Consolidated Case No. 1-08-2073

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff-Appellant, v. CHICAGO POLICE DEPARTMENT, Defendant-Appellee.	Appeal from the Circuit Court of Cook County Chancery Division No. 07 CH 3622 The Hon. Mary Anne Mason Judge Presiding
consolidated with	
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff-Appellant, v. CHIEF OF THE JOLIET POLICE DEPARTMENT, Defendant-Appellee.	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County No. 07 MR 530 The Hon. Bobbi N. Petrungaro Judge Presiding

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BRIEF OF PLAINTIFF-APPELLANT NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTRODUCTION

These two consolidated appeals concern the request of Plaintiff-Appellant National Association of Criminal Defense Lawyers ("NACDL") under the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1, *et seq.*, for the data underlying a study of eyewitness identification procedures that the Chicago Police Department, the Joliet Police Department and two other police agencies (the Evanston Police Department and the Illinois State Police) performed in 2005 pursuant to legislative mandate. *See* 725 ILCS 5/107A-10.

The Chicago and Joliet Police Departments resisted NACDL's FOIA request, relying principally on FOIA's so-called law enforcement exemption, 5 ILCS 140/7(1)(c); FOIA's privacy exemption, 5 ILCS 140/7(1)(b); and the claimed burden to redact the requested information, 5 ILCS 140/3(f). After extensive briefing and argument of cross motions for summary judgment, both lower courts directed the defendant police agencies to produce some of the requested data but found that the majority of the information sought was either protected from disclosure by FOIA's law enforcement and privacy exemptions or too burdensome to require the agencies to produce.

This appeal seeks *de novo* review of the lower court's summary judgment rulings. It does not raise any question on the pleadings.

ISSUES PRESENTED

In this appeal, the following issues are raised:

1. Whether the "law enforcement" exemption in FOIA, 5 ILCS 140/7(1)(c), bars disclosure of police data used to assemble a legislatively mandated study of lineup identification procedures even after all names, locations and other identifying information have been redacted from the police data.

2. Whether generic and conclusory statements in police affidavits that merely recite a fear that law enforcement activities "may" be infringed – without reference to how disclosure of any specific document could harm the interests of law enforcement – are sufficient to satisfy the police agency's burden of proof that the law enforcement exemption applies.

3. Whether the privacy exemption in FOIA, 5 ILCS 140/7(1)(b), bars disclosure of police data used to assemble a legislatively mandated study of lineup identification procedures even after all names and other personal identifying information has been redacted from the police data.

4. Whether disclosure of photographs of police lineups after redaction of all identifying information regarding the individuals whose images appear in the photographs is an unwarranted invasion of personal privacy and therefore exempt from disclosure under the privacy exemption. 5 ILCS 140/7(1)(b) and 140/7(1)(c)(vi).

5. Whether the burden of redacting identifying information from police data used to assemble a legislatively mandated study of eyewitness identification procedures outweighs the public interest in meaningful policy debate concerning the conclusions in the study so as to warrant barring access to the redacted data. 5 ILCS 140/3(f).

JURISDICTION

This is a consolidated appeal from final judgments of the Circuit Court of Cook County and of the Circuit Court of the Twelfth Judicial Circuit, Will County.

On June 30, 2008, the Circuit Court of Cook County entered summary judgment on all claims in *Nat'l Ass'n of Criminal Defense Lawyers v. Superintendant of the Chicago Police Dep't*, No. 07 CH 3622 (Cir. Ct., Chancery Div., Cook County) (hereinafter, the "Chicago

case"). On July 11, 2008, NACDL filed a timely notice of appeal from the final judgment in the Chicago case.

On July 31, 2008, the Circuit Court of the Twelfth Judicial Circuit, Will County, entered summary judgment on all claims in *Nat'l Ass'n of Criminal Defense Lawyers v. Joliet Police Dep't*, No. 07 MR 530 (Cir. Ct., Will County) (hereinafter, the "Joliet case"). On August 13, 2008, NACDL filed a timely notice of appeal in the Illinois Appellate Court for the Third Judicial District from the final judgment in the Joliet case.

With the appeals pending in different Districts, NACDL filed a motion in the Illinois Supreme Court to transfer the appeal in the Joliet case to the First District and to consolidate both appeals in this Court. The Illinois Supreme Court granted that motion on December 4, 2008. Order, No. 107521 (Ill. S. Ct. Dec. 4, 2008).

This Court has jurisdiction over both appeals under Illinois Supreme Court Rule 303.

STATUTUES INVOLVED

This appeal involves the interpretation of certain provisions of the Illinois Freedom of Information Act: (a) 5 ILCS 140/7(1)(c) ("law enforcement" exemption); (b) 5 ILCS 140/7(1)(b) (privacy exemption); (c) 5 ILCS 140/3(f) ("undue" burden of production); and (d) 5 ILCS 140/1 (public policy). The pertinent provisions are reproduced in the Appendix. App. A40-A42.

STATEMENT OF FACTS

The FOIA requests in issue in this appeal are for data that was generated by the Chicago Police Department and the Joliet Police Department during the course of a legislatively-mandated study regarding the accuracy of identifications made by eyewitnesses in criminal investigations. Chicago R. C141-43; Joliet R. C2-3.[1]

[1] Citations to the common law record in the Chicago case are in the form Chicago R. C___. Citations to the common law record in the Joliet case are in the form Joliet R. C___.

In the wake of widely-reported findings of the Ryan Commission on Capital Punishment that eyewitness mistakes had caused a number of innocent men to be sent to the Illinois Death Row, the Illinois General Assembly enacted a statute (725 ILCS 5/107A-10) requiring the Illinois State Police to conduct a field study of police eyewitness identification procedures (referred to in the statute as the "Pilot study"). The Pilot study was to compare the effectiveness and accuracy of the lineup procedures currently employed by Illinois police departments (where lineup subjects and photo arrays are displayed simultaneously to witnesses by administrators who know the identity of the suspected perpetrator) with reformed lineup procedures advocated for in the social science research community (where lineup subjects and photo arrays are displayed sequentially by administrators who do not know the identity of the suspected perpetrator). *See* 725 ILCS 5/107A-10; Chicago R. C142; Joliet R. C2-3.

The statute directed the Illinois State Police to select three pilot jurisdictions to participate in the study. 725 ILCS 5/107A-10. The State Police designated Chicago, Evanston and Joliet for this purpose. The Pilot study was conducted in 2004 and 2005 using data generated in lineups and photo arrays displayed to witnesses in actual criminal investigations conducted by those three police departments. Chicago R. C142; Joliet R. C3. In April 2006, the administrators of the Pilot study released a report (the "Report") stating that use of the traditional sequential lineup procedure produced fewer inaccurate identifications than did use of the reform sequential blind lineup procedure. Chicago R. C142; Joliet R. C3. This finding contradicted most previous research studies on lineup procedures. Chicago R. C142; Joliet R. C3.

The release of the Report garnered national publicity, including a front page article in the *New York Times*. Chicago R. C448-50; Joliet R. C71-73. The Report has been highly influential in the public debate concerning reform of eyewitness identification procedures and has

frequently been cited by opponents of reform of eyewitness identification procedures as evidence that the methods traditionally employed are more reliable than are reform procedures. Chicago R. C459; Joliet R. C84. The Report has also drawn extensive criticism from social science researchers, who have cited flaws in the Pilot study design and the failure of the Report's authors to submit the study for scientific peer review. Chicago R. C432-34; Joliet R. C54-56. In Illinois, the Report has effectively thwarted any prospect for reform of police eyewitness identification procedures. Chicago R. C455; Joliet R. C79.

NACDL is a national association of attorneys who practice in the area of criminal defense. Chicago R. C143; Joliet R. C4. In light of the activities of its membership and its longstanding institutional interest in advocating for fairness and accuracy in the criminal justice system, NACDL has a direct stake in the public debate regarding reform of eyewitness identification procedures. Chicago R. C419; Joliet R. C35-36. NACDL is on record as strongly supporting reform of the traditional eyewitness identification procedures. *Ibid.*

FOIA Requests and Administrative Exhaustion

In July and September of 2006, NACDL sent FOIA requests to the Illinois State Police and the three designated police departments (Chicago, Evanston, and Joliet) seeking information regarding the design and implementation of the Pilot study as well as the raw data that purportedly substantiated the statements in the Report. Chicago R. C154-55, C164-65, C186-87, C207-08; Joliet R. C43-44.

NACDL's FOIA request sought the following specific categories of information: (1) the procedures followed by investigating officers for traditional simultaneous lineups in the Pilot study, (2) the training materials and records for police personnel participating in the Pilot study, (3) records regarding the retention of certain personnel in connection with the Pilot study and the

Report, (4) the criminal court case numbers for each case in the Pilot study along with all corresponding photographs of lineups as well as suspects and fillers, and (5) the complete database of information used to generate the data tables in the Report as well as other information in the database that was not included in the Report. Chicago R. C144-45; Joliet R. C4-5.

The Chicago Police Department tendered a final administrative denial of NACDL's FOIA request in a letter dated October 13, 2006. Chicago R. C183-84. The response stated that the Chicago Police did not have possession of certain records (training materials and materials regarding the retention of personnel for the study). *Id.* The Chicago Police refused to produce any police reports or raw data in response to NACDL's remaining requests, claiming generally that such documents were exempt from disclosure under the law enforcement exemption in FOIA (5 ILCS 140/7(1)(c) and (d)). *Id.*

The Joliet Police Department submitted its final administrative response on September 20, 2006. Joliet R. C17. The Joliet Police disclosed some of the requested documents, asserted that it did not possess some requested documents, and asserted that other requested documents – principally police reports and raw data from the Pilot study – would not be disclosed because they were exempt from disclosure under FOIA's privacy exemption (5 ILCS 140/7(1)(b)) and law enforcement exemption (5 ILCS 140/7(1)(c)(i) and (viii)). The Joliet Police Department did disclose the procedures followed by investigating officers for traditional simultaneous lineups in the Pilot study and the training materials and records for police personnel participating in the Pilot study. Joliet R. C17.

Summary Judgment Proceedings in the Circuit Courts

NACDL filed the Chicago case on February 8, 2007, initially naming all four police departments as defendants.[2]

The Joliet Police Department responded to NACDL's complaint with a motion to dismiss for improper venue. Chicago R. C122-23. Thereafter, NACDL and the Joliet Police Department agreed to allow NACDL to voluntarily dismiss its claims against Joliet with leave to re-file them in the Circuit Court of Will County. Chicago R. C254. In accordance with the parties' agreement, on June 6, 2007, NACDL instituted the Joliet case in Will County. Joliet R. C2-7.

The Chicago case and the Joliet case followed parallel paths in the lower courts. In each case, the FOIA issues were resolved on motions for summary judgment. The Chicago case, as the earlier-filed of the two, proceeded through briefing and argument first. Thereafter, materially identical issues were decided in the Joliet case.

1. The Summary Judgment Record in the Chicago Case.

The Chicago Police Department filed a motion for summary judgment and supporting materials on August 14, 2007. Chicago R. C310-12, C285-306. NACDL filed its response and cross motion for summary judgment, with supporting materials, on September 27, 2007. Chicago R. C329-33, C431-526. Since, prior to briefing, the parties had resolved NACDL's

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[2] The Evanston Police Department and Illinois State Police are not parties in this appeal. Both were defendants in the Chicago case after NACDL exhausted its administrative remedies against them without receiving any requested documents. Chicago R. C141. Early in the litigation, Evanston abandoned its opposition and agreed to provide all of the requested documents in its possession subject to redactions that were agreed upon between counsel for the Evanston Police and NACDL. Chicago R. Vol. IV, 5/1/08 Tr. at C80. After the litigation was instituted, the Illinois State Police produced some documents but did not produce documents in its possession that had originated from the designated police departments. The State Police remained a party to the Chicago case, taking no active role in the litigation after informing NACDL and the Court that it would comply with any applicable court order regarding the disclosure of the documents in its possession from the designated police departments. Chicago R. C411, C420.

request for training materials, study protocols and the like, the summary judgment submissions focused on NACDL's request for the police reports and raw data underlying the findings in the Report. *See id.*

a. The Chicago Police summary judgment presentation.

The Chicago Police argued that disclosure of the underlying files was barred by the privacy exemption in FOIA (5 ILCS 140/7(1)(b)) and the law enforcement exemption (5 ILCS 140/7(1)(c)). The Chicago Police also contended that production of the requested records would impose an undue burden on the agency (5 ILCS 140/3(f)).[3]

In support of its arguments regarding the law enforcement and privacy exemptions, the Chicago Police submitted the affidavit of Police Officer Matthew Sandoval, who reported that, as of August 2007, approximately 50% of the Chicago investigations involved in the Pilot study remained open. Chicago R. C303-304.

Officer Sandoval's affidavit was supplemented with an affidavit of Lt. James Gibson opining that, with respect to open investigations, disclosure of information in police reports "could very well interfere with . . . [the] investigation." Chicago R. C300-302, 302. Lt. Gibson's affidavit stated that the police records subject to NACDL's FOIA request included lineup reports and case supplementary reports. Chicago R. C300. Gibson asserted that these documents contain information regarding the location and circumstances of the crime under investigation, including a great deal of identifying information as to automobiles, suspects, witnesses, victims and investigating personnel. Chicago R. C301. The affidavit provided only the following by way of

[3] The Chicago Police also argued that production of the requested records was barred by privacy interests established either by the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") or by the Illinois Juvenile Court Act of 1987. Those contentions were not addressed in the opinions below and do not figure in this appeal.

explanation of its conclusion that disclosure of the documents "could very well" interfere with ongoing police investigations:

> Suspects in these crimes could become aware of the status of the investigation, the degree of knowledge that the Police have as to their involvement, and the type of evidence that exists which could incriminate them. The identity of witnesses and their specific role in the investigation could be revealed. Disclosure could present a risk to the safety and well being of witnesses and their families. There are many examples of information contained in these documents that, if made public, could impede a criminal investigation, or could be used to interfere with the prosecution of a case.

Chicago R. C302.

Lt. Gibson also stated that release of the police reports "would constitute an invasion of privacy of the victims and witnesses involved." Chicago R. C302. The invasion of privacy would occur, according to Lt. Gibson, because "[t]hese documents contain the name, address and descriptive information including social security number of each person who has come forward to police regarding these crimes." *Id.*

In response to the NACDL presentation summarized in the following section, Lt. Gibson submitted a second affidavit summarizing his review of "a sampling" of the records from "open" – *i.e.*, ongoing – investigations that were included in the Pilot study. Chicago R. C354-58, 354. Lt. Gibson's second affidavit asserted that the investigations used in the Pilot study concerned "violent," "serious" crimes. Chicago R. C355. He emphasized that the investigation of such crimes involves eliciting the trust and cooperation of witnesses. *Id.*

Stating that "[t]he . . . documents for each criminal investigation tell its own unique story," Gibson averred that "[p]ublicly disseminating the Study documents for investigations that are ongoing could be very dangerous – even if those documents were released in redacted form." Chicago R. C355. Gibson identified four reasons for his conclusion:

- "Anonymizing" the documents "may not be possible," according to Gibson, because "[v]ictims, witnesses, informants and suspects often know one another; and where they live, work and go to school." Chicago R. C355.
- "If a publicly disseminated redacted report were linked to a specific ongoing investigation, harm could come to a witness." Gibson theorized that the harm could come about if an at-large perpetrator were to learn the extent of a witness's cooperation in the investigation. Chicago R. C356.
- Investigations could be impeded. Gibson theorized that a perpetrator might destroy clothing worn during a crime if he were to learn that the police had a clothing description. *Id.*
- "There is no way to adequately redact documents," since "each report tells its own story." *Id.*

Gibson's affidavit did not cite any specific examples to support the conclusions listed above. *See* Chicago R. C354-58.

The second Gibson affidavit conceded that police records from "closed" investigations could be produced without compromising privacy or law enforcement concerns, so long as the documents were redacted prior to disclosure. Chicago R. C357. With respect to lineup photographs (the only specific redaction dispute presented in this appeal), Lt. Gibson stated in full: "Individuals used in live lineups could be police officers, individuals in jail, civilians or suspects in the case. The photographs used in photo arrays are often culled from a database of arrested individuals. The release of the identity of these individuals could constitute a violation of privacy." *Id.*

b. NACDL's opening presentation.

NACDL's summary judgment presentation explained the need for the police data underlying the Pilot study to advance an ongoing public debate about the problem of erroneous eyewitness identifications in criminal investigations and how best to handle eyewitness identification procedures. *See* Chicago R. C416-19. NACDL also described its institutional stake in that debate and how it intended to use the requested documents. Chicago R. C419-21.

NACDL submitted the affidavit of Rob Warden, Executive Director of the Northwestern University School of Law Center on Wrongful Convictions, which noted that, in Illinois, eyewitness identification was the principal prosecution evidence in 59.3% — fifty-four of ninety-one — documented wrongful convictions in the state since 1900. Chicago R. C453-56, C454. The traditional eyewitness identification procedures figured in many, if not all, of the fifty four documented Illinois wrongful conviction cases that rest on erroneous eyewitness identifications. Chicago R. C455. None involved the use of sequential, double-blind procedures. Thus, according to Warden, researchers in the area of wrongful convictions strongly believe that reform of eyewitness identification procedures would reduce the prevalence of wrongful convictions. *Id.*

Warden noted that wrongful convictions entail enormous social costs, pointing out that the 54 men and women whose Illinois wrongful convictions rested on erroneous eyewitness identifications spent a total of 601 years behind bars. Chicago R. C454. In three of those cases, civil rights judgments resulted in the payment of a total of $33 million to the victims of erroneous identifications. Chicago R. C454.

Finally, the Warden Affidavit explained that the Pilot study Report has had a profound effect on public policy in Illinois, effectively thwarting the possibility that the Illinois General

Assembly will act in the near future to reform police identification procedures – reform that many believed would follow upon publication of the Pilot study data. Chicago R. C455.

Elsewhere, according to the affidavit of Norman Reimer, NACDL's Executive Director, opponents of reforming lineup procedures have cited and relied upon the Pilot study Report as evidence of the accuracy and sufficiency of the traditional lineup procedures. Chicago R. C457-61, 459. Reimer cited testimony and letters directed at legislatures in California, New Mexico, Rhode Island and other jurisdictions. Chicago R. C459. Reimer also listed multiple motions filed by the U.S. Attorneys Office in the District of Columbia, in which the Pilot study Report was cited in opposition to the admission of expert testimony regarding eyewitness identification. Chicago R. C459.

The salient finding of the Pilot study Report – that traditional lineup procedures resulted in a lower incidence of false positive identifications – contradicted decades of scientific research, according to the affidavit of Professor Nancy Steblay, a social psychologist with an expertise in eyewitness identification research whom NACDL retained as a consultant. Chicago R. C431-47. Not only are its findings controversial, but the Report has also been harshly criticized within the scientific community for flaws in its design and methodology. Chicago R. C433-34. A panel of distinguished university researchers, including Nobel Laureate Daniel Kahneman of Princeton University, issued a judgment that design flaws in the Pilot study rendered it unreliable as a basis for determining effective eyewitness identification procedures. *Id.*

Affiants Warden and Steblay concluded that, because of the enormous social costs of wrongful convictions founded on erroneous eyewitness identifications and the controversial nature of the Pilot study Report's findings, further informed public debate on the issue of proper

eyewitness identification procedures is urgently in the public interest. Chicago R. C455, C433-34.

Executive Director Reimer explained that, to further that debate, NACDL was interested in obtaining the police records that supplied the data for the Pilot study in order to subject them to further scientific study. Chicago R. C459-60. Dr. Steblay explained that several important research tasks could only be taken after the underlying data were disclosed: (a) an assessment of whether, in individual cases, there were any deviations from the study protocols for witnesses' performance of identification tasks; (b) a complete assessment of the identification histories of all witnesses who were asked to perform identification tasks as part of the Pilot study; (c) an assessment of the quality of the construction of the lineups used in the Pilot study; and (d) an assessment of the overall integrity of the data in light of the surprising findings in the study. Chicago R. C434-39.

Responding to the Chicago Police concerns about law enforcement and privacy interests, NACDL made clear that it could accomplish its research objectives with police records from which identifying information had been redacted. Chicago R. C460. Dr. Steblay explained that it is standard practice in social science field research to redact personal identifying information from records. Chicago R. C439-40. Dr. Steblay stated that production of police records from which personal identifying information of witnesses, victims and suspects had been redacted would be sufficient to enable her to perform the intended research. *Id.* NACDL also stated that, if necessary for the protection of law enforcement interests, it would accept police records from which crime scene locations, automobile identifiers and similar identifying information had also been redacted. Chicago R. C425.

b. Supplemental summary judgment evidence.

The Circuit Court scheduled an oral argument of the parties' cross motions for summary judgment on December 20, 2007. Chicago R. C368.

After hearing a portion of the argument, the court recommended that the parties consider settling the case under an agreement whereby the Chicago Police would provide NACDL with the requested, redacted police records subject to a protective order prohibiting their dissemination. *See* Chicago R. Vol. IV, Tr. of 12/20/07 at C21-24. The parties attempted to resolve the case on that basis, but were unsuccessful. *See* Chicago R. Vol. IV, Tr. of 1/28/08 at C48.

In the course of the settlement negotiations, it became apparent that there had been a miscommunication between the parties as to the scope of NACDL's FOIA request. Chicago R. C534-36. NACDL learned for the first time during those discussions that the researchers who compiled the Report had not had access to all of the police records concerning the investigations that were included in the study. Chicago R. C535. Rather, the researchers had merely been furnished with a form summarizing the outcome of the lineups to be included in the study and, in some instances, with a selection of the police reports from the investigation. *Id.* The Chicago Police interpreted NACDL's request to be limited to the reports and documents in the researchers' files. Unaware of the researchers' limited information, NACDL had intended for its request to encompass all of the police records relating to the criminal investigations included in the study. Chicago R. C535-36; Chicago R. Vol. IV 5/1/08 Tr. at C78-81.

The misunderstanding led to the filing of supplemental arguments and evidence by both parties. NACDL submitted a brief attaching a second affidavit of Dr. Nancy Steblay, which elaborated the reasons why the police records that had *not* been provided to the researchers were

important for her research tasks. Chicago R. C534-48. The Chicago Police also submitted a supplemental memorandum, with a copy of the Report and with evidence as to the burden that would be imposed on the police by being required to redact identifying information from the full police files in the investigations used in the study. Chicago R. C554-694.

Dr. Steblay's second affidavit explained that only by reviewing the full police files could she ascertain the witnesses' identification histories – *i.e.*, the record of all identification tasks that the eyewitnesses had been asked to perform in the course of the investigation. Chicago R. C375. Dr. Steblay explained in detail that a meaningful critique of the Pilot study – one that would actually advance the discourse about the validity of the Pilot study Report – would require examination of police records to determine whether the data analyzed by the Pilot study researchers excluded important identification history information for the witnesses included in the study. Chicago R. C376. As Dr. Steblay elaborated, the exclusion of identification history would introduce confounding factors into the Pilot study findings. Chicago R. C376-77. For example, if a witness whose lineup identification is recorded in the Pilot study data had previously been exposed to the suspect in an earlier lineup or photo array, there is a possibility that the witness's identification of the suspect in the second identification task was based on factors other than the witness's memory and perceptions at the crime scene. *Id.* Thus, according to Dr. Steblay, even though the Pilot study researchers had apparently not reviewed the full police files from the cases their study, review of those materials was nonetheless imperative to assess the validity of the Pilot study findings. *See* Chicago R. C378.

The Chicago Police countered by detailing the burden it would face to redact the full police file for each of the investigations included in the Pilot study. According to the affidavit of Assistant Corporation Counsel Amber Ritter, redaction of crime scene location and all other

identifying information from two randomly selected Chicago Police investigative files consumed two hours and required the exercise of professional judgment. Chicago R. C657-58, C658. Ms. Ritter estimated that, with improved efficiency over time, it would take about 30 minutes per police file to complete the redactions. Chicago R. C658. In its brief, the Chicago Police asserted that it would take about 85 person hours to redact the documents from the researchers' files – and about twice that amount of time (170 hours) to redact the full Chicago Police investigative files. Chicago R. C562.

After the submission of both sides' supplemental materials, the Circuit Court heard oral argument on May 1, 2008 and took the case under advisement that day. Chicago R. Vol. IV 5/1/08 Tr. at C68-133, C132.

2. The Summary Judgment Record in the Joliet Case.

In the Joliet case, NACDL filed its motion for summary judgment with supporting materials on October 22, 2007. Joliet R. C31-149. The Joliet Police filed its response and supporting materials on November 19, 2007. Joliet R. C150-172.

NACDL's submissions in the Joliet case were identical to those it made in Chicago, which are summarized above.

The Joliet Police submitted two affidavits. Joliet Deputy Police Chief Patrick B. Kerr's affidavit closely tracked the language in Chicago Police Lt. James Gibson's affidavit. Like Gibson, Kerr described in detail the types of records in the Joliet Police files and asserted that the files include documents with information regarding the location and circumstances of the crime under investigation, including a great deal of identifying information as to automobiles, suspects, witnesses, victims and investigating personnel. Joliet R. C161. Tracking Gibson, Kerr averred

that disclosure of the documents "could very well" interfere with ongoing police investigations. Kerr's complete explanation for this conclusion was also identical to Gibson's:

> Suspects in these crimes could become aware of the status of the investigation, the degree of knowledge that the Police have as to their involvement, and the type of evidence that exists which could incriminate them. The identity of witnesses and their specific role in the investigation could be revealed. Disclosure could present a risk to the safety and well being of witnesses and their families. Also, release of this information could impede a criminal investigation or could be used to interfere with the prosecution of a case.

Joliet R. C161.

Kerr also echoed Gibson's statement that release of the police reports "would constitute an invasion of privacy of the victims and witnesses involved." Chicago R. C302; Joliet R. C162. By way of explanation, Kerr had the same thing to say as Gibson: the invasion of privacy would occur because "[t]hese documents contain the name, address and descriptive information including social security number of each person who has come forward to police regarding these crimes." *Id.*

Like Gibson, Kerr did not include any specific examples to support his conclusions. *See* Joliet R. C160-62.

Joliet also submitted the affidavit of Joliet police officer Robert Puleo, who stated that it took him 461 minutes to locate, review and redact ten of the Joliet Police files from the Pilot study. Joliet R. C163-64, C164. Extrapolating from this, Officer Puleo estimated that a total of 197 person hours would be required to make redactions from the 257 Joliet Police files that had been included in the Pilot study. *Id.*

The Circuit Court heard argument in the Joliet case on June 18, 2008 and took the case under advisement on that date. Joliet R. Vol. I, 6/18/08 Tr.

Decisions of the Courts Below

1. The Chicago case.

The decision in the Chicago case, which is reproduced at App.A6-A21, was rendered on June 30, 2008.

The Circuit Court first held that it would interpret NACDL's FOIA request broadly to encompass both the data actually transmitted to the Pilot study researchers and the underlying police investigatory files. App. A9. The court noted that "resolving the case on a narrow interpretation of the FOIA request would not aid the resolution of the more important issues in this case that are ripe for determination." *Id.*

Turning to the substantive issues, the court separately analyzed NACDL's request as to "open files" (investigations that had not yet been completed) and "closed files" (in which there was no longer an active police investigation. App. A9-A19. The court held that *all* of the material in the open files was exempt from disclosure under FOIA's law enforcement exemption, 5 ILCS 140/7(1)(c). App. A11. The court accepted Lt. Gibson's assertions as to the "possible consequences" of releasing any of the police records. *Id.* The court also found persuasive Lt. Gibson's argument that redaction of the records "would be insufficient to prevent an ongoing investigation from being impeded." *Id.*

The court rejected NACDL's argument that Lt. Gibson's affidavits were speculative and non-specific. The court noted that the Gibson affidavits "provide[] a very detailed list of all of the information contained in the records." App. A13. The court concluded that the Gibson affidavits recited "with specificity [the Chicago Police] reasoning for believing the records to be exempt . . . and inform the court of the possible repercussions should they be disclosed." *Id.*

The court deemed this sufficient to satisfy the burden to show the applicability of the law enforcement exemption. *Id.*

Based on its assessment of the Gibson affidavits, the court found that it was unnecessary to conduct an *in camera* inspection of the requested documents to determine whether they could be redacted to avoid infringing on law enforcement interests. App. A12-A13.

The court also held that all of the material in the open files was exempt from disclosure under 5 ILCS 140/7(1)(c)(vi) (which incorporates FOIA's privacy exemption), finding that disclosure of this material would constitute a "clearly unwarranted" invasion of privacy. App. A13-A15. To support this conclusion, the court performed a balancing analysis, weighing NACDL's interest in disclosure, the public interest in disclosure, the degree of privacy invasion and the availability of alternative means of obtaining the requested information. *Id.* The court concluded that the privacy interests of victims and witnesses outweighed the interests in disclosure. *Id.* The court's analysis made no reference to the fact that NACDL had agreed to accept production of the documents with all personal identifying information redacted.

Turning to the closed files, the court noted that NACDL and the Chicago Police were in substantial agreement as to "the form and method of production," leaving only three issues for resolution. App. A15, A17.

Two of the issues concerned the scope of the redactions to be made on documents that the Chicago Police had transmitted to the Pilot study researchers. Only one of them is pertinent to this appeal.[4] The Police argued that all faces should be redacted from photographs of lineups and from photo arrays. NACDL opposed this redaction because these images were necessary to an assessment of whether the lineups in the study were properly constructed. Balancing the

[4] The other issue concerned redaction of "records division" numbers from the closed case files. The court held that the Police were not justified in making this redaction (App. A17) and the Chicago Police have not appealed from that determination.

interests in disclosure and in privacy, and specifically noting that lineup fillers had not consented to dissemination of the photographs, the court concluded that redaction of the faces was necessary to satisfy FOIA's privacy exemption. App. A15-A16.

Finally, the court addressed the disclosure of police reports from closed investigations that had *not* been provided to the Pilot study researchers. App. A17-A19. Relying on the Ritter affidavit, the court noted that redaction of these documents "could take several weeks of full-time work by [Chicago Police] personnel . . . who would need to possess a high level of knowledge and sophistication." App. A19. The court acknowledged that NACDL has an "identifiable interest" in production of the records, but found that "[o]n balance . . . the potential relevance of the additional information contained in the investigatory files is not sufficient to outweigh the substantial burden that would be imposed on [the police] by being forced to redact the entire investigatory file." *Id.* Thus, the court held that 5 ILCS 140/3(f) barred disclosure of these files.

2. The Joliet case.

The decision in the Joliet case, which is reproduced at App. A22-A32, was rendered on July 31, 2008. The Circuit Court of Will County followed the Cook County decision in most respects.

Like the Cook County court, the Will County court held that NACDL's FOIA request should be read to encompass "the entire files" – both those that the Joliet Police had furnished to the Pilot study researchers and the underlying police files that had not been provided to the researchers. App. A26.

The Will County court first addressed the "open" police files and concluded that production of those records was barred by the law enforcement exemption. App. A26-A28.

Relying upon the affidavit of Deputy Chief Kerr, the court held that, even after redaction, disclosure of these files could allow suspects to "become aware of the status of the investigation." App. A27. The court also accepted Kerr's assertions as to "the potential risk of disclosure of witness information to the safety and well being of witnesses and their families" as well as "the additional problem that disclosure of the information could further hinder obtaining cooperation of witnesses in the future." *Id.*

The court summarily rejected NACDL's contention that the Kerr affidavit was conclusory and non-specific. App. A27-A28. The court gave no consideration to NACDL's contention that *in camera* review of the files was essential to a determination of the applicability of the law enforcement exemption.

The court next turned to the privacy question, analyzing whether FOIA's privacy exemption barred disclosure of (a) photographs from lineups and photo arrays and (b) documents from open police files. App. A28-A30. The court first concluded that documents and the photographs were *per se* exempt from disclosure pursuant to 5 ILCS 140/7(b)(v) (which prohibits disclosure of documents "revealing the identity of persons who file complaints with or provide information to . . . law enforcement."). App. A28. Without explanation, the court found that NACDL's "request for redaction of information does not assist in this instance." *Id.*

The court also found that, to the extent 5 ILCS 140/7(b)(v) did not apply, the disclosure of the photographs and documents would constitute a "clearly unwarranted" invasion of privacy. App. A29-A30. The court reasoned that the invasion of privacy outweighed the interest in disclosure, referring to statements in the Kerr affidavit as to the "consequences of breaching the trust of . . . individuals providing information [to law enforcement]." App. A29. The court's

analysis made no mention of NACDL's offer to accept documents from which all personal identifying information had been redacted.

The court next addressed the production of information from "closed" files. Incorporating the privacy analysis summarized above, the court barred disclosure of photographs from these files. App. A30.

Finally, the court held that the Joliet Police had demonstrated that production of the police records from closed files which had *not* been provided to the Pilot study researchers would be unduly burdensome. App. A30-A31. The court reasoned that the burden identified in the affidavit of Officer Puleo outweighed NACDL's interest in the information. App. A31. The court stated that "[t]he potential relevance of the additional information contained in the closed cases does not outweigh the very real man hours that will be required to redact the entire files." *Id.*

STANDARD OF REVIEW

Each of these consolidated FOIA cases was resolved below on cross motions for summary judgment. Thus, it is well established that this Court will review *de novo* all of the issues that are presented in this appeal. *See Ill. Educ. Ass'n v. Ill. State Bd. of Educ.*, 204 Ill. 2d 456, 459 (2003); *Chi. Alliance for Neighborhood Safety v. City of Chi.*, 348 Ill. App. 3d 188, 198 (1st Dist. 2004).

ARGUMENT

This case requires the court to decide whether the Illinois FOIA still serves as a tool to enable informed public debate about the functions of government – here, meaningful discussion and analysis of the controversial, legislatively mandated Pilot study, which stands in the way of reforming police procedures that have resulted in scores of wrongful convictions. FOIA declares

that it is "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." 5 ILCS 140/1. FOIA recognizes that "[s]uch access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." *Id.*

NACDL demonstrated below that the information it seeks from the Chicago and Joliet Police Departments is vital to a meaningful assessment of the Pilot study findings and, thus, to "making informed political judgments" about how law enforcement personnel should interact with eyewitnesses in criminal investigations. NACDL also amply demonstrated that that particular policy question remains a vital one in this state – in which scores of innocent men and women have been wrongfully imprisoned as a result of erroneous eyewitness identifications.

The lower courts departed from FOIA's underlying principles in this case, essentially rubber stamping the Chicago and Joliet invocations of the law enforcement and privacy exemptions in the Act, 5 ILCS 140/7(1)(b) and (c), and uncritically accepting the police agencies' complaint that performing redactions of the requested police records would be an "undue" burden, 5 ILCS 140/3(f). In Section I of this brief, NACDL demonstrates that the lower courts erred fundamentally in their application of the law enforcement exemption (subpart A of the Section) and of the privacy exemption (subpart B). Section II shows that there it was unwarranted for the lower courts to conclude that redaction of the requested police records would impose an undue burden on the police.

I. THE LOWER COURTS ERRED IN UNCRITICALLY ACCEPTING THE POLICE AGENCIES' VAGUE AND NON-SPECIFIC JUSTIFICATIONS FOR INVOKING FOIA'S LAW ENFORCEMENT AND PRIVACY EXEMPTIONS.

The exemptions in FOIA serve the important purposes of protecting individual privacy and ensuring that the work of public bodies is not disrupted. *See* 5 ILCS 140/1. But, important as these purposes are, they are "restraints on information access [that] should be seen as limited exceptions to the general rule that the people have a right to know" about the activities of government. *See id.*

Adhering to the legislative mandate, this court and the Illinois Supreme Court have held that the exemptions in FOIA must be narrowly construed and that the government agency at all times bears the burden of proving that the exemption it has invoked is applicable in the case. *Lieber v. Bd. of Trs. of Southern Illinois University,* 176 Ill. 2d 401, 407-408 (1997); *Hoffman v. Illinois Dep't of Corrections,* 158 Ill. App. 3d 473, 476 (1st Dist. 1987). In a seminal case involving FOIA's law enforcement exemption, the Second District held that for the government agency to discharge that burden, it must demonstrate "how disclosure *significantly* risks circumvention of the law or the agency's regulations." *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 542 (2d Dist. 1989) (emphasis in the original). The Illinois Supreme Court has held similarly that the government agency can meet its burden to show the applicability of a FOIA exemption "only by providing some *objective* indicia that the exemption is applicable under the circumstances." *Illinois Education Ass'n v. Illinois State Board of Educ.*, 204 Ill. 2d 456, 470 (2003) (emphasis in the original).

NACDL shows in the following two subparts that the Chicago and Joliet Police Departments woefully failed to discharge their burden of proof regarding the exemptions they invoked.

A. The Lower Courts Erred In Concluding that the Affidavits Submitted by the Chicago and Joliet Police Departments Discharged the Burden to Prove the Applicability of the Law Enforcement Exemption.

Consistent with FOIA's mandate in favor of disclosure, the Illinois courts require that an invocation of the law enforcement exemption be supported by a detailed and specific demonstration of how disclosure of the requested materials would interfere with "pending or actually and reasonably contemplated law enforcement proceedings," 5 ILCS 140/7(1)(c)(i), or obstruct "an ongoing criminal investigation," 5 ILCS 140/7(1)(c)(viii). The police agencies abjectly failed to discharge this burden and the lower courts erred by uncritically accepting the non-specific and conclusory affidavits submitted by the Joliet and Chicago police.

As the Second District made clear in *Baudin v. City of Crystal Lake*, 192 Ill. App. 3d 530, 535 (2d Dist. 1989), agencies cannot "clothe material regarding the affairs of government with an exemption from public disclosure by *ipse dixit* statements that the material is exempt." "An agency such as a police department cannot simply take the position that, since it is involved in investigatory work and some of its records are exempt from disclosure under the Act, every document in its possession somehow comes to share in that exemption." *Id.* at 536. Instead, the agency must demonstrate how the exemption applies, by providing the court with "a detailed affidavit describing how disclosure *significantly* risks circumvention of the law or the agency's regulations." *Id.* at 542. Affidavits that are "entirely conclusory and merely recite or paraphrase the language of the statute without giving any clue as to the discloseability of the requested documents ... provide[] an insufficient factual basis to permit the trial court to grant summary judgment [to the agency], particularly in the absence of an *in camera* inspection of the disputed material." *Id.* at 537.

Other decisions adhere to these basic principles. For example, in *Lawyer's Committee for Civil Rights of San Francisco Bay Area v. Dep't of Treasury,* 2008 WL 4482855 (N.D. Cal. September 30, 2008), the court rejected an invocation of the law enforcement exemption in the federal Freedom of Information Act, 5 U.S.C. § 552,[5] holding that the government's affidavits did not explain *"in detail . . .* how releasing each of the withheld documents would interfere with the government's ongoing criminal investigation." 2008 WL 4482855 at 16 (emphasis in original). Nor did those affidavits "explain *how* disclosure of the petitions is likely to jeopardize other pending proceedings" or "describe the harm that would allegedly result from third parties' possession of the information." *Id.* at 17 (emphasis in original). The court therefore held that the potential "chilling effect" and related consequences proffered by the government were speculative and unsupported by an adequate explanation or rationale, and denied the government's law enforcement exemption claims. *Id.*

In *Long v. Dep't of Justice*, 450 F. Supp. 2d 42, 74 (D.D.C. 2006), another federal law enforcement exemption case, the government claimed that releasing information regarding the criminal charges under investigation in United States Attorney's offices "could jeopardize law enforcement proceedings by alerting suspects as to the existence and/or nature of investigations into their criminal activities" and enabling suspects to "alter [their] behavior to evade or obstruct law enforcement efforts." The court rejected the government's proffer as not only speculative but implausible, noting that, with redaction, it was unlikely that a suspect reviewing the produced data would be in a position to identify his investigation. Thus, the court rejected the

[5] Exemption 7(A) of the federal Freedom of Information Act parallels the Illinois FOIA exemption, exempting law enforcement records, "but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Illinois courts find the FOIA decisions of the federal courts persuasive "where the Illinois Act closely parallels Federal Law." *Baudin*, 192 Ill. App. 3d at 536; *see also Griffith Laboratories U.S.A v. Metropolitan Sanitary Dist.*, 168 Ill. App. 3d 341, 345 (1st Dist. 1988).

government's exemption claim, finding that it was "based on unreasonable speculation and hypothetical combinations of database entries rather than particularized proof." *Id.* at 75-76.

In *City of Chicago v. United States Dep't of Treasury,* 287 F.3d 628 (7th Cir. 2002), *amended,* 297 F.3d 672 (7th Cir.), *vacated on other grounds,* 537 U.S. 1229 (2003), the court found "improbable" and "not reasonable" ATF's claim that disclosure of information from its firearms transaction database could interfere with or compromise police investigations. On amendment, the court noted that "ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable,*" and rejected as insufficient ATF's proffered justification of the federal law enforcement exemption. 297 F.3d at 673.

Measured against the elaboration of the government's required burden from *Baudin* and the federal cases, it is obvious that neither the Joliet nor the Chicago police departments adequately discharged its burden to prove the applicability of the law enforcement exemption to the police records underlying the Pilot study findings.

1. The Joliet police did not discharge its burden to prove the applicability of the law enforcement exemption.

In support of its law enforcement exemption claim, the Joliet Police Department relied exclusively upon a series of unelaborated statements in a single paragraph from the affidavit of Deputy Police Chief Patrick Kerr. Deputy Chief Kerr claimed that, if the police records were disclosed "suspects could become aware of the status of the investigation;" "the identity of witnesses . . . could be revealed;" and "the safety and wellbeing of witnesses" could be put at risk. Joliet R. C161. These general statements do not come close to discharging Joliet's burden of proof.

The Kerr affidavit barely acknowledged the fact that NACDL seeks disclosure only of heavily redacted police documents. NACDL recognizes that, in ongoing investigations, police reports must be redacted to eliminate (a) the names and personal identifying information for all witnesses and others who provide information to the police in an investigation; (b) names and identifying information for suspects who have not been charged in the case; (c) names and identifying information of victims; (d) crime scene addresses and all other information regarding locations relevant to the investigation; (e) all identifying information relating to automobiles involved in the case; (f) any other specific information that might reasonably tie a produced police record to a particular suspect or investigation. NACDL made very clear that Dr. Steblay can perform her research tasks with all such information redacted and that, accordingly, it is willing to accept the police records with this information removed. *See* Joliet R. C61-62.

The Kerr affidavit completely fails to address how – with all of this information removed from the records – the concerns that the affidavit posits could possibly arise. Kerr does not explain how, after names, all locations and all other identifiers have been removed from the records, there is any reasonable risk that a suspect reviewing a disclosed police record might somehow manage to connect that record to his case. Similarly, with all personal identifiers removed, Kerr provides no explanation of how the personal safety of a witness could be put at risk.

Kerr does not aver that he has reviewed the set of police records NACDL is requesting. He provides no specific examples of how disclosure of those records – after redaction – might infringe upon or obstruct law enforcement. He nowhere suggests that disclosure of such heavily

redacted police records has ever interfered with a police investigation in the past.[6]

In short, the Kerr affidavit relies on little more than the sort of *ipse dixit* statements that *Baudin* held insufficient to establish the applicability of the law enforcement exemption. 192 Ill. App. 3d at 535. The affidavit fails to describe "how disclosure *significantly* risks circumvention of the law or the agency's regulations," *Baudin*, 192 Ill. App.3d at 542, and provides no "*objective* indicia that the exemption is applicable under the circumstances." *Illinois Education Ass'n*, 204 Ill. 2d at 470. The affidavit is utterly lacking in detail. It is pure boilerplate.[7]

The fears that Kerr raises (suspects may be alerted; safety of witnesses could be compromised) are completely speculative. Kerr's concerns closely track the types of speculation about police obstruction and witness endangerment that the courts rejected in *Lawyers Committee*, 2008 WL 4482855 at 15-17 (interference with ongoing criminal investigation) and *Long,* 450 F. Supp. 2d at 74-76 (suspected persons' evasion of law enforcement). Such rank speculation as to possible ill-effects on law enforcement does not discharge Joliet's burden of proof. To succeed, Joliet must not only point to a *possible* infringement on law enforcement from disclosure but must also establish that it is *reasonable* to fear such an infringement. *See City of Chicago,* 297 F.3d at 672.

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[6] There is every reason to believe the contrary – that disclosure of heavily redacted records would not obstruct the police or endanger witnesses. For example, in *N.Y. Civil Liberties Union v. City of Schenectady*, 2 N.Y. 3d 657, 660 (2004), which involved a FOIA request for records similar to those in issue here, the defendant had no objection to disclosure of properly redacted documents. And, in this case, the Evanston Police Department agreed to production of all police reports from Pilot study cases, after making the same redactions that NACDL agrees are appropriate for the Chicago and Joliet records. *See also Long,* 450 F. Supp. 2d at 74, in which the Department of Justice conceded that "redaction of the suspects' names and other directly identifying information would likely be sufficient to prevent against the harm in question, in which cases the information . . . would not be exempt."

[7] It bears mention that the relevant paragraph of Chief Deputy Kerr's affidavit is word-for-word identical to the affidavit that Chicago Police Lt. James Gibson initially submitted in the Chicago case. *Compare* Chicago R. C302 *with* Joliet R. C161. This strongly suggests that Kerr simply lifted Gibson's language without making his own independent review of the Joliet police records and assessment of whether there are really grounds to fear an adverse effect on law enforcement from release of the redacted police records.

Since Joliet failed to submit materials adequate to discharge its burden, this court must hold that the law enforcement exemption does not shield the Joliet police records from disclosure. Any other holding would serve only to repudiate the basic principles of FOIA, which favor disclosure and impose strict proof requirements on government agencies seeking to invoke the exemptions.

2. The Chicago police did not discharge its burden to prove the applicability of the law enforcement exemption.

The Chicago Police Department provided little more than Joliet in support of its invocation of the law enforcement exemption. Like Joliet, Chicago failed to discharge its burden to show, with specificity and in detail, how law enforcement investigations could be impaired or impinged by disclosure of the heavily redacted police records underlying the Pilot study.

The Chicago Police offered two affidavits of police Lt. James Gibson. The first was identical to the affidavit of Joliet Deputy Chief Kerr, discussed in the preceding subsection. The second contained a little bit – but not much – in the way of elaboration of the vague speculation discussed above.

Lt. Gibson's second affidavit averred only that he had reviewed a "sampling" of the police records NACDL is seeking. Yet Gibson asserted in his second affidavit that it "may not be possible" through redaction to conceal the identities of witnesses, victims and suspects in any of the police files. Chicago R. C355. For support, Gibson offered only one proposition, unsupported by any specific example: "Victims, witnesses, informants and suspects often know one another; and where they live, work and go to school" and, thus, redaction of identifying information might not ensure confidentiality. *Id.* There are at least two problems with this argument. *First,* the Gibson affidavit fails to address the extremely low probability that a person could identify himself as the suspect in a single investigation conducted in a city of several

million inhabitants where the Chicago Police engage in thousands of criminal investigations each year. *Cf. Long,* 450 F. Supp. 2d at 75-76 (the population of potential suspects was 479,000 people and, thus, "the exemption claim is based on unreasonable speculation and hypothetical combinations of database entries rather than particularized proof"). Chicago is not a small village in which disclosure of a redacted police report might reasonably be expected to trigger a clear inference as to specifics of the crime under investigation.

Second, the Gibson affidavit fails to take account of the fact that NACDL has agreed to the redaction of *all* personal identifying information from the police records – including all addresses. Therefore, a suspect reviewing the disclosed, redacted records would be in no position to identify a witness based on where he "lives, works and goes to school."

Apart from his speculation about witnesses, victims, suspects and informants who "know one another; and where they live, work and go to school," Lt. Gibson's affidavit offers nothing to substantiate the claim that heavy redaction of the police records would not ensure confidentiality. In fact, on this point, Gibson's affidavit is internally inconsistent. On the one hand, he claims that redaction of all personal identifying information would *not* be sufficient to protect confidentiality with respect to police records in *open* investigations. However, in the same affidavit, Gibson concedes that release of police records from *closed* investigations with redaction of "all information that could identify a witness or victim, . . . the exact location of the incident, . . . information that would identify the suspect, . . . the identities of all other individuals that appeared in the lineup or photo array, . . . [and] the exact date, RD numbers and other identifying codes that appear on the documents" *would* adequately protect the very same confidentiality concerns. Chicago R. C357. This internal inconsistency gravely undermines Lt. Gibson's credibility.

The balance of Gibson's affidavit does not help to demonstrate the applicability of the law enforcement exemption. The rest of the affidavit enumerates ways in which some, but not all, criminal proceedings could be impeded *if* a perpetrator becomes aware of the identity of a witness, but entirely fails to demonstrate *how* a perpetrator would become aware of the identity of a witness if personal identifying information and locations were redacted.

The confidentiality concerns that the Gibson affidavit raises are important ones: the safety of witnesses is clearly important; the apprehension of criminals is vital. No one – least of all NACDL – doubts that law enforcement would be "obstructed" or "impeded" if witnesses were endangered or suspects were tipped off about the status of police investigations. But Chicago cannot discharge its burden of proof in this case merely by pointing to those dire consequences – without also demonstrating that there is some real possibility that release of the redacted documents might actually yield those consequences.

The issue here is whether – after heavy redaction – there is a reasonable possibility that the police records could yield information that would threaten a witness's safety or tip off an at-large suspect. Lt. Gibson's affidavit simply fails to demonstrate the existence of such a possibility.

This court should therefore hold that the Chicago police records, like the Joliet records, are not covered by the law enforcement exemption.

3. At a minimum, *in camera* review of the requested records and the proposed redactions is necessary to determine whether the law enforcement exemption could cover specific documents.

The broad, categorical assertions in the Kerr and Gibson affidavits are, for the reasons expressed above, insufficient to discharge the police burden regarding the law enforcement exemption.

Should this court nonetheless conclude that outright reversal of the lower courts' decisions is unwarranted, this court should, at a minimum, require that both police departments undertake a document-by-document review of the requested records, perform the redactions to which NACDL agrees and present to the court for *in camera* consideration any specific records as to which they believe there is a reasonable possibility that disclosure – after complete redaction – could obstruct or impede law enforcement. This court should direct the lower courts to conduct an *in camera* review of any redacted documents that the police departments might submit.

There is ample authority that *in camera* review should be employed to test the applicability of claimed FOIA exemptions. *See* 5 ILCS 140/11(f); *and see also Baudin,* 192 Ill. App. 3d at 535; *Lawyers Committee,* 2008 WL 4482855 at 5-6 (citing cases). Such *in camera* review merely reflects the axiom that the FOIA exemptions are to be applied on a case by case basis to particular documents so that a specific determination can be made as to the applicability of the claimed exemption to each document. *See Goodrich Corp. v. Clark,* 361 Ill. App. 3d 1033, 1045-46 (4th Dist. 2005).

The Chicago opinion, citing *Illinois Education Ass'n,* 204 Ill. 2d at 469, held that *in camera* review was unnecessary because of the assertions in the Gibson affidavit that redaction could not protect law enforcement interests. But, in fact, the broad, categorical claims in the Gibson affidavits are framed in precisely the kind of "vague" and "sweeping" language that *Illinois Education Ass'n* found inadequate. As explained above, those affidavits clearly fail to justify the law enforcement exemption in this case. And they are no substitute for *in camera* review of the police records in issue.

At the federal level, the Ninth Circuit rejected similar categorical invocations of the law enforcement exemption in *Weiner v. FBI*, 943 F.2d 972 (9th Cir. 1991). In *Weiner*, the FBI relied on an affidavit stating that investigatory files were exempt because:

> Information of this category is *either* specific in nature *or* of a unique character, and thereby could lead to the identification of a source. *For example,* this information *may* contain details obtained from a one-on-one conversation between a source and another individual. It *may* be of such detail that it pinpoints a critical time frame *or* reflects a special vantage point from which the source was reporting. The information *may* be more or less verbatim from a source's report and thus reveal a style of reporting peculiar to that source along with other clues as to authorship, such as handwritten *or* typewritten reports of the informant. The nature of the information *may* be such that only a handful of parties would have access to it. It is the degree of specificity of this information that endangers the source's continued anonymity.

943 F.2d at 978 (emphasis in original). These "categorical indication[s] of anticipated consequences of disclosure" were "clearly inadequate." *Id.* at 979.

Lt. Gibson's similarly vague assertions – that disclosure of the documents "could very well interfere" with its operations "if investigations are still being conducted" (Chicago R. C355) – are also inadequate. Such boilerplate justifications, *i.e.,* justifications where "[n]o effort is made to tailor the explanation to the specific document withheld," afford the requester no "opportunity to intelligently advocate release of the withheld documents" and afford the court no "opportunity to intelligently judge the contest." *Weiner,* 943 F.2d at 978-79. *See also Kanter v. IRS*, 433 F. Supp. 812, 821 (N.D. Ill. 1977) (agency "must therefore review its documents to determine whether deletions, editing, or other methods of segregation can narrow the breadth of the claimed exemption," and do so in a manner that "persuade[s] the court that it has reviewed the materials accordingly, and that it is not seeking to withhold more than is absolutely necessary to satisfy the purposes of the exemption"); *Silets v. F.B.I.*, 591 F. Supp. 490 (N.D. Ill. 1984)

("expurgation of virtually entire documents under the "activity and/or method" exemption" is not appropriate).

The Chicago court erred in accepting Gibson's affidavits in place of *in camera* review because (1) the affidavits do not describe in detail any particular withheld document, (2) they do not specifically identify the kind of information found in that document that would create the dangers supporting exemption, (3) the second affidavit admits that each file is "unique" and "tells its own story," (Chicago R. C355-56), so they should be considered on a case-by-case basis, and (4) that affidavit also admits that only a "sampling" of the documents have been reviewed, providing an insufficient basis to make blanket assertions about all of the documents.

Therefore, at a minimum, *in camera* review of the police records must be performed before the records may be withheld from NACDL based upon the law enforcement exemption.

B. The Lower Courts Erred In Concluding that the Affidavits Submitted by the Chicago and Joliet Police Departments Discharged the Burden to Prove the Applicability of the Privacy Exemption.

Both lower courts held that the police departments' records were protected in two respects by the privacy exemption in FOIA. *First,* both courts held that the police affidavits carried the burden to establish that disclosure of all police records from "open" (*i.e.,* ongoing) police investigations would constitute a "clearly unwarranted" invasion of personal privacy under the exemption in 5 ILCS 140/7(1)(b). *Second,* both courts held that disclosure of facial images from photographs of police lineups and from photographs used in photo arrays – whether from an ongoing *or a closed* police investigation – was also barred as a clearly unwarranted invasion of personal privacy under the same exemption.

Both of these holdings were erroneous, as NACDL demonstrates in the following two subsections.

1. Disclosure of police files from which all identifying information has been redacted cannot constitute a "clearly unwarranted" invasion of personal privacy.

In holding that the personal privacy exemption bars disclosure of all of the police records from open investigations, the lower courts incorrectly applied the four factor analysis of *Lieber v. Bd. of Trustees of Southern Illinois University*, 176 Ill. 2d 410, 408-409 (1997), which requires the court to balance: (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.

The Chicago decision acknowledged that both NACDL and the public have a strong interest in disclosure of the police records from cases included in the Pilot study. *See* App. A14. The Joliet decision essentially ignored those interests. *See* App. A29. But in both cases the record was clear that both NACDL and the public have a vital interest in the Pilot study and the underlying data.

NACDL's own institutional interest in the Pilot study data as a stakeholder in the debate about eyewitness identification procedures is well documented in the record. The problem of false eyewitness identifications is of great concern to the criminal defense practitioners who comprise NACDL's membership. To be clear, however, this is not a case in which a plaintiff attempts to use a FOIA request as a bootstrap to discovery in connection with a particular controversy in which that plaintiff is interested, and NACDL does not seek to gain an advantage for any person involved in any of the individual cases in the Pilot Project. NACDL's focus is on the aggregate, redacted data for purposes of scientific inquiry and the rigorous examination of the Pilot study. NACDL firmly supports reform of eyewitness identification procedures and has an interest in challenging the validity of the Pilot study findings.

In addition – and separately – NACDL also demonstrated that the public has a substantial interest in disclosure of the Pilot study data. The Pilot study purported to evaluate procedures for handling eyewitness identifications in criminal investigations – a core duty of law enforcement agencies. The study's methodology and its findings, however, have been called into question by the scientific community, and NACDL seeks the Pilot study police records so that its expert can evaluate the scientific merits of the study findings. False eyewitness identifications have caused enormous harm in this state – not only to the 59 men and women known to have been convicted based on such identifications, but also to taxpayers who foot the bill for millions of dollars in civil rights judgments and for everyone with an interest in the integrity of the criminal justice system. Thus, the first and second *Lieber* factors weigh heavily in favor of disclosure.[8]

The lower courts erred in evaluating "the degree of invasion of personal privacy" from disclosure. Neither court below acknowledged, in its weighing of the *Lieber* factors, that NACDL does not seek *any* personal identifying information of any individual.[9]

NACDL has agreed to accept the Pilot study police records after redaction of all identifying information – including information about the nature and geographic location of the crime being investigated, the individuals involved, and the investigation itself. Redacting such identifying information will cure any risk to privacy that might have otherwise been created by disclosing the requested information. *See Bowie v. Evanston Community Consol. School Dist.*

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[8] Both courts below erroneously equated NACDL's interest and the public interest in disclosure of the Pilot study data. NACDL's own institutional interest as an advocate on behalf of the criminal defense lawyers it represents is distinct and separate from the larger public interest in this criminal justice issue. The courts below erred in collapsing two of the *Lieber* factors in their analysis. *See* App. A14 and A29.

[9] The Will County Circuit Court in the Joliet case erroneously held that the police records as a whole were *per se* exempt from disclosure under 5 ILCS 140(1)(b)(v) because the records would reveal the identity of persons who had provided information to the police. *See* App. A28. That holding was obviously in error, since personal identifying information would be redacted from the documents prior to disclosure and necessarily, therefore, would *not* be revealed.

No. 65, 128 Ill. 2d 373, 380-81 (1989) ("Where, as here, individual identifying information can be redacted and the record scrambled, preventing a clearly unwarranted invasion of personal privacy, the record *must* be disclosed.") (emphasis added); *see also Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill.App.3d 188, 204, 213 (1st Dist. 2004) ("[I]nformation in [producible] records may . . . be redacted to the extent disclosure would constitute a clearly unwarranted invasion of personal privacy."); *cf. Southern Illinoisan v. Department of Public Health*, 218 Ill.2d 390, 415-27 (2006) (stating explicitly that the Illinois Health and Hazardous Substances Registry Act, 410 ILCS 525/4(d), establishes a higher standard of confidentiality than does FOIA section 7, but *granting* a request for data that included specific information about registrants' "type[s] of cancer, zip code[s] and date[s] of diagnosis").

The only possible remaining privacy interest is highly attenuated and speculative: the fear that, even with all identifying information redacted, someone reviewing the produced records could somehow piece together the identity of some person involved in an investigation. As NACDL demonstrated in the preceding subpart, neither police department demonstrated that such a scenario is realistically possible. At bottom, therefore, the invasion of personal privacy that would be caused by disclosure of the records is either non-existent or negligible.[10]

Finally, as both lower courts correctly determined, there are no means for NACDL to obtain the Pilot study data from alternative sources.

All four of the *Lieber* factors therefore weigh in favor of disclosure and against the application of the privacy exemption. The police departments failed to carry their burden and the

[10] The Evanston Police Department, a participating agency in the Pilot study, has already provided NACDL with redacted versions of the raw data in that agency's possession. It would defy logic to believe that disclosing the data in the possession of Chicago and Joliet – again, with identifying information redacted – somehow poses a greater risk to individuals' personal privacy than did the disclosure by the Evanston Police Department.

lower courts erred in applying that exemption to the redacted Pilot study police records from "open" investigations.

2. Disclosure of lineup photographs and photo arrays, with personal data removed, would not constitute a "clearly unwarranted" invasion of personal privacy.

Both lower courts accepted the proposition that a "clearly unwarranted" invasion of personal privacy would occur if any photographs of lineups or photos used in photo arrays were to be disclosed – even after redaction of all identifying personal information associated with the photos. App.A15-A16, A30. The court in the Chicago case upheld the Chicago Police Department's position that facial features should be redacted from any such photographs. App. A16. The court in the Joliet case simply held that the photos should not be disclosed. App. A30. Both courts erred in their analysis of this privacy question and both decisions should be reversed.

As with the data from open police files discussed in the preceding subsection, whether disclosing the photos visually intact is appropriate should turn on the balance of the significant public interest in disclosure against the privacy interests of the individuals who participated in the relevant lineups. *See Lieber*, 176 Ill. 2d at 408-09; *Chicago Alliance for Neighborhood Safety*, 348 Ill. App. 3d at 207-13 (applying the *Lieber* standard). Even where disclosure might infringe on individuals' privacy interests, an important public interest *can* still justify disclosure. *See Lieber*, 176 Ill.2d at 408-09; *Chicago Alliance for Neighborhood Safety*, 348 Ill. App. 3d at 207-13; *see also National Archives & Records Administration v. Favish*, 541 U.S. 157, 172 (2004). The analysis under the *Lieber* factors of whether the requested lineup photographs from closed investigations should be disclosed closely follows that for the open investigations detailed above, and the conclusion is identical: the public interest in disclosure far exceeds the minimal potential for risk to personal privacy.

Just as above, NACDL and the public each have distinct and significant interests in disclosure of the photographs with facial features intact. The Chicago court incorrectly valued NACDL's and the public's interest in disclosure of the photographs, stating that "although [the photos] may be an important component of the critical analysis NACDL seeks to undertake, redaction of these photographs will not render the remaining materials worthless." App. A16.[11] In applying *Lieber,* the court must determine the interest in disclosure *of the disputed materials* to the petitioner and the public. It was error for the court to minimize the interest in disclosure because *some other* materials that would have value to NACDL and the public were being released. Among the tests that NACDL's expert seeks to perform on the Pilot study data is an assessment of the quality of the composition of the lineups in the study. *See* Chicago R. C434-39.. Without the photographs, this assessment cannot be performed. Thus, NACDL and the public have a very strong interest in disclosure, meeting the first and second *Lieber* factors.

On the other hand, the third *Lieber* factor provides little weight against disclosure. After redaction of any associated personal identifying information, the invasion of personal privacy that would be occasioned by disclosure of the photos is minimal. The courts below focused on the privacy interest of "fillers" in lineups and photo arrays (persons not suspected of the crime who serve as "distracters" as the eyewitness observes the suspected person) and concluded that those individuals would suffer a clearly unwarranted invasion of their personal privacy if the

[11] The court in the Joliet case gave no indication that it assigned any value to the interest NACDL and the public have in disclosure of the photographs. *See* App.A30.

photographs were disclosed.[12]

In fact, however, the privacy interests of lineup fillers are relatively weak. Fillers have neither filed the relevant complaint nor provided any information relevant to a case under police investigation so as to be entitled to protection of their privacy. *See* 5 ILCS 140/7(1)(b)(v). Instead, fillers have simply offered images of their physical characteristics to be viewed by those people who *have* filed complaints or provided information related to the investigation. By participating in a lineup, fillers have consented to allow strangers – people involved in the relevant investigation – to observe their physical characteristics or photographic images thereof. Furthermore, fillers presumably understand that, if the investigation results in formal charges, then the lineup photographs featuring their image will be put into evidence at a public trial. Thus, fillers' privacy interest in lineup photographs pales in comparison to the substantial public interest in enabling NACDL and its expert to analyze whether the lineups in the Pilot study were fairly composed. After volunteering to participate in this way in a police investigation, there is no basis for fillers to claim a "clearly unwarranted" invasion of personal privacy by further dissemination of a photograph of them.

Second, to the extent that disclosing the lineup photographs might present any risk to personal privacy, redacting information that would identify the individuals featured in the lineup photos would greatly reduce that risk. NACDL's expert can make full use of the lineup photos

[12] Of course, suspects who have been arrested and charged have little if any privacy interest in lineup photos containing their image. *See Detroit Free Press, Inc. v. Department of Justice*, 73 F.3d 93, 96-97 (6th Cir. 1996) (interpreting the federal FOIA and differentiating the significant privacy interest in personal data – name, address, rap sheet information – from the limited interest in mug shot photos of named subjects in ongoing investigations). Such photos are put into evidence at trial, and thereby become part of the public record. Moreover, lineup photos of suspects who have been charged with crimes are regularly released to and published in the media. *See, e.g.*, Chicago Tribune, *Charges: Home Invasion and Three First-degree Murders*, Chigagotribune.com, Dec. 3, 2008, http://www.chicagotribune.com/news/local/chi-mug-william-balfour,0,7934773.photo (prominently displaying a photo of William Balfour and discussing the charges against him) (last visited Jan. 29, 2009).

without any information identifying the individuals featured in those photographs. *See* Chicago R. C439-40; Joliet R. C61-62. Where there is a substantial public interest in disclosure and risk to individual privacy can be remedied with careful redaction, the requested documents must be redacted and disclosed. *See Bowie*, 128 Ill. 2d at 380-81; *Chicago Alliance for Neighborhood Safety*, 348 Ill. App. 3d at 204, 213. Neither court below, however, even acknowledged that all personal identifying information associated with the photographs would be redacted before any disclosure. There is a strong likelihood that redacting this information from the lineup photographs will preserve the anonymity of any individual whose image is disclosed.[13] Thus, since any invasion of privacy is speculative and minimal in any event, the the third *Lieber* factor also weighs in favor of disclosure.

Finally, it is undisputed that the fourth *Lieber* factor weighs in favor of disclosing the lineup photographs. The photographs can be obtained in no way other than by the police departments' compliance with this FOIA request.

Thus, all of the *Lieber* factors favor disclosure of the lineup photos – with identifying information redacted, but the faces of those pictured intact. In light of the significant public interest served and the minimal risk to personal privacy posed by disclosing these photographs, this Court should reverse the lower courts and order the disclosure of the photographs from the police records.

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[13] The Evanston Police Department has already provided NACDL with the lineup photos used in the Pilot study that were in Evanston's possession, subject to the redaction of associated personal identifying information. Chicago R. Vol. IV, 5/1/08 Tr. at C80. Therefore, the claim that disclosure of the photos in the possession of Chicago and Joliet – stripped of identifying information – is an unwarranted invasion of privacy interests must be met with skepticism.

II. THE LOWER COURTS ERRED IN HOLDING THAT THE BURDEN OF PRODUCING POLICE RECORDS FROM CLOSED INVESTIGATIONS OUTWEIGHED THE PUBLIC INTEREST IN DISCLOSURE.

Both lower courts held that the police departments would not be required to produce police reports from closed police investigations that had not been provided to the Pilot study researchers. App. A17-19, A30-31. Each court held that the burden of making redactions to those documents outweighed the public interest in disclosure of the information. 5 ILCS 140/3(f). The lower courts erred. Not only did they greatly understate the public interest in disclosure of the records, but they also overvalued the burden that redaction of these records would impose on the police departments. Both points are elaborated below.

First, in these cases, the public interest in disclosure of the full police files in closed Pilot study investigations is very substantial. The record in both cases clearly demonstrated that police management of eyewitnesses is vital to accuracy in the criminal justice system, since erroneous eyewitness identifications have caused scores of wrongful convictions; that the Pilot study has been instrumental in preserving the *status quo* as a result of its controversial findings approving traditional lineup procedures; and that debate and analysis concerning the Pilot study findings is in the public interest.

The Chicago court erroneously found that NACDL's interest in the full police files was not central to the research and analysis that Dr. Steblay, NACDL's expert, wished to perform on the Pilot study.[14] Without the full police data, the court found, NACDL "will not come away empty handed . . . [and] will still be able to examine the same data relied upon by the authors of the Report." App. A19. This finding simply ignored Dr. Steblay's explanation, in her supplemental affidavit, that the full police files are necessary to determine the "identification

[14] The Joliet court did not pause to assess the public interest in concluding that the burden of redacting the police files was "undue." *See* App. A30-31.

histories" of the eyewitnesses from the study. Chicago R. C376. Without those identification histories, according to Dr. Steblay's uncontradicted explanation, it is impossible to determine if the data from the Pilot study are skewed by confounding factors – and impossible to advance the public dialogue regarding the legitimacy of the Pilot study findings. *See id.* That advance in the public dialogue *cannot* take place based on production of "the same data relied upon by the authors of the Report."

Thus, there is a strong public interest in disclosure of the full police files from closed cases – an interest that it is not diminished as a result of the police departments' agreement to produce some of the study data with redactions.

Second, the lower courts gave excessive weight to the police departments' complaint that redaction of the requested files would be time-consuming. The Chicago Police estimated, based on the Amber Ritter affidavit, that redaction of the full police files from closed cases might consume 170 person hours. Chicago R. C658. The Joliet police estimated that the redaction of their files could take 197 person hours. Joliet R. C164. Both courts deemed the burden of this investment of time to outweigh the public interest in disclosure of the information.

This finding has no support in the decided cases. Cases in which the courts have found that a FOIA request did impose an undue burden on a government agency underscore the relatively small burden in issue here. For example, the Central Intelligence Agency was not required to conduct a "page-by-page search through the 84,000 square feet of documents in the [CIA] records center," for records the release of which would be against the public interest, since they were classified as "secret" by Congress. *Goland v. CIA,* 607 F.2d 339, 347, 353 (D.C. Cir. 1978), *cert denied,* 445 U.S. 927 (1980); *see also Irons v. Schuyler*, 465 F.2d 608, 611-12 (D.C. Cir.), *cert. denied,* 409 U.S. 1076 (1972) (explaining that it would be unduly burdensome for the

government to search through 4.5 million pages of documents from the entire history of a government agency, because the request was not narrowly framed enough to include "identifiable documents"). No such gargantuan imposition on the police departments' time is involved here.

In fact, the police departments are only being asked to expend time to complete necessary *redaction* of documents – not to locate the documents in NACDL's narrowly tailored FOIA request. Redaction is a necessary and inevitable part of the FOIA process. The Illinois Supreme Court has made clear that where redactions to a document *can* be made to render it producible, the redactions *must* be made. *See Bowie v. Evanston Community Consol. School Dist. No. 65*, 128 Ill. 2d 373, 380-81 (1989) ("where . . . individual identifying information can be redacted and the record scrambled, preventing a clearly unwarranted invasion of personal privacy, the record *must* be disclosed.") (emphasis added). The decisions below fly in the face of that principle, excusing the police departments from the obligation to make redactions and produce otherwise discloseable documents simply because the redaction process is time consuming.

It is not an "undue" burden on a public agency to invest the time necessary to redact a relatively small set of identified records – particularly where the documents are necessary to enable further informed public dialogue regarding the legitimacy of findings in a legislatively mandated study. It may be that the police departments will need to expend "valuable labor . . . time" in redacting their records. But that does not impose an "undue" burden. *Cf. Bowie v. Evanston Community Consolidated School Dist. No. 65,* 168 Ill. App. 3d 101, 112 (1st Dist. 1988), *aff'd,* 128 Ill. 2d 373 (1989) (where there was a public interest in disclosure of the information, the fact that the defendant school district would have to "expend valuable labor and computer time" to comply did not impose an undue burden).

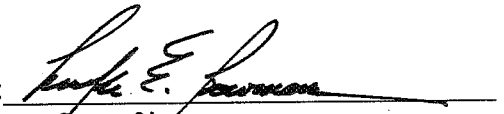
An important public dialogue is at stake. The Illinois legislature mandated the Pilot study in the expectation that it would shed light on whether to reform the procedures used in police lineups. The study was completed, but its findings are highly controversial. The uncontroverted evidence in the records of both of these cases shows that further inquiry into the legitimacy of those findings is stalled and cannot progress until researchers have the opportunity to review the full police files from the Pilot study investigations. The few dozen person hours that would be required to appropriately redact the records should not be permitted to stand in the way of furthering this important public dialogue. This court should reverse and direct the police departments to redact and produce the full police files from closed cases in the Pilot study database.

CONCLUSION

For the foregoing reasons, this court should enter an order reversing the decisions in both cases below and directing the Chicago Police and the Joliet Police to comply in full with NACDL's FOIA requests, subject only to those redactions that NACDL has agreed to accept.

Respectfully submitted,

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

By: 
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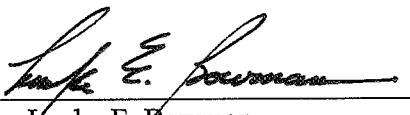
Consolidated Case No. 1-08-2073

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff-Appellant, v. CHICAGO POLICE DEPARTMENT, Defendant-Appellee.	Appeal from the Circuit Court of Cook County Chancery Division No. 07 CH 3622 The Hon. Mary Anne Mason Judge Presiding
	consolidated with
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff-Appellant, v. CHIEF OF THE JOLIET POLICE DEPARTMENT, Defendant-Appellee.	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County No. 07 MR 530 The Hon. Bobbi N. Petrungaro Judge Presiding

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 46 pages.



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