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

JOHN Q. KELLY, Plaintiff, v. VILLAGE OF KENILWORTH, ET AL. Defendants.	)	No. 16 CH 05192 Calendar 13 Judge Anna H. Demacopoulos

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Cross-Motions for Summary Judgment. Having reviewed the briefs, attached exhibits, pleadings, conducted an *in camera* inspection of the withheld and redacted documents, heard arguments of counsel on September 7, 2016; October 21, 2016; and November 10, 2016; and being fully informed in the premises:

For the following reasons, the Court finds (1) the Village of Kenilworth's investigation into the Percy murder is active and ongoing, and its files are exempt from disclosure; (2) because of the well documented cooperative nature of this case, any of the Village of Kenilworth's FOIA exemptions flow to Co-Defendants; (3) the Illinois State Police's investigation into the Percy murder is active and ongoing, and its files are exempt from disclosure; (4) the Cook County State's Attorney's Office's investigation into the Percy murder is active and ongoing, and its files are exempt from disclosure; (5) Kenilworth may assert an exemption over the Cook County Medical Examiner (CCME) files in which it has a substantial interest; and (6) Plaintiff's Motions for Partial Summary Judgment as to CCME is granted in part and denied in part, and the CCME email chains between Chief Miller, Tom Biesty, and Chief Medical Examiner Dr. Cina dated September 2015 will be released to Plaintiff with redactions and no attachments.

BACKGROUND

This case concerns the Illinois Freedom of Information Act, 5 ILCS 140 (FOIA or Act), and the 1966 murder of Valerie Percy in Kenilworth, IL. In the weeks before the culmination of her father Charles Percy's successful Senate run, 21-year-old Valerie was killed in her family's home. Despite collaborating with larger agencies, such as the Illinois State Police, Chicago

Police Department, and the Federal Bureau of Investigation, the Kenilworth crime remains unsolved. The investigative file spans over 20,000 pages of physical records, including, non-exhaustively, investigative reports, crime scene photographs, interview notes, and correspondence between law enforcement agencies.

For the first few weeks after the murder, the Kenilworth Police Department, Chicago Police Department, Illinois State Police, and the surrounding municipalities' police departments cooperated in the investigation. In October 1966, the Coroner of Cook County, Dr. Andrew J. Toman, impaneled a jury and conducted a public inquest into Ms. Percy's death that resulted in a Corner's Verdict. During this time, the Illinois State Police also used personnel and resources from the FBI to track leads in other states and conduct further investigations. From time to time, the investigation was led by various agencies.

In 2002, primary responsibility for the investigation was taken over by the Kenilworth Police Department (KPD). KPD has consistently used the resources of the Illinois State Police, the FBI, and the Cook County State's Attorney's Office to further its investigation. Currently, the Village of Kenilworth and the North Regional Major Crimes Task Force are the lead agencies investigating the murder. The North Regional Major Crimes Task Force is not a party in this action.

As the 50th anniversary of the murder approached, there was a renewed interest in the cold case by both the media and individuals. Between January 13, 2016 and January 20, 2016, Plaintiff John Q. Kelly sent FOIA requests to the Village of Kenilworth (Kenilworth or Village), Illinois State Police (ISP), the Cook County State's Attorney (CCSAO), Chicago Police Department (CPD), and the CCME for "all records related to the investigation into the September 18, 1966 homicide of Valerie Percy, including but not limited to [14 subcategories of records.]" Each agency denied Kelly's request or failed to produce records.

Kenilworth claimed release of the records would interfere with an ongoing criminal investigation; ISP claimed it would interfere with a pending or actually and reasonably contemplated law enforcement proceeding; CCSAO claimed the same reasons as Kenilworth and ISP, as well as citing an "investigatory privilege;" CPD claimed it has no responsive records, and even if it did, those records would be covered by the same exemptions as Kenilworth; and

CCME claimed it could not locate any records after searching its archives, never issuing a written denial.

Kelly brought suit on April 13, 2016, alleging FOIA violations against all Defendants. On July 13, 2016, Kelly filed nearly identical motions for partial summary judgment against Defendants ISP, CCME, CCSAO, and Kenilworth. No motion is currently pending against CPD. Kenilworth filed a cross-motion for summary judgment limiting its argument to the "ongoing investigation exemption," and without waiving its right to argue other exemptions. This Court has heard argument on this matter on September 7, 2016; October 21, 2016; and November 10, 2016. By interim orders, as discussed in detail below, the Court ordered that all motions be fully briefed, that certain documents be produced for *in camera* inspection, and an index of records be prepared by the CCME, as well as a supporting affidavit.

STANDARD OF REVIEW

Summary judgment is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the non-moving party, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c); *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 607 N.E.2d 1204, 1209 (Ill. 1992). Summary judgment should only be granted if the movant's right to judgment is clear and free from doubt. *Outboard Marine Corp.*, 607 N.E.2d at 1209. In making this determination, the Court is to construe the record strictly against the movant and liberally in favor of the opponent. *Delaney Electric Co. v. Schiessle,* 601 N.E.2d 978, 982 (Ill. App. 1st 1992).

A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw divergent inferences from the undisputed facts. *Adames v. Sheahan,* 909 N.E.2d 742, 753 (Ill. 2009); *Outboard Marine Corp.,* 607 N.E.2d at 1209. When the parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Ins. Co. v. Caremark Rx Inc.*, 855 N.E.2d 890, 896 (Ill. App. 1st 2005). Summary judgment is "a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt." *Adames,* 909 N.E.2d at 754.

To prevail on a summary judgment motion in a FOIA case, the defending public body bears the burden of showing that its search was adequate and any withheld documents fall within a FOIA exemption. *Bluestar Energy Servs. v. Ill. Commerce Commission*, 871 N.E.2d 880, 887 (Ill. App. 1st 2007) citing *Carney v. United State Dept. of Justice,* 19 F.3d 807, 812 (2d Cir. 1994). The agency must prove any exemptions claimed through clear and convincing evidence. 5 ILCS 140/11(f) (Lexis 2016).

OVERVIEW

Kenilworth argues that if its ongoing criminal investigation exemption is accepted by the Court, then as a result of the cooperation and joint-efforts between all Defendants over the past 50 years, and the current levels of participation in the investigation, its exemption should flow to the other Defendants. In other words, for purposes of the Valerie Percy murder investigation all Defendants operate as a single unit, with Kenilworth currently as the lead investigatory agency and all other Defendants acting as partners or agents during the course of the investigation. Therefore, this Court considers the combination of Defendants' affidavits and the Cooperative Agreements between Kenilworth and Defendants in ruling on Kenilworth's motion for summary judgment. After examining the eleven affidavits filed and conducting an *in camera* review of over 1,000 pages of documents, this Court is convinced there are detailed justifications to individually support each Defendant's claims, discussed *infra* at Section II: FOIA Exemptions.

Even if Kenilworth's FOIA exemption claims and cross-motion for summary judgment do not flow to the other Defendants, sufficient supporting documentation has been provided to the Court to remove any questions of material fact that each of the agencies is participating in an ongoing investigation. Accordingly, because there are no material questions of fact at issue, this Court will decide the questions presented as a matter of law. *Steadfast Ins.*, 855 N.E.2d at 896.

ANALYSIS

In his nearly identical motions for partial summary judgment against Kenilworth, ISP, CCME, and CCSAO, Kelly argues that he has not received a single record in response to his FOIA request. Pointing out that government secrecy is rarely appropriate and often abused, Kelly claims Defendants bear the burden of proof and must come forward with detailed supporting evidence. Additionally, Kelly argues each agency stands on its own to prove a claimed FOIA exemption, and that only one, if any, agency can be conducting an investigation.

Kenilworth presents two main arguments to the Court in its cross-motion for summary judgment. First, Kenilworth does not have to release any portion of its investigatory file because there is an "ongoing investigation" concerning the Percy murder. Second, because there is an ongoing investigation as to the Percy murder, all of Kenilworth's Co-Defendants who are participating in the investigation are also exempt. Plaintiff counters with claims that the investigation is not ongoing and, even if it were, Kenilworth already waived the claimed exemption based on information released to news agencies, and the existence of television shows and books speculating about the murder.

In addition to the ongoing investigation exemption, ISP also claims disclosure will interfere with law enforcement proceedings and disclose confidential sources connected to the investigation. Kelly emphasizes that *Kenilworth,* not ISP, is allegedly conducting an investigation, and FOIA exemptions are specific to the recipient of the FOIA request per the 2009 amendments. *See* 2009 Ill. SB 189 codified as amended at 5 ILCS 140/7(d)(vii) (adding, among other things, "by the agency that is the recipient of the request"). Kelly also argues (1) the investigation is not actively ongoing; (2) it cannot be prosecuted, because of the age of those involved after fifty years; and (3) Kelly doubts that disclosure of "confidential" sources would negatively impact the investigation, especially if they concern discounted suspects.

Defendants CCSAO and CCME's briefs almost exclusively rely upon the arguments brought by Kenilworth and ISP. The State's Attorney's Office claims the ongoing investigation exemption, highlighting the cooperative nature of the murder investigation, and also argues that release of the records would interfere with reasonably contemplated law enforcement proceedings. Kelly argues that the "derivative reliance" of the CCSAO and CCME's arguments ignores the adversary testing mandates of FOIA, and that neither organization is actively investigating the case. Particularly, CCME states it is not part of the ongoing investigation in its Response Brief, but also claims that most of its documents are identical to records claimed exempt by other Defendants. Thus, if CCME is ordered to release its documents it would thwart the exemption claims of the other agencies, further emphasizing the extraordinary circumstances surrounding this case, and ultimately arguing for withholding the records. After briefing and arguments were completed however, CCME abruptly changed its position. In a court ordered index of its file, CCME seeks to withhold only crime scene and autopsy photographs, and

produce all remaining documents with redactions. Kelly does not seek the autopsy photos, however he does seek the crime scene photos. *See, infra,* Section II (E).

I. THE ILLINOIS FREEDOM OF INFORMATION ACT

FOIA's purpose is to open governmental records to the light of public scrutiny. The Act's statement of policy clearly sets forth the legislature's intent to promote government transparency and accountability, thus enabling the people to fulfill their duties of discussing public issues "fully and freely." 5 ILCS 140/1 (Lexis 2016).

FOIA is given a liberal construction to further the legislative objective of providing easy public access to governmental information. *See, e.g., Southern Illinoisan v. Ill. Dep't. of Public Health,* 218 Ill. 2d 390, 416-17 (2006). Public records are presumed to be open and accessible. *Id.* at 415-16. Each public body is required to designate one or more officials or employees to act as its FOIA officer. 5 ILCS 140/3.5 (Lexis 2016). FOIA may not be used to disrupt the proper work of a governmental body beyond its responsibilities under the Act. 5 ILCS 140/1; *Dumke v. Chicago*, 994 N.E.2d 573, ¶ 12 (Ill. App. 1st 2013). However, a public body must comply with a request unless one of FOIA's narrow statutory exemptions from disclosure applies. *BlueStar Energy Servs., Inc. v. Ill. Commerce Comm'n,* 871 N.E.2d 880 (Ill. 1st Dist. 2007).

II. FOIA EXEMPTIONS

Section 7 of FOIA gives an extensive list of exemptions to disclosure. 5 ILCS 140/7 (Lexis 2016); *Cooper v. Dept. of the Lottery,* 640 N.E.2d 1299, 1302 (Ill. App. 1st 1994). FOIA exemptions are to be read narrowly and in furtherance of the legislative purpose of providing access to governmental information. *Illinois Ed. Ass'n v. Ill. State Bd. of Ed.*, 791 N.E.2d 522, 527 (Ill. 2003). If the public body contesting disclosure claims that an exemption applies, then the court must evaluate the information on a case-by-case basis. *Chicago Alliance for Neighborhood Safety v. Chicago,* 808 N.E.2d 56, 64 (Ill. App. 1st 2004). A public body attempting to invoke a Section 7 exemption under FOIA is required to give written notice specifying the particular exemption claimed to authorize the denial of records. 5 ILCS 140/9(b) (Lexis 2016); *Illinois Ed. Ass'n,* 791 N.E.2d at 527. Once an exemption is claimed, the FOIA requester can challenge the public body's denial in circuit court. *Cooper,* 640 N.E.2d at 1302. The public body bears the burden of proof at the trial level to establish the documents in question

are exempt from disclosure, and must provide a *detailed* justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing. *BlueStar,* 871 N.E.2d at 885-886 (emphasis in original) citing *Cooper*, 640 N.E.2d at 1302. The public body must prove by clear and convincing evidence that a record is exempt. 5 ILCS 140/11(f) (Lexis 2016); *Dumke v. Chicago,* 994 N.E.2d 573, 579 (Ill. App. 1st 2013).

Section 11(f) of FOIA also requires a trial court to conduct whatever *in camera* inspection of the requested records it finds appropriate to determine whether the totality of the records or any part of them may be withheld under the Act. 5 ILCS 140/11(f) (Lexis 2016); *BlueStar,* 871 N.E.2d at 886 citing *Baudin v. Crystal Lake,* 548 N.E.2d 1110, 1113 (1989). The Illinois Supreme Court has interpreted section 11(f) to mean that a circuit court is not required to conduct an *in camera* review where the public body meets its burden of showing that the statutory exemption applies by means of affidavits. *Illinois Ed. Ass'n. v. Ill. State Bd. of Ed.,* 791 N.E.2d 522, 530 (Ill. 2003).

The placement of detailed information in an affidavit is necessary for the trial court to be sufficiently apprised of the nature and extent of information contained in the contested documents. *Baudin v. Crystal Lake,* 192 Ill. App. 3d 530, 543 (2d Dist. 1989) (Justice McLaren, concurring). However, the level of detail required could foreseeably result in disclosure of the information sought by the plaintiff, causing the defendant extreme difficulty in preparing affidavits that give the court sufficient information to determine whether a privilege exists while simultaneously constricting the information to safeguard nondisclosure. *Id.*

To resolve this conundrum, Defendants provided extremely detailed affidavits to the Court for *in camera* inspection, and then, pursuant to court order, filed redacted versions of those affidavits for the record. Regardless of the compelling affidavits provided by Defendants, this Court conducted *in camera* inspections of the contested documents.

A. The Ongoing Criminal Investigation Exemption

FOIA section 7(1)(d)(viii) provides an exemption for record production when it would obstruct an ongoing criminal investigation, and states:

> (1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from

> disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:
>
> (d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:
>
> (viii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request. 5 ILCS 140/7(1)(d)(viii) (Lexis 2016).

Thus, records in the possession of any public body and any law enforcement agency created for law enforcement purposes are exempt from inspection and copying, but only to the extent that disclosure would obstruct an ongoing criminal investigation by the agency that is the recipient of the request. 5 ILCS 140/7(1)(d)(viii) (Lexis 2016). There is relatively little Illinois case law as to the "ongoing criminal investigation exemption;" however, the Court finds the cases of *Castro v. Brown's Chicken*, *Day v. Chicago*, *Dickerson v. DOJ,* and *Twin-Cities Broadcasting Corp. v. Reynard* instructive. *Brown's Chicken,* 732 N.E.2d 37 (Ill. App. 1st 2000); *Day*, 902 N.E.2d 1144 (Ill. App. 1st 2009); *Dickerson*, 992 F.2d 1426 (6th Cir. 1993); *Twin-Cities*, 277 Ill. App. 3d 777 (4th Dist. 1996).

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Dept. of Healthcare & Family Servs. v. Warner,* 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute, and if the statutory language is clear and unambiguous, it must be given effect as written. *Blum v. Koster,* 235 Ill. 2d. 21, 29 (2009). "[A] statute should be evaluated as a whole; each provision should be construed in connection with every other section." *Eden Retirement Ctr., Inc. v. Dep't. of Revenue,* 213 Ill. 2d 273, 291 (2004). A court may also consider the policy behind the law and its ultimate aims. Importantly, a Court must also assume the legislature did not intend an absurd or unjust result. *People v. Pullen,* 192 Ill. 2d 36, 42 (2000).

Plaintiff argues the plain language of Section 7(1)(d)(viii) controls, implying the language is clear and unambiguous. However, the Court disagrees. In question is whether "the agency that is the recipient of the request" must be leading its own ongoing criminal investigation, or may be participating within an investigation lead by another agency. After all, it is easy to participate in a project without being in charge of it, and that is precisely the question

before the Court. Law enforcement agencies do not operate within a void, completely separate from other agencies. By statute, discussed in Section II (D), certain agencies are required to cooperate towards the common goal of solving a criminal case. Plaintiff's argument, taken to its logical conclusion, yields absurd results for documents shared during a criminal investigation. It would open a floodgate of FOIA requests for uncharged crimes. That is not the purpose of FOIA. The Court holds that records, created for law enforcement purposes, in possession of any agency participating in an ongoing criminal investigation, regardless of whether it is the lead agency, are exempt from inspection and copying, but only to the extent that disclosure would obstruct an ongoing criminal investigation.

1. Investigatory Privilege

Castro v. Brown's Chicken concerns the 1993 Brown's Chicken Massacre in Palatine, IL.[1] Years before a conviction was secured, Castro, as administrator for the estate of his murdered son, filed suit against Brown's Chicken. During the course of discovery, Brown's Chicken subpoenaed the Village of Palatine's (Palatine) records on the crime, and Palatine moved to quash, arguing the subpoena was subject to the law enforcement investigatory privilege. On appeal, the First District of the Illinois Appellate Court found that the State's Attorney and Palatine had made a sufficient showing to invoke an investigative privilege. *Brown's Chicken*, 314 N.E.2d at 40.

The "law enforcement investigatory privilege" exists to "prevent disclosure of law enforcement techniques and procedures, preserve confidentiality of sources, protect witnesses and law enforcement personnel, safeguard the privacy of individuals involved in an investigation, and otherwise prevent interference with an investigation." *Brown's Chicken*, 314 N.E.2d at 47 quoting *Hernandez v. Longini*, 1997 U.S. Dist. LEXIS 18679, at *9 (N.D. Ill. Nov. 13, 1997). The Court stressed when determining whether this privilege applies, courts must balance the needs of civil litigants to receive information with the public benefit of keeping law enforcement investigations confidential. *Brown's Chicken,* 314 N.E.2d at 48 citing *In re Marriage of Daniels*, 607 N.E.2d 1255, 1263 (Ill. App. 1st 1992).

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[1] In 1993, two assailants robbed a Brown's Chicken franchise and murdered seven employees, stashing the bodies in a freezer. The case went unsolved for nine years, until an assailant was implicated by his ex-girlfriend and the police could pull DNA samples from the murder scene to match another suspect. Both assailants were eventually located and sentenced to life imprisonment in 2007 and 2009. Jake Griffin, *Degorski seeks new hearing in Brown's Chicken mass murder*, DAILY HERALD, Sept. 8, 2016, at www.dailyherald.com/article/20160908/news/160909062.

The *Brown's Chicken* Court found that the investigation was not complete and the perpetrator may still be at large, concluding "for this reason alone, it is imperative that the investigation remain confidential." *Id.* The Court emphasized that in an ongoing investigation courts "should defer to the executive branch and not interfere in the investigatory process." *Id.* Moreover, because the "entire investigation could be thwarted" if the task force were required to disclose the information, the Court affirmed the determination that there had been a sufficient showing to invoke the investigative privilege. *Id.*

In conducting its own research, this Court has been unable to locate any recorded discussion as to the purpose behind the 2009 Illinois FOIA amendments, or the reasoning behind its exemptions.[2] However, it is clear to the Court that the Section 7(d) exemptions were intended as adoptions of the common law privilege of "law enforcement investigatory privilege." 5 ILCS 140/7(d) (Lexis 2016). The common law privilege includes (1) prevention of disclosure of law enforcement techniques and procedures; (2) preserving confidential sources; (3) protecting witnesses and law enforcement personnel; (4) safeguarding the privacy of those involved; and (5) otherwise preventing interference with an investigation. *Brown's Chicken*, 314 N.E.2d 37, 47 (Ill. App. 1st 2000).

Section 7(d) of FOIA explicitly includes exemptions for (1) interference with law enforcement proceedings and (2) disclosing the identity of a confidential source. 5 ILCS 140/7(d)(i) (law enforcement proceedings); 140/7(d)(iv) (confidential sources) (Lexis 2016). "Obstructing an ongoing criminal investigation" serves as the umbrella for those parts of the common law privilege not explicitly adopted in the Act, such as preventing the disclosure of law enforcement techniques and procedures; protecting witnesses and law enforcement personnel; and, of course, preventing interference with an investigation. 5 ILCS 140/7(d)(vii) (Lexis 2016). As such, this Court will consider the policy behind the investigatory privilege to be the driving force behind the ongoing criminal investigation exemption. Just as the Court in *Brown's Chicken* was unwilling to risk the investigation by disclosing documents contained by one of the many agencies involved to the plaintiff, so is this Court. Law enforcement agencies do not operate within a vacuum, agencies often share theories and records, and this Court will not

[2] The Court is mindful, however, that the amendments were enacted after a FOIA action regarding former Governor Blagojevich was resolved at the appellate level. *Better Gov't Association v. Blagojevich,* 386 Ill. App. 3d 808 (4th Dist. 2008).

discourage agencies from cooperating for fear that sensitive investigatory work on open cases may be revealed through FOIA requests.

2. *Use of Affidavits*

In *Day v. Chicago*, the plaintiff was convicted of murder in 1994 and was serving a 60-year prison sentence when he filed suit alleging wrongful conviction. 902 N.E.2d 1144, 1146 (Ill. App. 1st 2009). Seventeen years into his sentence, Day submitted a FOIA request to the CPD seeking documents related to his conviction; the CPD provided some heavily redacted documents and refused to produce others, claiming FOIA's ongoing criminal investigation exemption. *Id.* The trial court relied wholly on the affidavits provided by CPD officers, despite plaintiff's request for an *in camera* inspection, in holding the exemption applied. *Day*, 902 N.E.2d at 1147.

Upon review, the Appellate Court found the affidavits presented were "entirely conclusory and inadequate to sustain the City's burden" to show the documents were exempt under the ongoing criminal investigation doctrine. *Id.* at 1148-49, citing *Illinois Educ. Ass'n v. Ill. Bd. of Educ.*, 791 N.E.2d 522 (Ill. 2003). Specifically, the Court took issue with how "nothing in any of the affidavits tells [the Court] when the documents at issue were created or when the last entry was made." *Id.* at 1149. The Court emphasized that a public body may not "simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman . . . Rather, the public body can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." *Id.* quoting *Illinois Educ. Ass'n*, 791 N.E.2d at 531 (Ill. 2003) (emphasis in original).

The affidavits in *Day* failed to explain how disclosure of any of the records at issue would specifically obstruct the remaining investigation. *Id.* at 1149-50. Nothing explained why the case was ongoing, or how disclosure of any documents would specifically obstruct any remaining investigation into the murder. *Day v. Chicago*, 902 N.E.2d 1144, 1149-50 (Ill. App. 1st 2009). The *Day* Court held that the "sweeping generalities" found in the provided affidavits were not the type of "detailed justifications" that lend themselves to the adequate adversary testing necessary to support an ongoing investigation exemption. *Day v. Chicago*, 902 N.E.2d 1144, 1150 (Ill. App. 1st 2009).

The Appellate Court did not base its ruling in *Day* solely on the fact that Plaintiff's case was seventeen years old when the FOIA action was filed. Rather, the fact of a criminal conviction combined with the sweeping generalities of the affidavits did not show a truly ongoing criminal investigation. The facts in this case are distinguishable. Despite the murder having occurred over 50 years ago, Defendants have provided incredibly detailed affidavits to the Court showing an active and ongoing criminal investigation. The phrase "ongoing criminal investigation" is not being invoked as some mere talisman in this instance; Defendants have met their burden through ample objective indicia that the claimed exemptions are applicable under the circumstances. These affidavits are supported by the documents provided to the Court *in camera*, and present clear and convincing evidence to support Defendants' exemptions.

3. *Method of* In Camera *Review*

The Illinois legislature intended that federal case law "should be used in interpreting [Illinois' FOIA]," although the Federal and Illinois acts are different. *Chicago Alliance for Neighborhood Safety v. Chicago*, 348 Ill. App. 3d 188, 202 (1st Dist. 2004); *House Debates,* H.B. 234, 83d General Assembly, May 25, 1983, at 184. Federal courts analyzing FOIA issues may provide persuasive guidance, although their decisions are not binding on this Court. *Heinrich v. White*, 975 N.E.2d 726, 730 (Ill. App. 2d 2012).

The Sixth Circuit Case of *Dickerson v. DOJ* has similar facts to this action. 992 F.2d 1426 (6th Cir. 1993). That case concerned the then 20-year-old FBI investigation into the disappearance of Jimmy Hoffa.[3] *Dickerson v. DOJ*, 992 F.2d 1426, 1428 (6th Cir. 1993). The FBI claimed an exemption under § 552(b)(7)(a) of the Federal FOIA, which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." *Dickerson* 992 F.2d at 1427; 5 U.S.C. § 552(b)(7)(a) (Lexis 2016). The Sixth Circuit Court of Appeals held the district court did not abuse its discretion by limiting its *in camera* review to specific documents and that the district

[3] Jimmy Hoffa was the president of America's largest union, the International Brotherhood of Teamsters, during the 1960s. He was widely regarded as having mafia-connections. In 1967 he was imprisoned for several criminal acts and his ties to organized crime. President Nixon pardoned him in 1971, and he disappeared in July of 1975 on the same day he was supposed to meet with two Mafia bosses. His body remains missing and the crime is unsolved. *Top 10 Famous Disappearances,* TIME, *available at* http://content.time.com/time/specials/packages/article/0,28804,1846670_1846800_1846821,00.html.

court was not required to find that "at least some non-public portions of the investigatory files were not protected from disclosure." *Id.* at 1427-28.

The plaintiff in *Dickerson* sent "sweeping," FOIA requests to the FBI. Although there was no pending criminal proceeding directly relating to Hoffa's disappearance, the FBI claimed the entirety of its file, consisting of nearly 400 volumes of records, was exempt. *Id.* at 1428. The district court relied on affidavits and *in camera* inspection to make its decision. *Id.* at 1430. Although the district court believed the government's affidavits were sufficient standing alone to support its findings, the Court felt the need for a "reality check" and ordered an *in camera* review of select documents. *Id.* at 1431-32. In the interest of keeping the scope of the *in camera* review manageable, the magistrate judge only examined the selected documents. *Id.* at 1430. After reviewing the file, the District Court was "satisfied beyond any doubt" that the investigation was active, continuing, and directed toward the institution of criminal proceedings. *Id.* at 1430.

The Sixth Circuit Court of Appeals affirmed the magistrate judge's approach in *Dickerson,* stating it "was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents *in camera* than he would have wanted to see." *Id.* at 1432. Describing the approach as sensible, the Sixth Circuit held that it was reasonable for the District Court judge to rule he had seen all that was necessary to make a proper decision. *Id.*

The Sixth Circuit also held the District Court was correct in its finding that the requested records could "reasonably be expected to interfere with a future prosecution." *Id.* at 1433. The Appellate Court emphasized, "particularly in homicide cases," the corroboration of evidence is important, and that verification of statements by future witnesses becomes harder "where the factual information developed in the investigation has entered the public domain." *Id.* at 1433. The Sixth Circuit specifically rejected the plaintiff's request to "remand the case with instructions that the government be required to segregate and produce all non-exempt material." *Id.* at 1434. Instead, the Sixth Circuit held "the words 'reasonably segregable' must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned." Because the record did not persuade the Court there were "prospects for finding any 'reasonably segregable' non-public portions" of the file, the remand would not have been justified, and the District Court ruling was affirmed. *Id.* at 1434.

Considering the volume of the Percy murder investigatory file, this Court adopts the same approach used by the trial court in *Dickerson.* Rather than review the tens of thousands of pages of documents individually, the Court has limited its *in camera* review to specific documents from each Defendant to keep the review manageable.[4] Moreover, after reviewing the documents, the Court finds it unlikely there is any reasonably segregable non-public portion of the investigatory record that could conceivably be released.

When examining identical FOIA requests to multiple agencies, Illinois Courts have explicitly held that a public body's possession of documents is not determinative of their release under FOIA if another governmental entity has a "substantial interest" in asserting an exemption. *Twin-Cities Broadcasting Corp. v. Reynard,* 277 Ill. App. 3d 777, 783 (4th Dist. 1996). Thus, a government entity in possession of information and documents may not consent to disclosure when another government entity having a substantial interest in the determination wishes to assert an exemption. *Twin-Cities,* 277 Ill. App. 3d at 778.

The Illinois Supreme Court has instructed that, in FOIA cases, summary judgment may be appropriate without an *in camera* review of the affidavits show with reasonable specificity why documents fall within a claimed exemption and are sufficient to allow adversarial testing. "However, we believe that *in camera* review by the circuit court is the most effective way for the public body to objectively demonstrate the exemption claimed does, in fact, apply." *Illinois Educ. Ass'n v. Ill. Bd. of Educ.,* 791 N.E.2d 522, 531 (Ill. 2003). "*In camera* review affords the benefits of an impartial arbiter without the risks accompanying public disclosure." *Id.* citing *Baudin v. Crystal Lake,* 548 N.E.2d 1110, 1118 (Ill. App. 2d 1989) (Justice McLaren, J. concurring). One of the benefits of an impartial arbiter performing an *in camera* review, as contemplated by the Illinois Supreme Court in *Illinois Education Association*, is that it allows for the adversarial testing required under FOIA while simultaneously safeguarding nondisclosure of the contested records.

During oral arguments on September 7, 2016, Plaintiff repeatedly referred to the Court's *in camera* inspection of affidavits as *ex parte* communications. *Ex parte* communications are a breach of legal ethics wherein a party to a case communicates with the judge without notice to the other parties. Ill. Sup. Ct. R.63(A)(5). Documents presented to the Court for *in camera*

[4] Even considering the Court's efforts to keep the number of documents for *in camera* review manageable, the Court has still reviewed easily over 1,000 of pages of documents.

inspections are not improper *ex parte* communications, but rather a judicial duty to review materials for which a privilege has been asserted and to determine whether that privilege applies. *In re Marriage of Decker,* 1553 Ill. 2d 298, 324-25 (1992); 1-501 Illinois Evidence Courtroom Manual § 501.7 (2016). There have been no *ex parte* communications with the Court regarding this matter. Moreover, the Court finds there was good faith by Defendants in requesting *in camera* review of the affidavits.

B. The Village of Kenilworth

In this case, Kenilworth initially submitted the affidavit of David Miller, Kenilworth's Chief of Police, for *in camera* review. The contents of Chief Miller's affidavit have not been shared with anyone, including Co-Defendants. Plaintiff argued this was a violation of the statute requiring a detailed justification for the exemption and that it did not satisfy the adversarial testing standard. The Court agreed in part, and ordered a redacted version of the affidavit be filed. Additionally, to not abdicate judicial responsibilities and consistent with practice articulated in *Dickerson,* the Court ordered documents referenced in certain paragraphs of Chief Miller's affidavit be produced for *in camera* inspection. The Court specifically selected reasonably recent documents that pre-dated Plaintiff's FOIA request.[5] The Court also ordered the production of any written agreements between Kenilworth and the North Regional Major Crimes Task Force (NORTAF). Kenilworth complied with the Court's order.

In addition to the historical perspective of the investigation, Chief Miller's sealed affidavit is a detailed fact driven account of the reasonably recent investigatory activities of the Kenilworth Police Department into the murder of Valerie Percy. It articulates with specificity the proactive, methodical approach of the interview of witnesses, and the use of modern technology and forensic testing that was not available in 1966. Additionally, the *in camera* review of over 1,000 documents reveals a team of seasoned investigators who work within confines of the 4th Amendment and other applicable State and Federal Statutes. The documents disclose the integral relationship between law enforcement officers, prosecutors and forensic scientists and their recent coordinated efforts to solve the murder of Valerie Percy. Not only has Kenilworth met the burden of clear and convincing evidence, but this Court has no doubt this is an active ongoing criminal investigation.

[5] The Court notes for the record that the requested items revealed documents shared by both ISP and CCSAO.

Plaintiff argues that Kenilworth must also prove that the release of the investigatory file would also obstruct the investigation. Paragraph 30 of Chief Miller's affidavit addresses this very concern, stating:

> It should be apparent from this recitation of confidential information from our Investigation File that various pieces of information and evidence may seem unconnected but later take on unanticipated significance. This is one of the reasons standard police investigations try to keep as much information confidential as possible.

Again, a reading of the entire sealed affidavit and *in camera* documents reveals a detailed justification that release of any portion of the file would obstruct the current active ongoing criminal investigation.

Mr. Kelly filed three separate affidavits in support of his position. Although he has a distinguished legal career with substantial criminal experience, Mr. Kelly does not have personal knowledge regarding the Percy murder or its investigation. Illinois Supreme Court Rule 191(a) gives specific requirements for affidavits that accompany motions for summary judgment; they shall (1) be based on personal knowledge; (2) set forth facts with particularity; (3) have certified copies of all papers relied upon attached; (4) not be conclusions, but admissible facts; and (5) affirmatively show the affiant can completely testify to its contents if sworn as a witness. Ill. Sup. Ct., R.191(a) (Lexis 2016).

An affidavit submitted for summary judgment purposes serves as a substitute for testimony at trial; it is thus necessary to enforce strict compliance with Rule 191(a) to ensure that trial judges are presented with valid evidentiary facts upon which to base a decision. *Fooden v. Bd. of Governors of State Colleges & Univs,* 48 Ill. 2d 580, 587 (1971). Rule 191(a) bars conclusive assertions and requires an affidavit to state facts with particularity. *Robidoux,* 201 Ill. 2d at 339; Ill. Sup. Ct., R.191(a) (Lexis 2016). When dealing with summary judgment motions, even an expert witness' affidavit must adhere to the requirements set forth in the plain language of Rule 191(a), regardless that experts testifying at trial may properly offer opinions based on facts not in evidence. *Robidoux,* 201 Ill. 2d at 339.

Despite his lengthy legal career, the Court does not consider Mr. Kelly to be an expert in this matter. Moreover, even if he were an expert, much of the information contained in Mr. Kelly's various affidavits does not meet the requirements of Rule 191(a). Mr. Kelly does not

have any *personal* knowledge of the murder or its investigation, instead relying only on those facts available to the public or relayed to him by others, which may or may not be accurate. Affidavits in opposition to motions for summary judgment must consist of facts admissible in evidence as opposed to conclusions, and conclusory matters may not be considered. *Woolums v. Huss.*, 323 Ill. App. 3d 628, 636 (4th Dist. 2001); Ill. Sup. Ct., R.191(a) (Lexis 2016). Mr. Kelly's affidavits are conclusory, and the Court will not consider their contents insofar as they do not relate to Mr. Kelly's personal knowledge. Accordingly, his affidavits do not present a genuine issue of material fact precluding summary judgment.

After considering the totality of the evidence presented, this Court finds that Kenilworth also has a substantial interest in asserting exemptions over the documents in possession of CCSAO, ISP, and CCME. Although it is this Court's finding that Kenilworth has met its burden in establishing that release of any portion of the investigatory file by any of Defendants would obstruct the investigation, this Court decided an additional level of judicial scrutiny would be prudent, if technically unnecessary, and ordered the remaining Defendants to respond to Plaintiff's motions for partial summary judgement.

C. The Cook County State's Attorney's Office

CCSAO denied Plaintiff's request claiming the ongoing criminal investigation exemption. Consistent with the Court's previous procedure, CCSAO responded to the partial motion for summary judgment with an affidavit of Assistant State's Attorney Tom Biesty, Bureau Chief of the Cold Case Unit, for *in camera* review. A redacted version was tendered to the parties and for public filing. CCSAO also provided documents in support of every single redacted segment of the Biesty Affidavit for *in camera* review. Mr. Beisty's affidavit is an even more compelling account supporting an active ongoing criminal investigation. (Biesty Aff. ¶ 5). In 2014, pursuant to the NORTAF agreement previously tendered to the Court, a Percy Homicide Task force was created consisting, not only of Kenilworth and various local law enforcement agencies, but also a Special Agent from the FBI. (Biesty Aff. ¶ 11).

Mr. Biesty avers that "included in the statutory duties of the State's Attorney's Office is the role of appearing before the Court and submitting applications for search warrants and presenting matters to the Grand Jury as well as request that the Grand Jury issue subpoenas for the purpose of obtaining documents and other evidence to assist its investigation." (Biesty Aff. ¶ 13). The Court reviewed the specific documents discussed in paragraphs 14--18 *in camera*. To disclose

anything further would completely abandon the public policy of the exemption, jeopardize the investigation, and thwart the ongoing efforts of investigators and prosecutors.

Plaintiff's argument that CCSAO is simply assisting Kenilworth when it receives "periodic leads" completely ignores most of Mr. Beisty's affidavit and is a gross misrepresentation. Plaintiff's argument that CCSAO fails to address an alleged lack of proof supporting its claim that the "alleged investigation will be interfered with unless the entire file is kept from the public" is also unavailing. In paragraphs 19--20, the Beisty Affidavit addresses how the recovery of evidence from the original crime scene, the findings of the Medical Examiner, photos of the victim, and investigative techniques used in pursuing other leads is critical in this ongoing and active investigation. Therefore, this Court finds that CCSAO has independently provided clear and convincing evidence to support the ongoing criminal investigation exemption, and that the Beisty Affidavit provides detailed justifications such that it meets the adversarial testing standard.

D. The Illinois State Police

The State Police Act requires state police to cooperate with municipal police agencies in Illinois. 20 ILCS 2610/16 (Lexis 2016). State's Attorneys have legal responsibility to cooperate and work with municipal police departments. *Ware v. Carey,* 75 Ill. App. 3d 906, 914 (Ill. 1st Dist. 1979). Although State's Attorneys duties include investigation and prosecution, it is a recognized practice that a State's Attorney will defer to the investigative duties of police, and stand ready to assist them. *People v. Wilson,* 254 Ill. App. 3d 1020, 1039 (Ill. 1st Dist. 1993).

Section 2605-25 of the State Police Act defines the "[d]epartment divisions" of the Illinois State Police. 20 ILCS 2605/2605-5 (Lexis 2016). The Division of Forensics Services is one of ISP's departments. *Id.* Section 35 governs the division of operations of the ISP, including "Cooperat[ing] with the police of cities, villages, and incorporated towns and with the police officers of any county in enforcing the laws of the State and in making arrests and recovering property." 20 ILCS 2605/260535 (Lexis 2016).

Section 40 of the State Police Act governs the Division of Forensics Services (Forensics Division). 20 ILCS 2605/2605-40 (Lexis 2016). It mandates the Forensics Division (1) provide assistance to local law enforcement agencies; (2) establish and operate a forensic science laboratory system; and (3) establish and coordinate a system for providing "forensic science and

other investigative and laboratory services to *local law enforcement agencies* and local State's Attorneys in aid of the investigation and trial of capital cases." 20 ILCS 2605/260440(3); 40(6); quoting 40(7) (Lexis 2016). Emphasis supplied.

FOIA generally requires that public bodies under the Act are individually subject to its mandates, however; certain FOIA provisions do contemplate inter-governmental cooperation and the sharing of sensitive information. *Duncan Pub'g v. Chicago*, 709 N.E.2d 1281, 1286 (Ill. App. 1st 1999) (regarding individuality mandates); 5 ILCS 140/3(e)(vii) (Lexis 2016) (FOIA allows for additional time to respond to a request when "there is a need for consultation, which shall be conducted with all practicable speed, with another public body or among two or more components of a public body having a substantial interest in the determination or in the subject matter of the request"). Thus, Illinois Courts have explicitly held that a public body's possession of documents is not determinative of their release under FOIA if another governmental entity has a "substantial interest" in asserting an exemption. *Twin-Cities Broadcasting Corp. v. Reynard,* 277 Ill. App. 3d 777, 783 (4th Dist. 1996).

ISP denied Plaintiff's FOIA request, claiming the information requested would interfere with a pending or actually and reasonably contemplated law enforcement proceeding conducted by a law enforcement or correctional agency. In responding to the motion for summary judgment, ISP also filed affidavits of Nancy G. Easum and Dana Pitchford. As legal counsel for ISP, Easum reviewed the records regarding the murder of Valerie Percy. She states that the ISP file not only includes ISP records, but also records from the Kenilworth Police Department, the City of Chicago Police Department, the FBI, and the Cook County Medical Examiner's office. (Easum Aff. ¶ 7). Easum also avers that some of the records contain names and information of confidential sources, and that Kenilworth has informed ISP Master Sergeant Tim Gainer that Kenilworth still considers this case an ongoing investigation.

Ms. Pitchford is a Forensic Scientist III at the ISP, employed there since 1997, and assigned to the Valerie Percy case since 2000. In her September 28, 2016 affidavit she states that results of forensic testing performed at the request of multiple agencies are not only maintained by ISP, but are also sent to the requesting agencies. In paragraph 6 she articulates with specificity what

she has done in the past six months for the investigation. On October 3, 2016, this Court requested the documents discussed in paragraph 6 for *in camera* inspection.[6]

Plaintiff John Q. Kelly filed an affidavit detailing the phone and email conversations with ISP concerning his FOIA request. In these conversations, the parties agreed to extend the response date to March 30, 2016. Attached to Mr. Kelly's affidavit is an email from Nancy Easum to Mr. Kelly stating she was still awaiting confirmation that the Percy investigation was closed. Between March 30, 2016 and April 6, 2016, various emails were exchanged, all with ISP consistently taking the position that it needed to verify the investigation was in fact closed. On April 6, 2016, a denial to the FOIA request was sent to Mr. Kelly claiming release of the information requested would interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by law enforcement or a correctional agency pursuant to 5 ILCS 140/17(1)(d)(i).

Plaintiff's motion for partial summary judgment, however, argues that ISP will not be able to meet the ongoing criminal investigation exemption under 5 ILCS 140/7(1)(d)(viii) because ISP is not conducting the investigation. Plaintiff takes the position that testing performed by the Illinois State Police Forensic Science Division is an isolated independent function of government and not a function of criminal investigations. This is an absurd interpretation of the FOIA statute, contradicts the statutory authority of the ISP Forensics Division previously stated, and undermines the public's expectation of supporting criminal prosecution with scientific evidence. Further, such an interpretation would discourage multidisciplinary cooperation in solving crimes, and is against public policy.

Therefore, this court finds that the ISP has independently provided detailed justification for the exemptions of (1) an ongoing criminal investigation and (2) interference with a pending or actually and reasonably contemplated law enforcement proceeding conducted by law enforcement by clear and convincing evidence meeting the adversarial standard.

E. The Cook County Medical Examiner

When the Percy murder occurred in 1966, Cook County did not have a medical examiner. In its place instead was the Cook County Coroner's office.[7] The Cook County Medical

[6] This Court also reviewed documents originating from the ISP predating the FOIA request during the *in camera* inspection of the Kenilworth documents. These documents detailed reasonably recent activity of ISP.

Examiner is an entirely different office than the Cook County Coroner, and it appears to the Court that in the years following the switch from Coroner to Medical Examiner, some information has been lost. All of the Cook County Coroner's Records after November 1911 are in the custody of CCME.[8]

CCME was established in 1976, and differs from a Coroner in several ways. Whereas a Coroner is an elected official who may be a lay person without any particular qualifications, a medical examiner is an appointed official with mandated credentials. A medical examiner must be a physician licensed to practice in the State of Illinois and certified by the American Board of Pathology in anatomic and forensic pathology.[9]

The Court's research has not revealed a copy of the Coroner's Act as it existed in 1966, however; the Court has located parts of the Coroner's Act as it existed in 1911 and finds the modern Coroner's Act instructive as to the likely duties that existed at that time.[10] The coroner is responsible for the investigation and certification of cause and manner of death in cases of violence or undue means. After a dead body is found, the coroner is to immediately go to that place and conduct a preliminary investigation concerning the death.[11] Any medical examination or autopsy ordered in 1966 was likely required to be performed by a licensed physician appointed by the coroner. 5 ILCS 5/3-3014 (Lexis 2016).

A coroner's inquest is a formal hearing into the cause and circumstances of a death that occurred under conditions indicating criminal acts. The inquest is conducted to make a formal determination of the cause and manner of death and to allow for further legal proceedings or criminal investigation. Inquests are performed before a jury, and whether the inquest is open to the public currently varies by county. 55 ILCS 5/3-3013(e) (Lexis 2016). Despite the Court's multiple inquiries, Counsel for CCME was unable to definitively answer which parts of the Cook County Coroner's Inquests were public in 1966, and which documents were produced publicly or withheld.

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[7] Tassava, Christopher J., *Cook County Morgue*, ENCYCLOPEDIA OF CHICAGO, www.encyclopeida.chicagohistory.org.
[8] *Cook County Coroner's Inquest Record Index, 1872-1911*, Office of the Illinois Secretary of State, http://www.cyberdriveillinois.com/departments/archives/databases/cookinqt.html; ILCS 5/3-3001 (Lexis 2016).
[9] *Medical Examiner*, Cook County Government, www.cookcountyil.gov.
[10] *Id.*
[11] *Coroner/M.E.*, Inside the Courthouse Fact Sheet Series Vol. 1, No. 3 of 14, http://www.ilcounty.org/upload/files/Coroner-Fact-Sheet-new.pdf.

The Court is persuaded the testimony of the inquest was public in 1966, which is the basis of the Court's prior order releasing the transcript to Plaintiff. However, no evidence has been presented that the toxicologist's report or pathological report were open to the public. Having reviewed these reports *in camera*, the Court agrees that they contain information integral to the ongoing criminal investigation, as asserted by Kenilworth, and therefore will not be released.

Plaintiff's motion for partial summary judgment alleges that CCME neither produced any records nor issued a written denial, but indicated orally that it located no responsive records. The CCME is represented by the Cook County State's Attorney's Office. In support of CCME's motion for leave to file *instanter,* filed October 18, 2016, the Cook County State's Attorney's Office stated that it received the responsive documents from CCME on the morning of October 17, 2016. It furthers stated that CCME's response "will in large rely upon and track that of other defendants in the matter." Leave to file CCME's Response *instanter* was granted. CCME's response, filed without supporting affidavit, states:

> After further inquiry and search, documents have been located by the CCME relating to the inquest in to the death of Valerie Percy. **A portion of those documents will be produced to Plaintiff concurrent with this response.** In addition to the records to be produced, the records also include the following documents: 1) History of Case for Statistical Purposes; 2) Pathological report and Protocol and related drawings; 3) toxicologist's report; and 4) a Transcript of the inquest proceedings and related draft questions **which are sought to be withheld.** (Emphasis supplied).

During oral arguments on October 21, CCME took the position that it was adopting and relying on the arguments of the other Defendants. Questioning by the Court revealed that no documents had been produced to plaintiff, contrary to CCME's Response Brief. During arguments, Kelly also indicated that he was no longer seeking the autopsy photos from CCME. Due to the inconsistent and baffling positions taken by CCME, the Court ordered an index be produced by October 28, 2016 pursuant to 5 ILCS 140/11(e).

The index identified 297 records by (1) CCME Bates Number; (2) Document Title; (3) Withheld/Redacted/Produced; and (4) Exemption Claimed for Withheld Documents. The Index was again inconsistent with previous pleadings and representations in court because the only records sought to be withheld in this filing were the crime scene and autopsy photographs.

In its index, CCME indicated it would now produce the 1) History of Case for Statistical Purposes; 2) Pathological report and Protocol and related drawings; 3) Toxicologist's report; and 4) a transcript of the inquest proceedings and related draft. Kenilworth promptly filed an emergency Motion for Stay. Through an additional affidavit of Chief David Miller, Kenilworth alleged that in September 2015, Kenilworth and CCSAO sought the assistance of CCME and provided records, in confidence, for further investigation by CCME. Kelly filed an objection to the Stay.

The Court issued a protective order on the entire CCME file and ordered that it be turned over to Kenilworth. The order also required Kenilworth to produce, through affidavit of Chief Miller, which documents had been given by Kenilworth to CCME in September 2015. Additionally, CCME was ordered to produce, through affidavit, which documents it had in its possession before September 2015 and on the date of the FOIA request by November 16, 2016.

On November 16, 2016, CCME failed to produce an affidavit. The Court granted Kenilworth's Motion to Stay with one exception. The Court ordered the immediate release of the October 1966 transcript of the public Coroner's Inquest (CCME Bates # 66--98) and the redacted email chain dated September 14-15, 2015 between Chief Miller, Bureau Chief of the Cold Case Unit Tom Biesty, and Chief Medical Examiner Dr. Cina (CCME Bates # 294-97) to Kelly's counsel under a protective order.

CCME filed the affidavit of FOIA officer Mary Marik on November 17, 2016, along with an Amended Index addressing some of the Court's concerns raised the previous day.[12] Marik's affidavit indicates that before May 13, 2016, CCME was unaware that Kelly's FOIA request for the Valerie Percy file was a "high profile case" until the State's Attorney's office contacted her about the lawsuit. She further avers that she located the file on May 13, 2016. The affidavit failed to address the inconsistent positions taken by CCME during litigation.

Kenilworth filed Chief Miller's third and final affidavit on November 18, 2016, which indicates "various documents in the Medical Examiner's possession contain evidence that will be used in the investigation into the murder of Ms. Percy and prosecution of charges against the

[12] The Court had received a redacted copy of CCME documents and an un-redacted copy for *in camera* inspection. Going through the redactions, the Court had noticed inconsistent redactions between identical documents, inconsistencies in redacting names, and a failure to redact information related to other cold cases that Mr. Beisty was seeking assistance on.

perpetrator of the murder of Ms. Percy, and the disclosure of the evidence would jeopardize the joint investigation and ultimate prosecution of the perpetrator." (Miller Aff. No. 3, ¶ 6).

In *Twin-Cities Broadcasting v. Reynard*, the Fourth District Appellate Court examined whether a government entity in possession of information and documents may consent to disclosure when another government entity having a substantial interest in the same documents asserts an exemption. 277 Ill. App. 3d 777, 778 (4th Dist. 1996). Certain documents were given to the Illinois State's Attorney by the Illinois State University Athletic Council's Board of Regents (Board) pursuant to an investigation conducted by the State's Attorney. Each organization received FOIA requests regarding those same documents. *Twin-Cities,* 277 Ill. App. 3d at 778-79. The Board wanted to withhold the documents, while the State's Attorney did not. *Id.* The Court found this case to be factually and legally distinguishable from similar federal cases because it involved two governmental entities, as opposed to one governmental entity and one nongovernmental one.[13] Concluding the Board was entitled to challenge the State's Attorney's threatened disclosure of the documents under Illinois' FOIA, the Court noted Section 3(e)(vii) of the Act, which specifically provides an entity may extend the time limit to respond to a FOIA request because of a need for consultation with another public body "having a substantial interest" in the subject matter. *Id.* Because "FOIA explicitly recognizes that documents of one agency may be in the possession of another, the originating agency has a continuing interest in their protection if they are exempt from disclosure." *Id.* at 782; 5 ILCS 140/3(e)(vii) (Lexis 2016).

The *Twin-Cities* Court further held, "[b]ecause the Board had a substantial interest in the subject matter of the request, it was entitled to assert an exemption, if one exists, despite the State's Attorney's refusal to do so." *Twin-Cities,* 277 Ill. App. 3d at 783. "[M]ere possession of documents, standing alone, is not determinative of a public body's ability to release documents pursuant to the FOIA if another governmental entity has a substantial interest in asserting the exemption." *Id.* Therefore, a government body may not consent to disclosure when another government body, having a substantial interest in the determination, wishes to assert an exemption.

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[13] A "typical" reverse-FOIA action involves (1) a government entity and (2) a private entity or nongovernmental entity who seeks to stop the government from releasing, usually, corporate documents lawfully in government possession. *See Chrysler Corp. v. Brown,* 441 U.S. 281 (1979).

The *Twin-Cities* Court did not limit its holding to the original authors of any given document, as Plaintiff argues; instead it explicitly used the "substantial interest" standard throughout. Kenilworth has a substantial interest in the documents CCME seeks to disclose, and Kenilworth may properly assert an exemption to withhold those documents. The optimal word here is "evidence." Any document in CCME's possession that memorializes the recovery or observation of evidence will not be released.

Although the public's rights under FOIA are broad, they do not lack limits. The public's need to know can be at least partially satisfied by the release of public statements made by Dr. Toman (CMME Bates # 7,30, 32, 36, 94) and the transcript of the inquest which contains a summary of Ms. Percy's injuries (CMME Bates #66-98). However, the Court recognizes that public safety and welfare, especially when dealing with an ongoing criminal investigation, must take priority. At least one Illinois court has noted, in construing FOIA exemptions, that the Act is intended to "guarantee that the *Government's* activities be opened to the sharp eye of public scrutiny," not protected information that happens to be in the warehouse of the Government. *Trent v. Office of the Coroner of Peoria County,* 349 Ill. App. 3d 276, 281 (2004) *appeal denied,* 212 Ill. 2d 556 (2004) (Emphasis in original). The withheld CCME documents do not concern functions of government, which FOIA is designed to expose; rather the protocol and withheld documents concern, by definition, the gathering of evidence when there is suspicion of a criminal activity. Kenilworth has demonstrated, by detailed justification, that it has a substantial interest in withholding the protocol and toxicologist's report.

The Court's research has not revealed any precedent on the release of autopsy reports in connection with the claimed ongoing criminal investigation exemption.[14] There also appear to be no opinions by the Public Access Counselor at the Illinois Attorney General's Office concerning the topic. Thus, this is another issue of first impression before the Court. In examining the disputed documents, the Court has considered the factual matters contained in CCME's affidavits and the documents reviewed *in camera*, rather than relying upon the contradictory positions submitted by CCME in the pleadings. The Court's *in camera* inspection revealed that evidence collected by CMME is critical to Kenilworth's ongoing investigation. To say anything more would, again, defeat the purpose of the exemption and jeopardize the ongoing investigation.

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[14] Autopsy *photographs*, by contrast, are not lacking in precedent.

The Court recognizes, however, that even if certain CCME documents are integral to Kenilworth's investigation, Kenilworth cannot claim exemptions for documents that (1) originated outside of the Coroner's Officer and (2) were not made by a public body for law enforcement purposes. Thus, the CCME email chains between Chief Miller, Tom Biesty, and Chief Medical Examiner Dr. Cina dated September 2015will be released to Plaintiff with redactions and no attachments. CCME Bates Nos. 1-99 will also be released to Plaintiff, except for Bates Nos. 54-56 and 62-65; because all the photographs in the CCME file were part of email attachments those will be withheld.

CONCLUSION

In the exercise of statutory construction, a court's primary task is to ascertain and effectuate the intent of the legislature. A court may consider the reason and necessity for the law, the evils it was intended to remedy, and its ultimate aims. A Court must assume the legislature did not intend an absurd or unjust result. *People v. Pullen,* 192 Ill. 2d 36, 42 (2000). The Supreme Court of the United States has consistently taken "a practical approach" to FOIA matters, and this Court tries to do the same. *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 157 (1989). The Court endeavors to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect law enforcement records from disclosure. *Id.*

The Court has examined the reasons for exemption from the disclosure requirements in determining whether Defendants have properly invoked any particular exemption. *Id.* In applying the ongoing investigation exemption, the Court has carefully examined the effect disclosure would have on the interests the exemption seeks to protect. *Id.* Plaintiff's interpretation of the ongoing criminal investigation exemption, wherein law enforcement agencies exist within a void and shared documents are subject to exemptions by one agency but disclosable by another, yields absurd results. The statutory provision of the Illinois FOIA requiring nondisclosure of records that would obstruct an ongoing criminal investigation should not be construed in a way that defeats the core purpose of the exemption and discourages cooperation among law enforcement agencies.

For these reasons and those stated in open court, Kenilworth's summary judgment motion is granted as to all Defendants.

WHERERFORE, IT IS HEREBY ORDERED:

1. Kenilworth's summary judgment motion is granted as to CCSAO, ISP, and CCME in part;
2. Kelly's motion for partial summary judgment against Kenilworth is denied;
3. Kelly's motion for partial summary judgment against CCSAO is denied;
4. Kelly's motion for partial summary judgment against ISP is denied;
5. Kelly's motion for partial summary judgment against CCME is granted in part and denied in part;
6. The Court's November 16, 2016 Protective Order is superseded by this Order. All documents discussed in that Protective Order must be returned to CCME;
7. CMME Bates Nos. 1-99 will be released to Plaintiff, except Nos. 54-56 and 62-65;
8. The CCME email chains between Chief Miller, Bureau Chief of the Cold Case Unit Tom Biesty, and Dr. Cina dated September 2015 will be released to Plaintiff with redactions and no attachments; and
9. This is a final order as to Kenilworth, CCSAO, ISP, and CCME, order to follow on CPD. The Court finds there is no just reason for delaying either enforcement or appeal.

Judge Anna Helen Demacopoul

ENTERED: DEC - 6 2016
Circuit Court – 2002

Judge Anna H. Demacopoulos