paragraph 7 above. A true and correct copy of the KCSAO’s FOIA response letter is attached hereto as Exhibit “2” and is incorporated herein by this reference.

ANSWER: Joseph admits that Exhibit 2 was sent to Plaintiff.

9. The KCSAO asserted their denial is predicated upon the sought documents being exempt from the Act citing 5 ILCS 140/7(11(a) and 5 ILCS 140/7.5, specifically 5 ILCS 430/70.5(a)(ii). The KCSAO wrote, “Specifically: Documents concerning reports of sexual harassment are confidential by operation of law...” Please note that 5 ILCS 140/7.5 does not exist.

ANSWER: Joseph admits that Exhibit 2 was sent to Plaintiff.

10. On October 15, 2018, Jeff Ward appealed the KCSAO’s denial of FOIA questions “a” and “b” in paragraph 7 above to the Illinois Attorney General’s Public Access Counselor Office. A true and correct copy of that appeal letter is attached hereto as Exhibit “3” and is incorporated herein by this reference.

ANSWER: Joseph admits that Exhibit 3 was sent to Plaintiff.

11. On October 26, 2018, the Public Access Counselor determined “further action is warranted” and asked the KCSAO for the sexual harassment documentation described in paragraph 7 as well as “...a detailed explanation of the factual and legal basis for the applicability of the cited FOIA exemptions to the first and second items of the request.” A true and correct copy of that appeal letter is attached hereto as Exhibit “4” and is incorporated herein by this reference.

ANSWER: Joseph admits that Exhibit 4 was an opinion issued by an employee of the Attorney General’s Office.

12. On November 16, 2018, the KCSAO responded to the Public Access Counselor’s request, citing the following assertions for their FOIA denial:

- a. Asked and answered. Since they’d previously denied a similar FOIA request, the second request was not valid.
- b. The KCSAO is a state entity which “permits a government entity to adopt a sexual harassment policy that includes confidentiality provisions” (5 ILCS 430/70-5).
- c. The KCSAO thusly adopted a sexual harassment policy that “includes confidentiality provisions.”
- d. The redaction of names in the sought sexual harassment complaints “is an

insufficient guarantee of confidentiality.”

- e. That requested documents were created by attorneys, and this, are “privileged.”
- f. Regardless of the Public Access Counselor’s ruling, the KCSAO would not release the requested documents “absent a court order.”

A true and correct copy of the KCSAO’s response to Jeff Ward’s FOIA appeal is attached hereto as Exhibit “5” and is incorporated herein by this reference.

ANSWER: Joseph admits that Exhibit 5 was issued by his office in his capacity as State’s Attorney.

13. As to paragraph 12 “a,” there is no provision in the Act prohibiting the issuance of the same FOIA request twice, and even if there were, the FOIA requests were materially different.

ANSWER: See Answer to Paragraph 12.

14. As to paragraph 12 “b,” 5 ILCS 430-70/5, provides for confidentiality provisions but does not make them an absolute requirement. Furthermore, the Attorney General has previously ruled (Ill. Att’y Gen. Inf. Op. No. 1-07-042) that state’s attorney’s offices are not “government entities” and thus, are not exempt from disclosing the records under 5 ILCS 430-70-5.

ANSWER: See Answer to Paragraph 12.

15. As to paragraph 12 “c,” an office policy is neither law, nor does it supersede or override the Act. If it did, the KCSAO could render themselves FOIA-proof through office policies. Furthermore, neither a home rule ordinance nor an ethics policy can exempt records from disclosure because the Act is an exclusive prerogative of the State of Illinois.

ANSWER: See Answer to Paragraph 12.

16. As to paragraph 12 “d,” please see paragraph 15, *supra*.

ANSWER: See Answer to Paragraph 12.

17. As to paragraph 12 “e,” that is not a correct reading of the statute as it would render the KCSAO, and all state’s attorney’s offices, FOIA-proof. The Illinois Supreme Court Rule 201 (b)(2) work-produce doctrine states that to claim this exemption, a public body must demonstrate the requested records “reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience.” *Monier v. Chamberlain*, 35 Ill. 2d 351, 359 (1966). Everything else is subject to disclosure as the KCSAO has many functions that

do not pertain to trial preparation. To wit, there was no trial and no courtroom involved in creating the requested documents and the fact they were compiled by and adjudicated by attorneys does not automatically confer privilege.

ANSWER: See Answer to Paragraph 12.

18. As to paragraph 12 “f”, no state’s attorney’s office is above the law.

ANSWER: See Answer to Paragraph 12.

19. Furthermore, Illinois state’s attorneys have argued they are somehow “special” a lawyers or members of the judiciary, and therefore, immune to the Act. But the courts have resoundingly rejected that argument, as made clear by the KCSAO’s own cited authority, *Nelson v. Kendall County*, 2014 IL 116303.

ANSWER: Joseph denies he is a “special” lawyer. The office he holds is constitutional in nature. He acknowledges the Supreme Court of Illinois’s opinion.

20. On June 14, 2019, the Public Access Counselor upheld Jeff Ward’s FOIA denial appeal and requested “the State’s Attorney’s Office provide Mr. Ward with copies of the records,” subject to the limited redactions they set forth. A true and correct copy of the Public Access Counselor’s letter is attached hereto as Exhibit “6” and is incorporated herein by this reference.

ANSWER: The Public Access Counselor issued an opinion. Joseph respects, but disagrees with that person’s opinion.

21. On July 3, 2019, the KCSAO sent Jeff Ward a letter ignoring the Public Access Counselor’s ruling and denying the FOIA request in paragraph 7 for the same reasons that were the Public Access Counselor ruled against. A true and correct copy of that KCSAO letter is attached hereto as Exhibit “7” and is incorporated herein by this reference.

ANSWER: Joseph did not ignore the opinion of the Public Access Counselor. Disagreement with another person’s views does not denote one ignores the opinion.

22. The KCSAO’s denial of Jeff Ward’s request, described in paragraph 7 “a” and “b” above, is wrongful.

ANSWER: Joseph denies the facts as stated in paragraph 22.

23. Section 11 of the Act provides that any person denied access to inspect or copy any public record by a public body may file suit for injunctive or declaratory relief, and the 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. 10 ILCS

140/11(a), (d).

ANSWER: The Act speaks for itself. Any records were not withheld improperly. Joseph asserts the following exemptions from disclosure under the Act. 5 ILCS 140/7(1):

(a) Information specifically prohibited from disclosure by federal or State law or rules or regulations implementing federal or State law.

(c) Personal information contained within public records, the disclosure of which would constitute a clearly warranted invasion of personal privacy, unless the disclosure is connected to in writing by the individual subjects of the information.

(f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated.

(m) Communications between the Office of the Kane County State's Attorney and an attorney or auditor representing the Office of the Kane County State's Attorney that would not be subject to discovery in litigation, and materials prepared or compiled by or for the Office of the Kane County State's Attorney in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the Office of the Kane County State's Attorney, and materials prepared or compiled with respect to internal audits of the Office of the Kane County State's Attorney.

(r) Records relating to the Office of the Kane County State's Attorney's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

Consonant with the State Officials and Employees Ethics Act (5 ILCS 430/1-5, 5 ILCS 430/5-5, 5 ILCS 430/5-10, 10.5, 5 ILCS 430/5-65, 5 ILCS 430/70-5), the Illinois Human Rights Act and Title VII, and regulations adopted pursuant to those statutes, the Office of the Kane County State's Attorney, as a state executive officer, agency or employee, prohibits sexual harassment and has adopted a confidential sexual harassment complaint process to encourage employees to report incidents of sexual harassment and to encourage honest participation in investigations regarding sexual harassment. As such, sexual harassment complaints and investigation materials are confidential and are not subject to public disclosure.

WHEREFORE, Respondent, Joseph M. McMahon, Kane County State's Attorney, prays this


Honorable Court enter an order:

- a. Denying Plaintiff's Petition;
- b. The records withheld were consistent with the Act, as stated, and lawful.

- c. Plaintiff's claim does not allege irreparable injury due to the failure to disclose records; and
- d. For any other relief deemed just and appropriate.

Respectfully Submitted,

JOSEPH M. McMAHON
KANE COUNTY STATE'S ATTORNEY

By: 
Patrick M. Kinnally,
Special Assistant State's Attorney

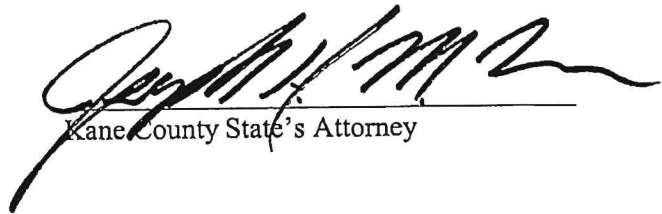
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VERIFICATION BY CERTIFICATION


Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this **Verified Answer to Petitioner's Complaint for Declaratory Judgment and Mandatory Injunctive Relief**, including the statements as to want of knowledge, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true and correct.

Date: August 5, 2019

Joseph M. McMahon


Kane County State's Attorney

SUBSCRIBED and SWORN TO before me
this 5th day of August, 2019.


NOTARY PUBLIC

