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

ROB WARDEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 16 CH 07064
	)	
SUPERINTENDENT OF THE CHICAGO POLICE DEPARTMENT, and CHICAGO POLICE DEPARTMENT,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court on the parties' cross-motions for summary judgment. Plaintiff Rob Warden ("Warden") challenges the denial of his request under the Freedom of Information Act, 5 ILCS 140/1, *et seq.* ("FOIA"), for the most recent photographs of nine Chicago Police Officers. He contends that the Chicago Police Department ("CPD") has a blanket policy of denying FOIA requests for the photographs of its police officers. The CPD contends that photographs of its officers are exempt from public access under the FOIA.

Warden is a journalist who, over the course of his career, has worked as a reporter for the *Chicago Daily News* and *Washington Post*, and editor and publisher of *Chicago Lawyer*. Since 2014, he has been the co-director of Injustice Watch, a not-for-profit journalism organization dedicated to exposing institutional failures that obstruct equality and justice. Police misconduct is among the subjects of Warden's investigative journalism work. In 2016, as part of his investigative reporting, Warden submitted a FOIA request to the CPD seeking the most recent photographs of nine police officers, which he identified by name and star number. The CPD photographs every sworn police officer for purposes of creating an identification card with a picture. The CPD denied his request, asserting FOIA exemptions grounded in personal privacy and safety. The CPD's standard practice is to deny FOIA requests for photographs of its officers.

Under the FOIA, there is a presumption that public records are open and accessible. *Lieber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill. 2d 401, 407 (1997); *see* 5 ILCS 140/1.2 ("All records in the custody or possession of a public body are presumed to be open to inspection or copying."). Public records include "photographs . . . , 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." 5 ILCS 140/2(c). When a public body receives a proper request for public records, "it must comply with that request unless one of the narrow statutory exemptions set forth in section 7 of the Act applies." *Ill. Educ. Ass'n v. Ill. State Bd. of Educ.*, 204 Ill. 2d 456, 463 (2003); *see* ILCS 140/3(a) ("[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in section 7 of this Act."). FOIA exemptions are narrowly construed. *S. Illinoisan v.*

Ill. Dep't of Pub. Health, 218 Ill. 2d 390, 416 (2006). The burden of proof is on the governmental agency to prove, by clear and convincing evidence, that it is exempt from disclosing the requested information. 5 ILCS 140/1.2.

The CPD does not dispute that the subject photographs are public records, but argues that they are exempt under sections 7(1)(c) and 7(1)(d)(vi) of the FOIA. Thus, the photographs must be disclosed unless the CPD can show, by clear and convincing evidence, that they are protected under these exemptions. We address each exemption in turn.

Section (7)(1)(c) protects "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 ILCS 140/7(1)(c). "'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 personal privacy." *Id.* Courts are required to balance the individual's right to privacy with the public's legitimate interest in disclosure. *State Journal-Register v. Univ. of Ill. Springfield*, 2013 IL App (4th) 120881, ¶44. 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 privacy; and (4) the availability of alternative means of obtaining the requested information." *Nat'l Ass'n of Criminal Def. Lawyers v. Chicago Police Dep't*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010). The Court is also mindful that public law enforcement officers have a reduced expectation of privacy compared to ordinary citizens. *See e.g., Lissner v. U.S. Customs Serv.* 241 F.3d 1220, 1223 (9th Cir. 2001); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980) ("In their capacity as public officials FBI agents may not have as great a claim to privacy as that afforded ordinarily to public citizens, but the agent by virtue of his official status does not forgo altogether any privacy claim in matters related to official business.").

The CPD argues that providing Warden with the subject photographs would be an invasion of its officers' privacy because it may prevent the officers from working undercover. The CPD's argument fails for two reasons. First, its position is at odds with its practice of publishing photographs of its officers on its Facebook social media account to highlight examples of their good work to the community. For example, over a four-month period, the CPD published 300 pages of photographs of its officers on its Facebook page, including some with the officers' names. The CPD publicly releases the photographs of several officers by name every month. The CPD conceded that it would be reasonable to estimate that thousands of photographs of its police officers are publicly available. In an analogous case, the owner of an apartment building approved by a university for freshman housing submitted a FOIA request to the university for the names and addresses of students who contacted the university about freshman housing. *Lieber*, 176 Ill. 2d at 403. The university resisted, invoking the "unwarranted invasion of personal privacy exemption" under the present-day version of section 7(1)(c). *Id.* at 406. The court rejected the university's argument because, among other reasons, the university voluntarily disclosed the names and addresses of the students to local newspapers and campus ministries. *Id.* at 412-13. The court reasoned that "voluntary disclosure in one situation can preclude later claims that the records are exempt from release" because allowing the government to selectively disclose records "'is offensive to the purposes underlying the FOIA and intolerable

as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government the FOIA was intended to obviate.'" *Id.* at 413 (quoting *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)). The CPD's explanation that it publishes officer photographs only after considering the (i) safety of the officer, (ii) personal privacy of the officer (and his family) while off-duty, and (iii) organizational involvement of the officer confirms that the CPD's blanket policy of denying FOIA requests for police officer photographs cannot be justified as an "unwarranted invasion of personal privacy."

Second, the factors that courts consider in determining whether disclosure would constitute an unwarranted invasion of personal privacy weigh in favor of disclosure. Warden's interest as a journalist weighs in favor of disclosure. The CPD argues that Warden can publish his story without the subject photographs, but it does not dispute Warden's evidence that the publication of a photograph of the subject of a news story bolsters its impact and reach. The public's interest also weighs in favor of disclosure. While the public has an interest in the safety of law enforcement officers, *see People v. Gonzalez*, 294 Ill. App. 3d 205, 211 (2d Dist. 1998) (rejecting automobile passenger's claim of violation of his Fourth Amendment rights in a traffic stop based on safety concerns of police officer), it also has an interest in ensuring that police officers do not engage in misconduct and the disclosure of police officer photographs serves to check police misconduct. In addition, there is no other practical method of obtaining the photographs of the officers in question. Finally, any invasion of an officer's personal privacy by the publication of his photograph is minimal at best. As to this element, the CPD recognizes that police officers interact with the public at large, wear uniforms and identification, and are sometimes photographed by members of the public. CPD Cross Mot. for S.J., p. 4. Nevertheless, it argues that CPD officers have a personal privacy interest in their photographs because publication of officer photographs may affect their career development and advancement by limiting their ability to work undercover or on joint CPD and federal task forces (which the Court assumes may require undercover work although the record is not clear on this point). In addition, the CPD claims that disclosing officer photographs may preclude officers from working for the federal Drug Enforcement Agency or the United States Secret Service. On its face, the personal privacy exemption in section 7(1)(c) does not encompass career advancement of an officer. To the contrary, it states that "[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." 5 ILCS 140/7(1)(c). Regardless, the career advancement theory also fails on the merits in this case. At any given time, the number of officers engaged in undercover work is a relatively small percentage of the total sworn personnel in the CPD. Warden concedes that, under the officer safety exemption in section 7(1)(d)(iv) addressed below, the public dissemination of an undercover officer's photograph would entail an unacceptable risk that the officer could be harmed by a criminal who might learn that the officer in question was a member of law enforcement. However, none of the nine officers whose photographs Warden seeks are currently working undercover, and there is no evidence that any of them seek to work undercover.

Moreover, the Court finds the decision of a Tennessee court persuasive as it relates to the CPD's argument that these officers may be used in an undercover capacity in the future. In *Henderson v. City of Chattanooga*, 133 S.W.3d 192 (Tenn. App. 2003), the court held that the undercover officer exemption in Tennessee's FOIA did not apply to the photographs of five police officers involved in a physical altercation that ended in gang member's death and one

police officer who prepared the police report. A witness for the Chattanooga Police Department testified that every one of its 450 active officers was subject to being used to work undercover. *Id.* at 207. However, the court determined that the mere possibility that an officer may work undercover in the future is not dispositive when considering the applicability of the undercover officer exemption. *Id.* at 207-09. The court held that interpreting the undercover officer exemption so broadly would swallow the rule of fullest public access to public records. *Id.* at 209. Likewise, under the CPD's reasoning, the section 7(1)(c) exemption would swallow the rule of public access to photographs – no police officer's photograph would be subject to FOIA because it may deprive an officer of the opportunity to work undercover or on a joint CPD and federal task force. In conclusion, the subject photographs are not exempt under section (7)(1)(c) of the FOIA because any invasion of the officer's privacy from the disclosure of his photograph is outweighed by the other factors that favor disclosure.

The CPD next argues that the subject photographs are protected under section 7(1)(d)(vi) of the FOIA, which exempts "[r]ecords in the possession of . . . any law enforcement . . . agency for law enforcement purposes, but only to the extent that disclosure would . . . (vi) endanger the life or physical safety of law enforcement personnel or any other person." 5 ILCS 140/7(1)(d)(vi). Thus, to satisfy its burden, the CPD must offer evidence that police officers, or other persons, would be endangered by the disclosure of the photographs. Recognizing that it has no evidence of any harm befalling an officer as a result of the public dissemination of his photograph, including notorious officers like Jon Burge and Reynaldo Guevara whose photographs are widely available in the public domain, the CPD argues that releasing the photographs would enable criminal elements to create a searchable computer database that, when coupled with facial recognition technology, would permit them to identify police officers and target them for harm. Putting aside the fact that Warden is not seeking the photographs to create a searchable database, the CPD's evidence is utterly lacking in foundation. Instead of offering an expert on facial recognition technology and/or computer science, the CPD relies on the deposition testimony of Lieutenant Eric Winstrom, who stated that criminals could use facial recognition technology to identify police officers as law enforcement officials, and Anthony Guglielmi, the CPD's Chief Communications Officer, who stated that the availability of a searchable database of officer photographs would present a danger to officers. The CPD, however, offers no evidence that Lieutenant Winstrom or Mr. Guglielmi are qualified to opine on facial recognition technology or searchable databases. At argument, the CPD observed that the pop singer Taylor Swift uses facial recognition technology to scan concertgoers to screen for her known stalkers. Again, the CPD offers no admissible evidence to support its theory. Moreover, the CPD admits that the very nature of a police officer's position is to face the public on a daily basis while wearing a name badge or plate. And, of course, it is fact of modern life that cameras are omnipresent, recording police and civilians alike.

In addition, section 7(1)(d)(vi) of the FOIA states that records are exempt "only to the extent that disclosure *would* endanger the life or physical safety of law enforcement personal or any other person." 5 ILCS 140/7(1)(d)(iv) (emphasis added). The CPD has not offered evidence of any physical harm befalling an officer because his photograph was released in the public domain, and even stipulated that no such record existed for 2016. However, the CPD argues that the very fact that no officer has been harmed is proof of the causal link between its blanket policy of denying FOIA requests for officer photographs and lack of harm to its officers. This evidence constitutes, at best, speculation that officers *could* be endangered by the disclosure of

their photographs, which does not satisfy the threshold established by section 7(1)(d)(vi) of the FOIA. *See* Ill. Att'y Gen Ltr. 25887, issued Jan. 11, 2019 (CPD's "fail[ure] to identify specific circumstances from which [the] office could conclude that the disclosure of any individual officers' photograph would endanger his or her life or physical safety" precludes application of section 7(1)(d)(vi) endangerment exemption to FOIA). Indeed, the opposite causal connection could just as easily be drawn considering that the CPD disseminates photographs of many of its officers on its Facebook account without any harm befalling them. Even if the Court were to interpret "would" as "could," the CPD offers no admissible affirmative evidence showing how the disclosure of the photographs could endanger the lives or physical safety of law enforcement personnel or any other persons. Accordingly, the subject photographs are not exempt under section 7(1)(d)(vi) of the FOIA.

Except as provided below, Warden's motion for summary judgment is granted, the defendants' cross-motion for summary judgment is denied, judgment is entered in favor of Warden and against the defendants, and the CPD is ordered to turn over the subject photographs to Warden within 21 days. Warden makes no response to the defendants' motion as it relates to civil penalties under section 11(j) of FOIA; accordingly, judgment is entered in favor of the defendants on Warden's claim for civil penalties.

The Clerk shall notify all counsel of record of the entry of this Order.

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