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

MEMORANDUM OF LAW

NOW COMES Joseph M. McMahon, Kane County State's Attorney ("Mr. McMahon"), by counsel of record, and for his Memorandum of Law in support of denying the relief sought by Petitioner, Jeffery Ward ("Mr. Ward"), states as follows:

Introduction

This cause originates from an emailed Freedom of Information Act ("FOIA") request sent by Mr. Ward on October 11, 2018 to the Kane County State's Attorney's Office ("KCSAO") wherein Mr. Ward requested the following to be produced:

> "1. All sexual harassment complaints - in any form - against former prosecutor Alex Bederka during his entire tenure with KCSAO.
> 2. All response [*sic*] and dispositions to those sexual harassment complaints - in any form.
> 3. 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."

In response to Mr. Ward's FOIA request, the KCSAO ultimately provided a copy of the disciplinary letter dated June 5, 2017 (signature redacted) responsive to Mr. Ward's request for

dispositions pertaining to the sexual harassment complaints. The KCSAO further advised Mr. Ward that the remainder of the requested materials in items #1 and #2 were exempt from disclosure and cited specific subsections of 5 ILCS 140/7(1) as the authority it relied on. Thereafter, Mr. Ward filed suit seeking production of the documents the KCSAO determined are exempt from disclosure. The following Memorandum of Law supports the determination made by the KCSAO with respect to Mr. Ward's FOIA request.

Purpose of the Freedom of Information Act

"Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act." 5 ILCS 140/1. The purpose of the Freedom of Information Act is to open governmental records to the light of public scrutiny. *Rushton v. Department of Corrections*, 2019 IL App (4th) 180206, ¶25; *Martinez v. Cook County State's Attorney's Office*, 2018 IL App (1st) 2018, ¶14. However, this Act is not intended to cause an unwarranted invasion of personal privacy. 5 ILCS 140/1.

Legal Standard/Burden of Proof

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. Any public body that asserts that a record is exempt from disclosure has the burden of proving that it is exempt by clear and convincing evidence. 5 ILCS 140/11(f). In order to satisfy its burden, the public body must provide a detailed explanation for asserting the exemption in order for those relied upon

reasons to be tested in an adversarial proceeding. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401, 408 (1997). In any [FOIA] 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. 5 ILCS 140/11(f).[1]

The Confidential Sexual Harassment Complaint Process Prohibits Public Disclosure

To the extent Mr. Ward suggests the State Officials and Employees Ethics Act ("SOEEA") does not require the KCSAO to create a process for the confidential reporting of sexual harassment, his position turns a blind eye to the plain language contained within the Act itself. The SOEEA specifically requires each officer, member, and employee to annually complete a sexual harassment training program which at a minimum must include details on how an individual can report an allegation of sexual harassment, *including options for making a confidential report to a supervisor*, ethics officer, Inspector General, or the Department of Human Rights. 5 ILCS 430/5-10.5 (emphasis added). As a part of the executive branch, the provisions of the SOEEA unquestionably apply to the KCSAO. See *Nelson v. Kendall County*, 2014 IL 116303, ¶27 (Holding a state's attorney's office is part of the executive branch).

Additionally, the SOEEA plainly states, "*All persons* have a right to work in an environment free from sexual harassment." 5 ILCS 430/5-65(a) (emphasis added). The legislature would have never included the requirement that employee be trained on how to confidentially report sexual harassment, if those persons could not be assured their reports would

[1] On August 27, 2019, Mr. McMahon turned a complete, non-redacted set of the records and internal documents at issue to the Court for an in camera review in accordance with the provisions of 5 ILCS 140/11(f).

remain confidential.

The previous point is one of particular importance. Should the sexual harassment complaints Mr. Ward seeks be released, it would have a profound impact on whether any future victim of sexual harassment reported it or participated in any investigations of reported sexual harassment. In the instant case, the process was utilized because confidentiality was the fundamental ingredient of the program. To release the sexual harassment complaints would mean the promise of confidentiality was empty, resulting in significantly less (if any) future reporting of instances of sexual harassment within the KCSAO. It would also make the text of 5 ILCS 430/5-10.5 meaningless. As previously stated to Mr. Ward by Assistant State's Attorney Joseph Lulves on July 3, 2019, to conclude sexual harassment complaints and investigation materials are subject to public disclosure would render "State's Attorney's Offices as the only state office or agency where employees are not entitled to a confidential sexual harassment complaint and investigation process."

The interests of a victim of sexual harassment have a greater significance than those of a perpetrator. The purpose of the confidential sexual harassment complaint process at the KCSAO is to encourage those who feel threatened to come forward and report those grievances to Mr. McMahon. By doing so, such a complainant affords Mr. McMahon the ability to address the problem so it can be corrected. Thereby, making the workplace more conducive to the work carried out by the KCSAO. The requirements contained within the SOEEA promote this goal. If such reports were not kept confidential it would create a disincentive for those who have been harassed from coming forward and reporting. That systematic view far outweighs the interpose of Mr. Ward in knowing the identity of any complainant.

The Personal Privacy Exemption is Applicable to Mr. Ward's FOIA Request

Pursuant to Section 7 of the Act, "Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of person privacy, unless the disclosure is consented to in writing by the individual subjects of the information. 'Unwarranted invasion of personal privacy' means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of person privacy." 5 ILCS 140/7(c).

Courts are required to balance the individual's right to privacy with the public's legitimate interest in disclosure. *Lieber v. Southern Illinois University*, 279 Ill.App.3d 553, 561 (1996). In weighing those interests, the court should consider: (1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of invasion of personal privacy; and (4) the availability of alternative means of obtaining the requested information. *Id.* The 4-prong test stated in *Lieber*, support the KCSAO's conclusion the requested documents at issue are exempt as it would greatly invade the personal privacy of those who brought the allegations of sexual harassment to Mr. McMahon's attention through the KCSAO's confidential sexual harassment complaint process.

Considering the first prong of the *Lieber* analysis, Mr. Ward does not have a sufficient interest in disclosure of the requested documents. To say Mr. Ward has even a minimal interest in the salacious details contained within a confidential sexual harassment complaint, would be a dubious proposition at best, and an understatement at the very least. As it relates to any

individual interest Mr. Ward has in being apprised of reported sexual harassment within the KCSAO, that interest has been satisfied. The June 5, 2017 disciplinary letter already disclosed to Mr. Ward provided the general allegations made against Alex Bederka, and the actions taken in response by Mr. McMahon.

Turning to the second prong of *Lieber*, the public interest in public disclosure of whom complained about being sexually harassed is non-existent. Shielding a victim's identity promotes the fact that a victim will come forward, be frank in the disclosures made, and not fear retribution for making the complaint originally. Contrariwise, the disclosure of the complainant's identity would result in complaints not being made when they should be; providing piecemeal revelations; and creating fear of retaliation. None of which is consonant with trying to eradicate sexual harassment in the workplace. The plaintiff's curiosity in any complainant's identity in this context and any revelation of such identity serves no public purpose.

Furthermore, simply redacting the names of those who confidentially report instances of sexual harassment would not protect the personal privacy of those individuals. The KCSAO is a workplace comprising of approximately 120 employees, including attorneys, legal assistants and other support staff. A majority of the employees know one another by way of working collaboratively on the responsibilities and endeavors of the KCSAO. They know where each other work, when they work, who they work with, and what they work on. The same can be said of many courthouse staff, those in law enforcement, and others who are familiar with the employees of the KCSAO. For these reasons redacting the names of those who confidentially report sexual harassment to Mr. McMahon does not sufficiently safeguard their personal privacy since the disclosure of any detailed information contained in the complaints would make the

individual more easily identifiable.

Those who have experienced and endured sexual harassment have a right to not be the subject of further embarrassment, ridicule or scorn through the public disclosure of a deeply personal and likely traumatizing experience in their life. They are the ultimate gatekeepers to their story and they have a reasonable expectation of privacy which is constitutionally protected. See *Carey v. Population Services, Intern.*, 431 U.S. 678, 684-685 (1977), (Holding individuals have a protected right to certain areas or 'zones of privacy' including independence in making certain kinds of important decisions examples of which include personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education). Unlike the federal constitution, our Illinois Constitution unmistakably provides for a distinct right of privacy. IL. Const. art. 1, §6; See *Kunkel v. Walton*, 179 Ill.2d 519, 537 (1997), (Holding "...the Illinois Constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and that the protection of that privacy is stated broadly and without restrictions."); see also *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, §62, (Holding by expressly guaranteeing a right of privacy, the state constitution provides protections which are separate and distinct from those provided under the federal constitution.) It declares the individuals have a right to privacy not only in their homes but in their communications. It is a broad guarantee which the FOIA does not efface. More importantly, it is not a right the General Assembly has the prerogative to cancel. That is left up to our citizens through constitutional amendment. The individual's right to privacy regarding their experiencing sexual harassment does not get supplanted because the harassment occurred in their workplace which happens to be a public body. Considering the subject matter of the documents Mr. Ward seeks, the significant

weight of the third prong of the *Lieber* analysis cannot be understated.

As it pertains to the fourth prong of *Lieber*, other avenues exist for Mr. Ward to obtain the information he is seeking. The names of the employees who have worked for Mr. McMahon at the KCSAO are matters of public record. They appear in list form within the Kane County document library and is easily accessible online for anyone to review. Kane County Government, *County General Information*, https://www.countyofkane.org/Pages/OrgChart.aspx (last visited Oct. 11, 2019). If Mr. Ward desired, he could attempt to contact any of these individuals and request interviews or other information related to the subject matter of his FOIA request.

The 4th District case, *State-Journal Register v. University of Illinois Springfield*, is instructive. 2013 IL App (4th) 120881. In *State-Journal Register*, a newspaper and reporter brought suit seeking to enforce two FOIA requests seeking documents related to the resignation of university coaches. The university claimed some of the documents requested involving sexual misconduct were exempt since there release would constitute an unwarranted invasion of personal privacy (5 ILCS 140/7(1)(c)). The court applied the 4-prong test from *Lieber v. Southern Illinois University*, and ultimately determined typed staff notes describing interviews with coaches, students, and student's parent, related to the reported sexual misconduct were exempt from disclosure under section 7(1)(c) of FOIA. *State-Journal Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶58. The court specifically noted "details of ...sexual misconduct are highly personal, which weighs heavily in favor of exemption." *Id.* at ¶56. For the same reasons, the documents which are the subject of Mr. Ward's lawsuit, are exempt from disclosure.

The Public Access Counselor Opinion Usurps the Vital Function of the Court

In addition to the reasons stated above, there is a more telling issue this case admits. It is one that has been overlooked by the Attorney General as well as our Legislature.

Mr. Ward has relied unequivocally on an opinion of the Attorney General as the grounds as to why the records should be released by the KCSAO. Indeed, it is the sole reason he employs to say the non-disclosure by the KCSAO violates FOIA. The KCSAO respects the view of the Attorney General but respectfully submits it should not be considered by this Court.

The Illinois General Assembly created the Freedom of Information Act. In our system of government, it created a law. It then decided to establish a Public Access Counselor. This person(s) is charged with determining appeals from private citizens as to whether certain public records should be released to them pursuant to FOIA. The Public Access Counselor can issue opinions that are either "binding" and "nonbinding".

With respect, the Office of the Attorney General ("AG Office") is part of the executive branch of the Government of the State of Illinois. As a member of the executive branch, the AG Office is charged with enforcing Illinois law. Notwithstanding, through the use of Public Access Counselor opinions, the AG Office has engaged in interpreting the law. That is a usurpation of the judicial branch of our government. Interpreting the law and saying what it means is a responsibility exclusively within the purview of the Judiciary, not the Attorney General.

Attached as Exhibit 6 to Mr. Ward's complaint is the Public Access Counselor opinion in which the AG Office interprets several legal issues in this matter including: (1) whether state's attorney's offices are prohibited from disclosing records pursuant to section 70-5(a)(ii) of the SOEEA (5 ILCS 430/70-5(a)(ii)); (2) whether disclosing the records would constitute an

unwarranted invasion of Mr. Bederka's privacy; and (3) whether limited redactions in the confidential complaints would sufficiently protect the complainant's personal privacy interest. The AG Office's practice of enforcing as well as interpreting the law of Illinois is nothing short of a violation of the separation of powers doctrine. The purpose of the separation of powers doctrine is to insure that each of the three branches of government retains its own sphere of authority, free from undue encroachment by the other branches, and so one branch cannot exert a substantial power belonging to another. *Martinez v. Department of Public Aid*, 348 Ill.App.3d 788, 794 (1st Dist. 2004). In the analysis here, whether records are exempt from disclosure is a judicial function, not one for the AG Office to decide.

The Plaintiff's complaint should be dismissed. No further disclosure of records is required under the Freedom of Information Act.

Respectfully Submitted,

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