No. 127229

IN THE
SUPREME COURT OF ILLINOIS

CHARLES GREEN,

Plaintiff-Appellant,

v.

CHICAGO POLICE DEPARTMENT,

Defendant-Appellee.

Appeal from the Appellate Court of Illinois, First District
No. 20-0574
There heard on appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
No. 18 CH 8945
The Honorable Anna M. Loftus, Judge Presiding

BRIEF OF DEFENDANT-APPELLEE CHICAGO POLICE DEPARTMENT

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POINTS AND AUTHORITIES

NATURE OF THE CASE

In November 2015, Charles Green submitted a FOIA request to the Chicago Police Department ("CPD"), asking for all police officer complaint register ("CR") files. Those files date back to 1967. Earlier that year, in May 2015, the Circuit Court of Cook County had entered an injunction prohibiting CPD from releasing CR files that were more than four years old in response to any Freedom of Information Act request. CPD did not respond to Green's request within five days, which automatically constituted a denial under FOIA. The injunction was still in effect at that time. Green then filed this lawsuit. While Green's suit was pending in the circuit court, the appellate court vacated the injunction that barred the release of CR files. The circuit court in Green's case then found that CPD did not improperly withhold the CR files that were from 2011 and before because the injunction barred their production, but ordered CPD to produce those records nonetheless because the injunction was lifted during the pendency of Green's suit. The appellate court reversed, on the ground that the circuit court erroneously ordered the release of records that were not improperly withheld at the time the FOIA request was denied. No questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the circuit court had authority under FOIA to order the release of CR files that CPD did not improperly withhold at the time Green's

FOIA request was denied.

2. Whether CPD may assert that Green's request is unduly burdensome.

JURISDICTION

On January 10, 2020, the circuit court entered an order requiring CPD to produce all CR files from 1967 to 2011. C. 866-67; A24-25.[1] Green's claim for attorney's fees remained outstanding, C. 873, and on March 16, 2020 the circuit court entered an order pursuant to Ill. Sup. Ct. R. 304(a) that there was no just reason to delay an appeal of the court's January 10, 2020 order, C. 966-67. CPD filed a notice of appeal on March 25, 2020. C. 969-70. The appellate court issued an opinion reversing the circuit court's judgment on March 31, 2021. Green filed a petition for leave to appeal on May 5, 2021, which this court allowed on September 29, 2021. This court has jurisdiction pursuant to Ill. Sup. Ct. R. 315.

STATUTORY PROVISIONS INVOLVED

Section 3(d) of FOIA, 5 ILCS 140/3(d):

> Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. Denial shall be in writing as provided in Section 9 of this Act. Failure to comply with a written request, extend the time for response, or deny a request

[1] The record consists of the common-law record, which we cite as "C. __," and the report of proceedings, which we cite as "R. __." We cite Green's brief and the appendix to his brief as "Green Br. __" and "A__," respectively.

> within 5 business days after its receipt shall be considered a denial of the request. A public body that fails to respond to a request within the requisite periods in this Section but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies. A public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g).

Section 3(g) of FOIA, 5 ILCS 140/3(g), in pertinent part:

> Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any public body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.

Section 11(d) of FOIA, 5 ILCS 140/11(d):

> The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access. If the public body can show that exceptional circumstances exist, and that the body is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

STATEMENT OF FACTS

In 2014, the Chicago Tribune and the Chicago Sun-Times submitted FOIA requests to CPD seeking certain information relating to complaints

dating back to 1967 against Chicago police officers. Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago ("FOP I"), 2016 IL App (1st) 143884, ¶ 4. The Fraternal Order of Police ("FOP") sued to enjoin the release of the requested information. Id. ¶ 5. At the same time, FOP and the City were engaged in two arbitrations of grievances claiming the City violated the union's collective bargaining agreement by failing to destroy "records of alleged police misconduct once the records reach a certain age." Id. ¶¶ 5, 12 n.4. FOP's suit for an injunction included claims that releasing the information the newspapers requested would interfere with arbitration, and that the Illinois Personnel Record Review Act barred the release of information that was more than four years old. Id. ¶ 5. On December 19, 2014, the circuit court enjoined the City and CPD from releasing responsive information that was more than four years old as of the time of the Tribune and Sun-Times requests. Id. ¶¶ 9-10; C. 439-42. Then, on May 27, 2015, the circuit court issued a second injunction, which prohibited CPD from responding to any FOIA request by releasing CR files that were more than four years old at the time of the request. FOP I, 2016 IL App (1st)143884, ¶ 13; C. 443-44. The City and CPD brought interlocutory appeals challenging both injunctions. FOP I, 2016 IL App (1st) 143884, ¶¶ 11, 13.

On November 4, 2015, an arbitrator presiding over one of FOP's grievances issued an award "ordering the City to purge its online system of records of police misconduct investigations and discipline more than five

years old." FOP I, 2016 IL App (1st) 143884, ¶ 14. The City petitioned the circuit court to vacate that award, and the case was assigned to the same judge who was presiding over FOP's suit to enjoin the release of CR files in response to FOIA requests. Id. ¶ 18.

On November 18, 2015, while the injunction against releasing CR files that were more than four years old was in effect, Green submitted a FOIA request to CPD in which he sought "any and all closed complaint register files that relate to Chicago Police Officers." C. 21 (internal quotation marks omitted). CPD did not respond to Green's request within five days, see C. 89, which under FOIA constitutes a denial, 5 ILCS 140/3(d). Green then filed a complaint in the circuit court alleging that CPD "violated FOIA by failing to respond to" his request. C. 23. Green asked the court to declare that CPD "has violated FOIA" and order CPD to produce the records he requested. C. 23. CPD answered on February 18, 2016, and asserted an affirmative defense that "an order this Court entered on May 27, 2015" barred CPD from releasing CR files that were more than four years old. C. 92. The affirmative defense further specified the name and number of the case in which the May 27, 2015 order arose. Id. Over the next several months, the circuit court held status hearings and entered orders continuing Green's FOIA suit. C. 98-112.

On July 8, 2016, while Green's suit was pending, the appellate court vacated the injunctions in the FOP litigation. FOP I, 2016 IL App (1st) 143884, ¶ 55. The court reasoned that any arbitration award requiring the

City to destroy police disciplinary records "would violate the FOIA as well as the public policy underlying the General Assembly's adoption of the Act." Id. ¶ 32. This court subsequently denied FOP's petition for leave to appeal. Fraternal Order of Police v. Chicago Police Sergeants Association, 60 N.E.3d 872 (Ill. 2016). The sole remaining claim in that case related to information in CR files pertaining to off-duty conduct, and the circuit court dismissed that claim on October 6, 2017. Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago, 2019 IL App (1st) 172796-U, ¶ 12.

Also while Green's suit was pending, the arbitrator presiding over FOP's other grievance entered an award requiring the City to destroy disciplinary records pursuant to the union's collective bargaining agreement. City of Chicago v. Fraternal Order of Police ("FOP II"), 2020 IL 124831, ¶¶ 13-16. The City petitioned the circuit court to vacate the award, and in October of 2017 the court granted the City's petition on the ground that the award violated public policy favoring the retention of government records. Id. ¶ 21. The appellate court affirmed, id. ¶ 23, and this court subsequently affirmed the appellate court's judgment, id. ¶ 52.

After the series of status hearings and continuances in Green's suit, the circuit court entered an order on January 10, 2018, setting a briefing schedule for a dispositive motion by CPD. C. 113. CPD then moved for partial summary judgment and argued that, pursuant to the injunction in the FOP litigation, it properly withheld CR files that were more than four years

old as of the time of Green's request, dating back to 1967. C. 127. CPD further acknowledged that it must produce the newer CR files that were not covered by the injunction. Id. CPD also stated that it waived its ability to treat Green's request as unduly burdensome because it did not respond to the request within five days. Id. Under FOIA section 3(d), "[a] public body that fails to respond to a request received may not treat the request as unduly burdensome under subsection (g)." 5 ILCS 140/3(d).

At a July 25, 2018 hearing on CPD's motion for partial summary judgment, the presiding judge explained that he issued the injunction in the FOP litigation, and that he "put [Green's case] together with the FOP litigation because it seemed to [him] that [his] injunction obviously affected the Green case." C. 254. The court further commented on the procedural complexity of the case:

> It's messier, in part, because it's my fault. Instead of managing all these litigations on a current, ongoing basis and trying to figure out in my own head what the relation was between each litigation and all of the other litigations, I put them together and figured that we would try to work them out. And then the appellate court took a hammer to the whole business, which made my life simpler in the short run but didn't do anything to resolve the pieces. So I am not willing to penalize the City for what was arguably a management error by me. I am also not willing to penalize Mr. Green for having made what turns out to have been a perfectly good FOIA request that still hasn't been fully responded to.

C. 268.

The court also stated that where a court order bars the release of records in response to a FOIA request, "the existence of the court order

means that the municipality has not wrongfully refused to produce the records." C. 244. In the context of Green's case, the injunction against the release of CR files meant that "the City did not act wrongfully by failing to produce complaint register files which were more than four years old as of the date of Mr. Green's request." C. 275-76. The injunction was "not, however, a complete defense," because it did not apply to CR files that were newer than four years old. C. 276. The court added that it had "not made a determination as to whether . . . a proper method of dealing with all of this type of situation is to require the requester to file a new request." C. 279. The court stated that it "lean[ed] against this," adding that "until the lawsuit goes away, [the court] can't say that [Green] has given up his demand." Id.

At the conclusion of the hearing, the court entered an order stating: "The court finds that at the time of Mr. Green's request, CPD did not act wrongfully by failing to produce complaint register files older than four years from the date of his November 18, 2015 FOIA request." C. 199. The court also ordered the parties "to confer about a schedule for production of files not subject to the injunction." Id. After a subsequent status hearing on September 19, 2018, the court ordered CPD to produce CR files from 2011-2015 by December 31, 2018. C. 200.

Between November 19, 2018 and February 7, 2019, the parties briefed cross-motions for summary judgment that addressed, among other things, whether CPD violated FOIA by withholding CR files that were subject to the

FOP injunction at the time of Green's request. C. 201-11; C. 299-307; C. 316-21; C. 324-26. CPD did not produce CR files from 2011 to 2015 by the court's December 31, 2018 deadline, and on March 11, 2019, Green filed a motion to compel the production of those records. C. 328-32.

The circuit court conducted a hearing on the parties' motions on April 5, 2019. R. 2. CPD acknowledged that it had "gone over time" by missing the court's December 31, 2018 deadline. R. 11. CPD explained that it had hired an outside vendor to review and redact the CR files, but that the vendor did not "do an extremely thorough job" of redacting the names of crime victims and complainants. R. 6. To protect those individuals' identities, attorneys for CPD had "to go through and fix the redactions." Id. Counsel was "personally working around the clock on trying to get this done." R. 7.

With respect to the older CR files, which were covered by the since-vacated FOP injunction, CPD cited the court's previous finding "that CPD did not act wrongfully by failing to produce" those files. R. 20. CPD argued that under section 11(d) of FOIA, a court has jurisdiction to enjoin only those records that a public body "improperly withheld." R. 23. Accordingly, the court could not order CPD to produce those CR files. R. 24. In response, the court stated that it would "be inclined to agree that [CPD] can't be sanctioned for not producing something that [CPD was] not wrongfully withholding." R. 44. But the court disagreed that a public body has "an absolute exemption on having to produce the information" when "the initial withholding was not

wrongful." Id.

The court then stated that it was "inclined to think that a FOIA response calls for what it calls for on the day it is made and should be addressed in the statutory framework as of the day it is made." R. 48. Additionally, the court stated it "decline[d] to" impose on public bodies "an ongoing duty to supplement the response in light of changed circumstances." R. 47-48. The court added that "[o]n the other hand, where a FOIA request is responded to by withholding information because of an existing court order, it does not make a great deal of sense . . . that the withholding continues after the court order has ceased to exist." R. 49. The court also expressed its view, based on prior representations that the City intended to create a portal of CR files, R. 5, that "the City has bowed to necessity by creating . . . a portal, which will in the fullness of time make available all the CRs," R. 50. Given that, the court believed there was no reason for the City to "tell Mr. Green that he can't have access to it and requiring Mr. Green to file a new FOIA request in order to get access." Id.

The court ordered the parties "to confer and submit [a] proposed court order on [a] schedule for production of materials sought by Mr. Green's FOIA request by May 13, 2019." C. 349. The court also continued Green's motion to compel until May 15, 2019, id., pursuant to its observation at the hearing that it would not immediately try to resolve the parties' factual disagreement over whether CPD had acted diligently to produce the CR files from 2011-

2015, R. 54. The court also continued the parties' cross-motions for summary judgment until May 15, 2019. C. 349. The court predicted that it would "end up granting in part both motions," but not before it better understood "the practicalities." R. 58-59.

CPD then filed a motion for reconsideration in which it argued that the court's April 5, 2019 order was based on a factual misunderstanding that CPD had already pledged to release all CR files through an online portal. C. 353. CPD further argued that the court was under the misapprehension that CPD would not give Green access to the portal containing CR files unless he filed a new FOIA request. C. 358. CPD reiterated its position that "because it was enjoined from producing any CR files from prior to 2011 at the time the request was made in November 2015, it can only be compelled to produce records from 2011 through 2015." Id. On May 15, 2019, the court issued an order that the parties "meet and confer and file the production schedules ordered on April 5, 2019 no later than May 29, 2019." C. 449. The parties met and conferred on May 22, 2019, C. 840, but did not come to an agreement on a production schedule. Green filed a second motion to compel on May 29, 2019. C. 450.

The parties met and conferred again in June of 2019, C. 843, and CPD inquired whether Green would be willing to narrow the scope of his request, R. 160-61. CPD sought to limit the production to CR files "of high public interest," such as those dealing with "force complaints," as opposed to those

that arose from minor incidents such as dress code violations. R. 160. Green, who was convicted of murder in 1986, C. 20, and later released from prison, made clear that he was using his FOIA request and "the millions of dollars [his] case winds up costing" as leverage to motivate the City to support his claim of innocence, C. 844. Green stated that he would not narrow his request unless the City "aided [him] in having his conviction overturned, and obtaining a certificate of innocence." C. 843. In particular, Green wanted the City to "use its influence on the Cook County State's Attorneys' Office to convince prosecutors to undo [his] conviction." C. 846. Alternatively, Green asked for the City's "support for [his] petition for an innocence pardon and . . . in his criminal court case," with "an admission" that he "is likely innocent." Id. The parties met again in July 2019 to discuss Green's proposal, C. 724, but they did not come to an agreement.

In August 2019, CPD proposed narrowing Green's request so that CPD would produce "the summary digest reports of the complaint registers for 2005-2015." C. 852. Green rejected that proposal. Id. He also stated that he was "[h]appy to continue to discuss compromise" and that "there may be areas of irrelevant information of no public interest [he] would consider excluding from the production." Id.

On August 28, 2019, the court ordered CPD to "file two production schedules by September 16, 2019." C. 466. One schedule was to be "for the undisputed files," and it would be binding on CPD. Id. The other was "for

the disputed files" – those from 1967 to 2011 – and it "shall not be binding on CPD." Id. The presiding judge subsequently retired from the bench, C. 859; A17, without having ruled on the parties' cross-motions for summary judgment.

On September 16, 2019, CPD submitted two production schedules to Green. For the undisputed CR files, CPD anticipated completing the production by June 30, 2021. C. 471. For the disputed CR files, CPD anticipated that it would "begin this production at the end of 2021, and complete the production by 2030." Id.

The new presiding judge held a hearing on November 22, 2019. R. 71. CPD reiterated its position that it should not be ordered to produce CR files from before 2011. R. 85-86. Additionally, CPD brought to the court's attention the recent appellate court decision in Kelly v. Village of Kenilworth, 2019 IL App (1st) 170780, and noted that the court in that case allowed the public bodies to assert FOIA's exemption for unduly burdensome requests for the first time on remand. R. 96-97. According to CPD, Kelly would allow CPD to assert that exemption for the portion of Green's request seeking CR files from before 2011. R. 99. CPD did not challenge its obligation to produce CR files from 2011 to 2015. Id.

Later, on December 4, 2019, CPD filed a status report addressing the CR files from 2011 to 2015. C. 566-68. As of that date, CPD had produced 2,130 CR files to Green, and 27,604 CR files remained. C. 566-67. CPD

anticipated that it could produce approximately 3,000 CR files per month. C. 567. CPD also included its vendor's estimate that it would cost $740,600 to produce all the CR files from 2011-2015. C. 583.

On January 10, 2020, the court issued an omnibus order on the parties' pending motions. C. 858-67; A16-A25. The court granted Green's motion for summary judgment and ordered CPD to produce the CR files from 1967 to 2011 by December 31, 2020. C. 866; A24. According to the court, "once the FOP injunction was lifted, CPD no longer had a valid defense to withholding the CR files that were more than four years old and, without that defense, CPD must comply with FOIA." C. 861; A19. The court also deemed Kelly "of limited application here" and determined that "CPD forfeited its right to raise an undue burden exemption." C. 862; A20.

With respect to the CR files from 2011 to 2015, the court "order[ed] CPD to produce no fewer than 3,000" CR files per month until the production is complete. C. 866; A24. Last, the court issued a $4,000 civil penalty against CPD based on its finding that CPD willfully and intentionally violated the court's September 2018 order to produce all 2011-2015 CR files by December 31, 2018. C. 864-66; A22-A24. Green's request for attorney's fees remained outstanding, C. 873, and the court subsequently granted CPD's request for a finding pursuant to Ill. Sup. Ct. R. 304(a) that there was no just reason for delaying appeal of the January 10, 2020 order, C. 966. The court also granted CPD's request for a stay on the production of the CR files from

1967-2011. Id.

The appellate court reversed. Green v. Chicago Police Department, 2021 IL App (1st) 200574, ¶ 30; A11. The appellate court explained that the circuit court's authority under FOIA to order the production of the 1967-2011 CR files depends on whether those records were "'improperly withheld.'" Green, 2021 IL App (1st) 200574, ¶ 21 (quoting 5 ILCS 140/11(d)); A8. In turn, the question whether CPD had improperly withheld those records hinges on "the point in time at which a court should evaluate the propriety of a public body's decision to withhold documents." Green, 2021 IL App (1st) 200574, ¶ 22; A8. Drawing on cases interpreting the federal FOIA, the appellate court observed that "[c]ourts confronting this issue have overwhelmingly considered whether the documents requested were improperly withheld *at the time the decision to withhold was made*." Id. The appellate court therefore examined whether CPD's withholding of the 1967-2011 CR files was proper "as of November 2015." Green, 2021 IL App (1st) 200574, ¶ 24; A9. At that time, "CPD was required to obey the May 2015 injunction and could not release the 1967-2011 CR files." Green, 2021 IL App (1st) 200574, ¶ 26; A10. Accordingly, CPD did not improperly withhold those records, and the circuit court erred by ordering their production. Id. The court did not decide "whether the [circuit] court also erred in refusing to allow the CPD to belatedly raise FOIA's undue burden exemption." Green, 2021 IL App (1st) 200574, ¶ 28; A11.

The dissenting justice disagreed with a result that would require Green to file a new FOIA request after the injunction was lifted, which would delay production of records to Green and allow CPD to assert an exemption it failed to raise in response to his original request. Green, 2021 IL App (1st) 200574, ¶ 33 (Delort, J., dissenting); A12. The dissent would have affirmed the judgment on the ground that Illinois FOIA includes a statement of legislative intent, whereas the federal FOIA does not. Green, 2021 IL App (1st) 200574, ¶ 37 (Delort, J., dissenting); A14.

ARGUMENT

Green's FOIA request sought records that CPD could not release without violating a court order. It is uncontested that under those circumstances, at the time it denied Green's FOIA request, CPD did not improperly withhold the CR files. As the appellate court correctly held, under FOIA, courts lack authority to order production of records that were not improperly withheld at the time the public body denied the request. Thus, CPD may not be ordered to produce the records. The appellate court's judgment should be affirmed.

At a minimum, CPD should have the opportunity to assert that Green's exceedingly broad request was unduly burdensome, despite CPD's missing FOIA's five-day window to respond to the request. Producing all the CR files Green has requested would take nearly 10 years and cost the City millions of dollars, and Green has refused CPD's reasonable proposals to

narrow his request. FOIA should not be interpreted to impose an absurd and unjust outcome.

These two issues – whether, under FOIA, CPD may be ordered to release the 1967-2011 CR files, and whether CPD may assert that Green's request was unduly burdensome – present questions of statutory interpretation. This appeal also arises from the circuit court's grant of summary judgment in favor of Green. This court reviews questions of statutory interpretation, as well as grants of summary judgment, de novo. Stern v. Wheaton-Warrenville Community Unit School District 200, 233 Ill. 2d 396, 404 (2009). The court should affirm the appellate court's judgment, or in the alternative, remand the case to the circuit court so that CPD may assert FOIA's unduly burdensome exemption.

I. COURTS LACK AUTHORITY UNDER FOIA TO ORDER PRODUCTION OF RECORDS THAT THE PUBLIC BODY DID NOT IMPROPERLY WITHHOLD AT THE TIME IT DENIED THE FOIA REQUEST.

When the General Assembly enacted FOIA, it provided that any person who is denied access to records may sue for declaratory or injunctive relief. 5 ILCS 140/11(a). The statute also contains a clear limitation on the circuit court's power: the "court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access." 5 ILCS 140/11(d). Where, as here, the General Assembly creates a justiciable matter, it "may define it in such a way as to limit or preclude the circuit

court's authority." In re A.H., 195 Ill. 2d 408, 416 (2001). When the "court's power to act is controlled by statute, the court must proceed within the strictures of the statute, and may not take any action that exceeds its statutory authority." People ex rel. Devine v. Stralka, 226 Ill. 2d 445, 454 (2007). Thus, pursuant to section 11(d), the circuit court is powerless to order the production of records that were not "improperly withheld."

Here, the circuit court found that CPD did not "wrongfully" withhold CR files that were more than four years old at the time of Green's request. C. 199; see also C. 275-76. Green ignores this finding in his opening brief, but without question, the court was correct on this point. At the time that CPD constructively denied Green's request, an injunction in the FOP litigation barred the release of such records. C. 443-44. As this court has explained, "a lawful court order takes precedence over the disclosure requirements of FOIA." In re Appointment of Special Prosecutor, 2019 IL 122949, ¶ 66. Thus, when a public body withholds documents pursuant to a lawful court order, the public body does "not 'improperly withhold' the requested documents within the meaning of section 11(d) of FOIA." Id. ¶ 68 (quoting 5 ILCS 140/11(d)). So here, CPD did not improperly withhold the CR files at issue when it constructively denied Green's request.

In addition, as the appellate court correctly decided, the propriety of a withholding is judged as of the time of the public body's response to a FOIA request, and not at some later date. As we now explain, that is consistent

with the text, structure, and purpose of the statute, and with cases interpreting the FOIA statutes of other jurisdictions.

A. The Appellate Court's Holding Is Consistent With FOIA's Text, Structure, And Purposes, While Green's Proposed Rule Is Not.

To begin, section 11 of FOIA makes clear that a FOIA suit requires the circuit court to review the public body's prior decision to withhold records. The statute provides a right of action to anyone who has been "denied access to inspect or copy any public record." 5 ILCS 140/11(a). Green acknowledges that the court's role is to "review" the public body's withholding. Green Br. 21. Thus, the circuit court's task is necessarily a backward-looking inquiry into the propriety of the public body's response.

The appellate court's holding is consistent other aspects of FOIA as well. The statute provides for prompt responses to requests by giving a public body five business days to respond or obtain an extension of up to an additional five business days, and by providing that a failure to respond in that time frame constitutes a denial. 5 ILCS 140/3(d), (e), (f). If the propriety of a withholding is judged at the time of the denial, that allows public bodies to respond with finality to each request, enabling them to move more quickly through the FOIA queue and process other requests, consistent with FOIA's short window for responding.

Likewise, the appellate court's holding advances FOIA's goal of prompt resolution of litigation arising from a denial. "Except as to causes the court

considers to be of greater importance," a FOIA suit "shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way." 5 ILCS 140/11(h). It supports this goal of speedy resolution of FOIA suits to evaluate the public body's response as of the time it was made. Under that rule, a circuit court can review and decide right away whether the public body improperly withheld records.

Green's proposed rule would undermine all these purposes. It would encourage a FOIA suit to linger on the theory that if it pends long enough, something could happen that could allow the court to conclude that as of that moment in the litigation, the records are being improperly withheld. This clashes with FOIA's command that these cases be "expedited in every way." Indeed, Green laments that his case has taken years to litigate, e.g., Green Br. 16-17, even though the delay in this case is largely attributable to the circuit court's erroneous belief that developments in the FOP litigation affected the merits of Green's FOIA suit. The circuit court even acknowledged that it made the case "messier" by tying it up with the FOP litigation. C. 268. But that is the rule that Green purports to advance.

Relatedly, Green complains that the appellate court's "decision would require Green to file a brand new FOIA request and restart the months- or even years-long FOIA process, all because the Preliminary Injunction was briefly in effect after Green filed his request." Green Br. 24. This only

exposes Green's own failure to take action. CPD's answer to Green's FOIA complaint, C. 85, filed just three months after he submitted his request, C. 21, informed Green that that the FOP injunction barred CPD from releasing the records he requested, C. 92. The answer even provided the circuit court case name and number in which the injunction arose. Id. As Special Prosecutor holds, when an injunction bars the release of records, a FOIA "requester must first have the court that issued the injunction modify or vacate its order barring disclosure." 2019 IL 122949, ¶ 67. A "collateral attack" on an injunction in the form of a FOIA suit is "impermissible." Id. Thus, it was Green's responsibility to seek the injunction's vacatur. He did not do that.

Of course, *CPD* was doing that. CPD, in fact, was the party that succeeded in vacating the injunction in the FOP litigation. FOP I, 2016 IL App (1st) 143884, ¶ 55. It would not have been difficult or burdensome for Green to keep track of the proceedings on the injunction and immediately submit a new FOIA request once the injunction was vacated and allow that new request to be processed in the ordinary course. Nothing required Green to wait through the circuit court proceedings or the appellate court decision. For all these reasons, Green's accusations of delay by CPD ring especially

hollow.[2] And in the end, the duration of Green's case and the reasons for any delay do not bear on whether FOIA authorized the circuit court to order the production of records that were not improperly withheld in the first instance. FOIA does not grant that authority, as we have explained, so the appellate court should be affirmed. There is no basis in FOIA to fashion an equitable remedy simply because a FOIA suit has remained pending for a long time.

Another problem with Green's proposed rule, whereby a court must assess the propriety of a withholding as of the time the court renders a decision in a FOIA lawsuit, Green Br. 21, is that it would obligate public bodies to update a withholding that was proper when made. FOIA contains no language suggesting that once a public body properly withholds records, it has a continuing duty to monitor and update its response if circumstances happen to change at some indefinite point in the future. Courts may not read language into a statute that the General Assembly did not include. People v. Hommerson, 2014 IL 115638, ¶ 13.

Nor would such a rule advance FOIA's purposes. There would be no finality and proceedings would be drawn out. Public bodies would need to monitor subsequent developments and update their responses accordingly.

[2] Contrary to Green's assertion that the appellate court's ruling "rewarded" delay, Green Br. 26, a public body gains nothing when a case remains pending even though a justification for dismissal is apparent. As we have explained, the appellate court's holding promotes the prompt resolution of FOIA suits by making the propriety of a withholding ascertainable from the outset, whereas Green's proposed rule only drags them out.

This could include not only monitoring the status of injunctions or protective orders, but of any number of other matters prohibiting the records' release at the time of the FOIA response. For example, a public body may deny FOIA requests where the records concern an ongoing investigation, 5 ILCS 140/7(d)(vii); under Green's rule, the public body would need to monitor those investigations and potentially update its response if the investigation were later closed. Still other exemptions expressly apply only for a limited period of time. E.g., 5 ILCS 140/7(1)(r) (exempting "[t]he records, documents, and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated"). Green's rule would require public bodies to monitor and update all of these responses as well, when they inevitably become out-of-date.

And this burden would last for years. FOIA does not provide a limitations period for suits to obtain declaratory or injunctive relief, see 5 ILCS 140/11, so Illinois' general five-year limitations period applies, 735 ILCS 5/13-205. Thus, Green would have public bodies monitor and update a proper withholding for five years, or else face a FOIA suit claiming that a withholding has become improper with the passage of time. Such a rule would substantially burden public bodies, such as CPD, that receive tens of thousands of requests per year, many of which involve records that are tied up in other litigation or otherwise exempt. The devastating tax on the public body's resources would, in turn, slow the overall processing of requests.

Critically, Green's proposed rule would also encourage the perverse result that a requester could prevail in a FOIA suit, thus entitling the requester to fees and costs, even though the public body properly withheld records when it responded to the request. FOIA provides that "[i]f a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorney's fees and costs." 5 ILCS 140/11(i). It would be incongruous and unfair for a public body to properly withhold records at the time of a denial, and yet nevertheless be subjected to a costly fees and costs award because circumstances changed months or years later. Such an award would necessarily be premised on the public body's failure to supplement a response that was proper at the time it was made. But as we have explained, FOIA imposes no such duty. Imposing a fee award for failing to perform an act that the statute does not require would be absurd. A statute should not be interpreted to achieve an absurd result. E.g., Kelly, 2019 IL App (1st) 170780, ¶ 29.

B. The Statutory Provisions Green Relies On Do Not Support Evaluating A Withholding "At The Time Of The Court's Decision."

In the appellate court, Green's argument that CPD improperly withheld the CR files at issue rested on the notion that the FOP "injunction was void and did not have to be obeyed" from the start. Green, 2021 IL App (1st) 200574, ¶ 27; A11. The court rejected that argument, id., and Green has

abandoned it. Now, for the first time, he asserts that FOIA's plain language commands courts to evaluate a withholding "as of the time of the court's decision." Green Br. 21. But the statutory provisions on which Green relies, id. at 19-28, do not support that newfound contention. Some are irrelevant. For example, Green considers it noteworthy that a circuit "'court may retain jurisdiction and allow the agency additional time to complete its review of the records,'" if the public body establishes that it "'is exercising due diligence in responding to the request.'" Green Br. 21 (quoting 5 ILCS 140/11(d)). But this language merely allows a circuit court to grant a public body additional time to respond to a request under certain circumstances. It does not authorize the circuit court to deem the public body's response improper if circumstances change after the public body issues its response.

Green also relies on FOIA's provision for "de novo" review of the public body's response. Green Br. 23 (citing 5 ILCS 140/11(f)). But that merely instructs the circuit court to review a public body's withholding without granting any deference to the public body's reasoning. Thus, a reviewing court may consider justifications for a withholding that the public body did not assert in a denial letter. Kopchar v. City of Chicago, 395 Ill. App. 3d 762, 769 (1st Dist. 2009). But contrary to Green's argument, Green Br. 22, de novo review does not authorize a court to order the disclosure of records when the public body did not improperly withhold them in the first instance.

Along similar lines, Green cites the language in section 11(f) that

comes after the provision for de novo review, which provides that a circuit court "'shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld.'" Green Br. 22 (quoting 5 ILCS 140/11(f)) (emphasis omitted). This describes the review process. It does not suggest that the court is evaluating anything other than the original denial. If the court agrees with the denial, the records in question "may be withheld" pursuant to the court's ruling; otherwise, they must be produced.

Likewise, Green's reliance on the word "is" in section 11(f), Green Br. 23, gets him nowhere. This portion of the statute provides that the public body has the burden to establish "that its refusal to permit public inspection or copying is in accordance with" FOIA. 5 ILCS 140/11(f). When a public body is in court after having denied a FOIA request, it is still refusing to permit public inspection based on its original denial. Thus, a public body successfully establishes that its response "is" in compliance with FOIA by establishing that it properly withheld the records in the first instance. In other words, if a public body's response is proper when made, it "is" proper at the time of the circuit court's subsequent review.

Green also invokes FOIA's statement of public policy and legislative intent, Green Br. 23-28, like the dissenting justice in the appellate court did, Green, 2021 IL App (1st) 200574, ¶¶ 34-38 (Delort, J., dissenting); A12-A14, but that reliance is misplaced. For example, Green draws attention to

FOIA's emphasis on "efficiency and speed" in the resolution of FOIA requests. Green Br. 24. But as we have explained, it promotes the prompt resolution of FOIA disputes for circuit courts to examine whether the public body's withholding was correct when made. The alternative, which Green urges, encourages cases to linger, on the chance that the justification for the withholding will eventually go away. Green's proposed rule would also impose on public bodies a duty to monitor and update their prior responses, and that additional burden would hamper their ability to respond to other requests promptly, as we have also explained.

Elsewhere, Green relies on FOIA's statement of policy to argue that the appellate court's holding "[e]xcus[es]" public bodies from their disclosure obligations, Green Br. 25, but that is not accurate. Upon receiving a request, a public body fulfills its obligations under FOIA by producing or withholding the records in question in accordance with the law. When a withholding is proper, FOIA does not impose any duty to update a response if circumstances happen to change at some indefinite point in the future.

Green also argues that the appellate court's ruling undermines FOIA's provision that a public body "'may not treat the request as unduly burdensome'" when it does not respond to a request, because CPD could assert that exemption if Green were to submit a new request now that the injunction is lifted. Green Br. 25 (quoting 5 ILCS 140/3(d)); see id. at 15 (appellate court's ruling "wrongfully rewards CPD for flouting its FOIA

responsibilities"). Green's focus on CPD's ability to assert that exemption in response to a new request is a red herring. If, as the appellate court correctly held, the propriety of a withholding is evaluated at the time of the denial, and here, the withholding was proper at that time because of the injunction, that should have been the end of the matter. In other words, the unduly burdensome exemption should have been unnecessary in response to the present request, because most of the request was undisputedly barred by an injunction and CPD agreed to produce the rest. The case should therefore have been promptly dismissed.

More important, it would not undermine any provision of FOIA to allow CPD to assert a plainly applicable exemption to a new FOIA request by Green. Instead, it would precisely serve FOIA's purposes to allow assertion of the unduly burdensome exemption in response to a single FOIA request that seeks more than 40 years of records that would take nearly ten years and cost millions of dollars to complete. See C. 471, C. 566-68, 583.[3]

Green's complaints about how CPD handled this particular FOIA

[3] These estimates are extrapolated from CPD's production of the 2011-2015 CR files, which amounted to nearly 300,000 pages and cost nearly $750,000. C. 583. That was for merely 4 years of CR files. The production at stake now is more than 40 years. Any given CR file could contain a dozen or hundreds of pages, plus various media including audio recordings of interviews, surveillance or other video, and photographs. Before production, each page, video, or recording must be reviewed for private and personal information (like social security numbers, medical information, dates of birth), and redactions must be made to protect the privacy of complainants, witnesses, and informants. And all of this effort would be to respond to *one* of thousands of FOIA requests CPD receives each year.

request also miss the mark because whatever analysis this court adopts will apply in all FOIA cases, not just this one. So, if accepted, Green's position that FOIA requires a response to be evaluated "as of the time of the court's decision," Green Br. 21, would apply to any public body even if it made an express denial that unquestionably preserved the unduly burdensome exception. Even in a case like that, under Green's rule, the public body would need to continually monitor its response and update it if circumstances changed that would allow production, or it will pay attorney's fees. In addition to being unfair and unworkable, that it not the law, as we have explained.

C. Special Prosecutor Does Not Support Green's Position.

Green's reliance on Special Prosecutor, Green Br. 30-33, is also misplaced. Special Prosecutor did not address the question presented here – whether a court should evaluate whether a withholding is improper as of the time the FOIA request is denied or as of some later date based on subsequent circumstances. Green acknowledges as much. Id. at 17. Green nevertheless asserts that "[i]f CPD's position were correct," Special Prosecutor "would have ordered the case dismissed on the ground that the protective order pending at the time of the request deprived the Circuit Court of jurisdiction to consider the disclosure question – but the Court did no such thing." Id.

This makes no sense. The supreme court in Special Prosecutor addressed whether a public body "improperly withheld" records when it did

so on the basis of an active protective order. 2019 IL 122949, ¶ 68. The supreme court could not have ruled that the protective order "deprived the Circuit Court of jurisdiction to consider the disclosure question," because nothing in FOIA prevents a circuit court from "considering" that question. Rather, FOIA prohibits *ordering production* of records that were properly withheld. 5 ILCS 140/11(d). Indeed, Green injects this confusion throughout his brief, characterizing our position and the appellate court's as being that courts may not "rule" or "evaluate" whether records were improperly withheld, or may not "entertain" Green's action, "hear[ ]," or "adjudicate" a FOIA request. E.g., Green Br. 20, 30, 31; see also id. at 22 (arguing that improper withholding is not "prerequisite" to cause of action). This attempt at obfuscation should be rejected. FOIA states, and the appellate court held, under section 11(d), a circuit court may not *order production* of records that were not improperly withheld. Green, 2021 IL App (1st) 200574, ¶¶ 26, 28; A10-A11. Nothing about Special Prosecutor undermines that conclusion.

Next, contrary to Green's argument, Special Prosecutor's statements that an "injunction must be obeyed . . . until it is modified or set aside by the court itself or reversed by a higher court," 2019 IL 122949, ¶ 64, and that a requester could "have the court that issued the injunction modify or vacate its order barring disclosure," id. ¶ 67, do not say anything about the authority of a circuit court to order a public body to produce records that were not improperly withheld at the time the FOIA request was denied. Green Br. 31.

Special Prosecutor is silent on that issue. The quoted statements instead refer to the public body's obligation when responding to a FOIA request for records covered by an injunction. The public body must obey the injunction and withhold the records, rather than produce the records in contempt of the court that issued the injunction. Special Prosecutor, 2019 IL 122949, ¶ 64. Here, CPD complied with that rule by withholding the CR files that the FOP injunction barred it from releasing. And after that, CPD rightly stood by its response throughout Green's FOIA suit.

Green's apparent concern that the appellate court's holding will give rise to "conflicting orders that require a public body to act in contempt of court," the "situation that *Special Prosecutor* expressly sought to avoid," Green Br. 32, is unfounded. As we have explained, the appellate court's rule empowers circuit courts to decide right away whether a public body's withholding was improper. Green's proposal, however, would let cases linger in court for long periods of time, thus creating more opportunity for courts in other cases to issue conflicting orders.

Moreover, Green's proposed rule would enable a public body to *prevail* in a FOIA suit even when it improperly withheld records at the time of the denial. That incongruous result would attach if, for example, a public body lacks a legal basis at the time of its denial, but a court subsequently enters an injunction prohibiting the release of the records at issue. Under Green's reading of FOIA, the injunction would render the withholding proper "as of

the time of the court's decision," Green Br. 21, thus requiring judgment in the public body's favor.

In sum, the appellate court's holding comports with FOIA and furthers the purposes of the statute. As we now explain, cases interpreting the FOIA statutes outside Illinois further bolster the appellate court's decision.

D. Case Law From Other Jurisdictions Supports CPD's Position.

"The General Assembly patterned FOIA after the federal FOIA," Special Prosecutor, 2019 IL 122949, ¶ 54, and thus "Illinois courts often look to federal case law construing the federal FOIA for guidance in construing FOIA," id. ¶ 55. Here, the appellate court's analysis of section 11(d) relied on federal case law interpreting federal FOIA. Green v. Chicago Police Department, 2021 IL App (1st) 200574, ¶¶ 22-23; A8-A9. That approach was correct, contrary to Green's insistence that "'key differences'" between the Illinois and federal statutes make reliance on federal cases improper. Green Br. 29 (quoting Kelly v. Village of Kenilworth, 2019 IL App (1st) 170780, ¶ 43). This court has already rejected the notion that section 11(d) "differs materially" from its federal counterpart, Special Prosecutor, 2019 IL 122949, ¶ 54 (internal quotation marks omitted), and Green does not attempt to argue otherwise. Rather, he urges a departure from federal case law on the ground that federal FOIA lacks a statement of legislative purpose akin to Illinois FOIA's, Green Br. 28-29, which supposedly means that federal courts have more "leeway" not to order disclosure, id. at 43. But that supposed

distinction would render federal FOIA case law irrelevant in every instance, even where the controlling substantive provisions of federal and Illinois FOIA are identical. Plainly, that is not the approach of courts in this State. Federal case law aids this court's interpretation of section 11(d).

One such case is Bonner v. United States Department of State, 928 F.2d 1148 (D.C. Cir. 1991). There, the State Department redacted or withheld various records in response to a series of FOIA requests. Id. at 1149. The Department also provided a representative sample of the redacted records so the district court could test the propriety of the redactions. Id. During the pendency of the requester's lawsuit, the Department voluntarily produced unredacted copies of some of the documents that were initially in the sample set, citing a "change in circumstances and the passage of time." Id. (internal quotation marks omitted).

On appeal, the requester argued that since a portion of the sample documents were released in full, that meant the same portion of the rest of the redacted documents should be released as well. Bonner, 928 F.2d at 1153. In particular, he took the position that since the federal FOIA provides for de novo review, a court should "determine whether a document is properly withheld or redacted as of the time of the court's review." Id. at 1152. The court rejected that argument. As the court explained, "FOIA judicial review, . . . while *de novo*, remains an assessment of the *agency* decision to withhold a document." Id. Accordingly, the agency's decision to withhold "ordinarily

must be evaluated as of the time it was made." Id. That rule comports with federal FOIA's "premium on the rapid processing of FOIA requests" and avoids "an endless cycle of judicially mandated reprocessing" based on events that arise after the agency makes its decision. Id.

The considerations that animated the Bonner decision apply here as well. Illinois FOIA, like its federal counterpart, calls for a court to consider de novo a public body's withholding of records. That does not mean that a court should decide whether the withholding is proper as of the time the court renders its decision. Rather, the court's role is to review the public body's decision. Thus, the court evaluates that decision from the time it was made. Moreover, the Illinois and federal versions of FOIA similarly put a premium on the prompt processing of requests, and the Bonner rule advances that purpose.

Contrary to Green's view, the Bonner rule is not limited to situations "where the agency has gone to great trouble to process potentially responsive records." Green Br. 37. Bonner was indifferent to the amount of work the agency put into its initial FOIA response. Rather, the court sought to avoid imposing a burden of updating a response based on "post-response occurrences." 928 F.2d at 1152. Thus, the court relieved agencies of that burden where the withholding is proper "when made." Id. at 1153. Green also highlights the agency's subsequent disclosure of certain records that it initially withheld, but that disclosure was voluntary, and not "necessary," as

he says. Green Br. 40. Indeed, the whole point of Bonner is that the agency would have been justified continuing to withhold those records, and any other records that became disclosable due to "post-response occurrences," provided that the withholding decision was proper "when made." 928 F.2d at 1152-53.

Additionally, Green is wrong to say that the appellate court read federal cases such as Bonner to impose "a *jurisdictional* limitation on the Circuit Court's ability to consider post-response events." Green Br. 37 (emphasis in original). Rather, the appellate court correctly cited Bonner as one of several federal cases that assessed the propriety of a withholding as of the time of the agency's response. Green, 2021 IL App (1st) 200574, ¶ 22; A8. The "limitation" in Bonner, as here, is on a court's authority to order the production of records that were not improperly withheld in the first instance. That was not merely "a *prudential* matter," as Green asserts. Green Br. 37 (emphasis in original). As Bonner explained, "[u]nless the State Department unlawfully withheld information in its prior responses, a court has no warrant to place Bonner at the head of the current State Department FOIA queue" by ordering the production of that information. 928 F.2d at 1153. So too here: unless CPD's withholding was improper at the time of its response, the circuit court had no warrant to order the production of the CR files at issue.

Lesar v. United States Department of Justice, 636 F.2d 472 (D.C. Cir. 1980), is also instructive. There, the agency withheld certain records on the

ground that they were classified pursuant to an executive order. Id. at 479. During the pendency of the requester's FOIA suit, a new executive order went into effect, and the requester argued that the new order should govern whether the records could be withheld. Id. The court rejected that argument, in part because the new executive order provided that records classified pursuant to previous orders retained their classified status. Id. at 480. The court further explained that to "remand whenever a new Executive Order issued during the pendency of an appeal would not only place a heavy administrative burden on the agencies but would also cause additional delays in the ultimate processing of these types of FOIA requests." Id.

Green attempts to distinguish Lesar on the ground that CPD "never responded to Green's request," Green Br. 41, but that is not a meaningful difference. As we have explained, a non-response constitutes a denial under Illinois FOIA. 5 ILCS 140/3(d). Thus, for purposes of the CR files at issue here, CPD's withholding is the same as it would have been had CPD sent Green a denial letter within FOIA's time frame for a response. Lesar and Bonner teach that when a denial is proper when made, a court should not subsequently order the production of the records in question.

Other federal cases similarly declined to deem a withholding of records improper based on events that transpired after the agency made its decision. E.g., Meeropol v. Meese, 790 F.2d 942, 959 (D.C. Cir. 1986) (refusing to evaluate an agency's withholding decision pursuant to standards that took

effect after the agency's withholding decision and explaining that "[t]he government cannot be expected to follow an endlessly moving target"); American Civil Liberties Union v. National Security Agency, 925 F.3d 576, 602 (2d Cir. 2019) (explaining that "[i]mposing a continuing duty on agencies to update their responses to FOIA requests renders . . . agencies vulnerable to repeated reprocessing requests mid-litigation").

Additionally, "[c]ases from other states concerning freedom of information may have persuasive force," Better Government Association v. Village of Rosemont, 2017 IL App (1st) 161957, ¶ 24, and the Michigan Supreme Court has interpreted that state's FOIA consistently with CPD's position here. In a case concerning the relevance of events that transpired after the public body withheld records, the court held "that unless the FOIA exemption provides otherwise, the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption." State News v. Michigan State University, 753 N.W.2d 20, 26-27 (Mich. 2008). The court's rationale applies equally here. As the court explained, a "public body relies on the information available to it at that time to make a legal judgment whether the requested public record is fully or partially exempt from disclosure." Id. at 27. A reviewing court's role is to determine whether the public body properly asserted an exemption, and "[s]ubsequent developments are irrelevant to that FOIA inquiry." Id. Moreover, Michigan's FOIA contains no language

"that requires a public body to continue to monitor FOIA requests once they have been denied." Id. Likewise, Michigan "FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure." Id. The same is true of Illinois FOIA.

Green cites federal cases, Green Br. 33-36, that he criticizes the appellate court for not "acknowledging," id. at 36, but he did not cite any of them before that court rendered its decision. In any event, none supports the outcome Green urges. Some involve the sufficiency of so-called Glomar responses, in which an agency neither confirms nor denies the existence of responsive records. See Florez v. Central Intelligence Agency, 829 F.3d 178, 181 (2d Cir. 2016). For example, in Florez, upon receiving a request for records relating to a former diplomat, the CIA issued a Glomar response citing national security concerns, and the district court granted summary judgment to the CIA. Id. While the appeal was pending, the FBI disclosed records pertaining to the diplomat. Id. The CIA reviewed the records and stood by its Glomar response. Id.

The Second Circuit remanded the case so that the district court could consider whether the Glomar response had been proper in light of the newly disclosed records. Florez, 829 F.3d at 189-90. In so ruling, the court acknowledged the "general rule that a FOIA decision is evaluated as of the

time it was made and not at the time of the court's review." Id. at 187 (internal quotation marks omitted). The court stated that it was departing from that rule because remand would not involve "judicially mandated reprocessing," in that the CIA had already reaffirmed its Glomar response on its own initiative. Id. at 188. Thus, Green is wrong to say that the court "required the CIA to re-review its FOIA responses," Green Br. 34; in fact, the agency had done that work already. Here, by contrast, Green seeks "judicially mandated reprocessing" in the form of a court order to produce records that CPD properly withheld at the time of its response.

Additionally, in Florez the FBI disclosures called into question whether the CIA's Glomar response was proper at the time it was made. The CIA premised its response on the notion that "the mere acknowledgement that it does or does not have" responsive records "would harm the national security." Florez, 829 F.3d at 185. As the court explained, the newly released documents bore on whether the original justification was plausible. Id. at 185-86. Here, by contrast, CPD's withholding was undisputedly proper at the time of the denial, because the FOP injunction barred the release of the CR files at issue.

Other cases on which Green now relies similarly involved government disclosures following FOIA withholdings premised on national security concerns. New York Times Co. v. United States Department of Justice, 756 F.3d 100 (2d Cir. 2014), involved requests for records pertaining to the

targeted killing of suspected terrorists. Id. at 104-07. The government acknowledged the existence of a responsive legal memorandum and withheld it on the grounds that it was privileged and classified. Id. at 105-06. The government otherwise generally declined to identify any allegedly classified responsive documents. Id. at 105-07. The government subsequently disclosed the legal analysis in the withheld memorandum and publicly commented on the targeted killing program. Id. at 110-11. The Second Circuit considered those "ongoing disclosures by the Government made in the midst of FOIA litigation," id. at 110 n.8, and concluded that the claimed exemptions were waived, id. at 116, 122. American Civil Liberties Union v. C.I.A., 710 F.3d 422 (D.C. Cir. 2013), is similar. There, the CIA's Glomar response to a request for records concerning drone strikes became untenable after government officials publicly acknowledged the intelligence community's involvement in targeted killings. Id. at 429-31. These cases do not support the rule Green proposes. While these courts found exemptions waived based on the government's own later disclosures, Green would compel disclosure based on *any* change in circumstances, even where the change is beyond the public body's control. Moreover, unlike the agencies that waived exemptions in New York Times and ACLU, CPD could not waive the effect of the FOP injunction. Indeed, CPD had no choice but to follow it.

Green cites other cases in passing, Green Br. 33, but those do not help him, either. In Powell v. United States Bureau of Prisons, 927 F.2d 1239

(D.C. Cir. 1991), the agency withheld a record and maintained that it was not segregable into portions that could be disclosed. Id. at 1242. While the appeal was pending, it was discovered that in a prior case, the agency disclosed portions of that same record. Id. at 1241. The court of appeals remanded the case to the district court because the disclosure contradicted the agency's assertion that the record could not be segregated. Id. at 1242-43. Thus, the discovery of the prior disclosure indicated that the agency's withholding was improper at the time of the response. That is not comparable to what happened here, as we have explained. And in Carlisle Tire & Rubber Co. v. United States Customs Service, 663 F.2d 210 (D.C. Cir. 1980), the court merely affirmed summary judgment for the requester with respect to records "already in the public domain." Id. at 219.

Other cases are even further afield. Green says that in Morgan v. United States Department of Justice, 923 F.2d 195 (D.C. Cir. 1991), the court determined that "if a sealing order in a separate case is lifted while FOIA litigation is pending, the agency must produce" responsive records, Green Br. 36. That is not correct. Morgan, too, evaluated whether a withholding was proper at the time it was made. There, an agency denied a FOIA request on the ground that the requested records had been placed under seal in a separate case, and the district court granted summary judgment to the agency. Morgan, 923 F.2d at 196. The court of appeals reversed and remanded to the district court with an instruction "to determine whether the

seal in fact prohibit[ed]" disclosure. Id. at 195. Thus, the issue in Morgan was the proper scope of the sealing order, which in turn determined whether the agency's withholding was proper at the time of its response. Here, by contrast, there is no question that the FOP injunction barred CPD from releasing the CR files at issue. Finally, National Security Counselors v. C.I.A., 898 F. Supp. 2d 233 (D.D.C. 2012), which Green also cites, Green Br. 36, concerned an agency's use of a cut-off date when searching for responsive records, National Security Counselors, 898 F. Supp. 2d at 282-83, which does not remotely resemble any issue at stake in this case.

For all these reasons, the appellate court rightly decided that cases interpreting federal FOIA overwhelmingly support the conclusion that the circuit court erred by ordering the production of records that CPD did not improperly withhold when it denied Green's request.

II. CPD SHOULD BE ALLOWED TO ASSERT THAT GREEN'S REQUEST IS UNDULY BURDENSOME.

Green's FOIA request sought every single CR file spanning 48 years. For the small fraction not covered by the FOP injunction – those from 2011 to 2015, or one-twelfth of the overall time period – the files consist of more than 290,000 pages, and cost $740,600 to review, redact, and produce. C. 583. CPD estimates that it would cost an additional $8 million to produce the CR files at issue in this case, and that such production would take approximately

10 years to complete. C. 471.[4]

FOIA provides an exemption for requests that are unduly burdensome, 5 ILCS 140/3(g), and Green's staggering request plainly fits that description. But because CPD did not respond to Green's request within five days, CPD initially took the position that it had forfeited that exemption pursuant to FOIA's provision that "[a] public body that fails to respond to a request received may not treat the request as unduly burdensome." 5 ILCS 140/3(d). Later, while the parties' motions for summary judgment were pending, CPD argued that should be allowed to assert that Green's request is unduly burdensome, citing new case law. C. 594-98. The circuit court rejected CPD's position and deemed the unduly burdensome exemption forfeited. C. 862. That was error. If this court does not affirm the appellate court's judgment, this case should be remanded to the circuit court for a determination whether Green's request is unduly burdensome.

In Kelly, the appellate court allowed public bodies to assert the undue burden exemption on remand, even though none had raised it up to that point. 2019 IL App (1st) 170780, ¶ 54. Kelly submitted requests for records to five different public bodies. Id. ¶ 1. As pertinent here, some responded with denials citing FOIA's exemption for records whose release would interfere with a law enforcement investigation or proceeding. Id. ¶ 5. One

[4] CPD derives its estimate of the cost to produce the disputed CR files from the cost of producing the CR files from 2011 to 2015.

public body did not respond at all. Id. None asserted that the request was unduly burdensome pursuant to section 3(g), id., but one did argue in its summary judgment motion that the file containing responsive records "could potentially require hundreds of hours to review, analyze and redact information," id. ¶ 9 (internal quotation marks omitted). In all, there were around 20,000 pages of responsive records. Id. ¶ 7.

The circuit court granted summary judgment to the defendants on the ground that there was an ongoing investigation. Kelly, 2019 IL App (1st) 170780, ¶ 16. The appellate court reversed, holding that the defendants had not established that the entire file was exempt. Id. ¶ 54. The court further noted that FOIA provides an exemption for unduly burdensome requests, but that the defendants "inexplicably failed to cite that exemption or comply with the corresponding statutory procedure" by giving Kelly an opportunity to narrow his request. Id. ¶¶ 40-41. Instead, the defendants "tried to obtain the benefits of section 3(g) without satisfying its burdens." Id. ¶ 42.

The appellate court nevertheless granted the defendants "the opportunity to raise a section 3(g) exemption upon complying with the procedures required by that statute" for the first time on remand. Kelly, 2019 IL App (1st) 170780, ¶ 54. Critically, that opportunity extended to all defendants, including the one who did not respond to Kelly's request at all. As the court explained, it was better "to give defendants the opportunity to raise a section 3(g) exemption in the first instance than to foist additional

work upon the circuit court," id. ¶ 49, by requiring the court to review 20,000 pages' worth of redactions.

The Kelly approach was sound. As the appellate court emphasized, "FOIA cannot be used to disrupt a public body's proper work." Kelly, 2019 IL App (1st) 170780, ¶ 22. A remand granting the defendants an opportunity to show that Kelly's request was unduly burdensome balanced the requester's right of access to public records with the need to avoid unduly burdening public bodies. A similar approach is warranted here, notwithstanding section 3(d)'s provision that a public body's failure to respond forfeits the undue burden exemption. "Where a literal reading of a statute would lead to inconvenient, unjust or absurd results, the literal reading should yield." Id. ¶ 29 (internal quotation marks omitted). A literal reading of section 3(d) that does not permit any exceptions would lead to the absurd result of requiring public bodies to respond to astonishingly expensive and disruptive requests, where a public body missed a five-day window to respond due to inadvertence – and when production was barred regardless by a then-pending injunction. Especially for a public body such as CPD, which receives thousands of FOIA requests a year, an oversight with respect to a single request should not subject the public body to a crushingly onerous production.

Moreover, whereas the public bodies in Kelly did not satisfy section 3(g)'s requirement of granting a requester the opportunity to narrow a request, 2019 IL App (1st) 170780, ¶ 9, here CPD met with Green in an effort

to narrow his request to more manageable proportions. R. 158-61. For instance, CPD suggested that Green focus on CR files "of high public interest," such as "force complaints," as opposed to those dealing with minor violations such as dress code infractions. R. 160. Such trivial matters could not have borne on Green's claim of innocence, which was the stated reason for his request, C. 171, or for that matter anyone else's. Additionally, the records at issue in this case are many orders of magnitude more voluminous than in Kelly.

Barring CPD from asserting that Green's request is unduly burdensome does not advance FOIA's goals. It imposes a tremendous cost on CPD – thus diverting scarce resources from the department's other important work – while making no allowance for a narrower and more focused production. At the same time, CPD has not sought to avoid transparency when it comes to CR files. Quite the contrary: CPD succeeded in having the FOP injunction vacated, FOP I, 2016 Il App (1st) 143884, ¶ 55, and the City successfully vacated an arbitration award that would have required the destruction of records of police misconduct, FOP II, 2020 IL 124831, ¶ 52. CPD asserts simply that a public body should not have to produce CR files spanning 48 years in response to a single FOIA request. If this court does not affirm the appellate court's judgment, it should remand the case to the circuit for a determination whether Green's request is unduly burdensome.

* * *

If Green wishes to obtain CR files, he can submit a new FOIA request and work with CPD to narrow it to the extent possible. He could also submit a more manageable request, as any other member of the public could. CPD, in fact, produces CR files on a regular basis in response to FOIA requests.

Thus, to the extent Green insinuates that CPD is shirking its responsibilities or attempting to shield the requested records from the public, see Green Br. 27-28, that is unfounded. CPD is the party that appealed to successfully overturn the injunction prohibiting disclosure of CR files. And even in this case, as the record shows, CPD endeavored to come to an agreement with Green to limit his request to CR files "of high public interest," and to eliminate categories of files dealing with minor incidents like officer dress code violations that would not bear on officer misconduct. R. 160. It was Green who made very clear that he was using this FOIA litigation and the "millions of dollars this case winds up costing" not to actually obtain the records, but as leverage to force the City to "use its influence" on county prosecutors to "convince" them to "undo Mr. Green's conviction" or "provide support" for Green in his petition for "an innocence pardon" or in his court case. C. 844-46.

The appellate court's decision is faithful to the text and stated purposes of FOIA and should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court should be affirmed; or in the alternative, the case should be remanded to the circuit court for consideration whether Green's request is unduly burdensome.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this response brief conforms to the requirements of Rule 341(a) & (b). The length of this brief, excluding the pages containing or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 48 pages.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements in this instrument are true and correct and that the foregoing Brief was served on all counsel of record via File & Serve Illinois on March 23, 2022.

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