No. 127229

IN THE SUPREME COURT OF ILLINOIS

CHARLES GREEN, *Plaintiff-Appellant,* v. CHICAGO POLICE DEPARTMENT, *Defendant-Appellee*	Appeal from the Appellate Court, First Judicial District, Fifth Division Case No. 1-20-0574 Circuit Court of Cook County, Ill. County Department, Chancery Division Case No. 15 CH 17646 Honorable Alison C. Conlon, Trial Judge Presiding

REPLY BRIEF OF

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The central question before this Court is discrete and clear. The parties agree that FOIA gives the circuit court 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); *see* Brief of Def.-Appellee Chi. Police Dep't, No. 127229 (filed Mar. 23, 2022) ("CPD Br."), at 17. And CPD[1] admits it "is still refusing to permit public inspection" of the records Green seeks. CPD Br. at 26. The only question, then, is: Did the Circuit Court have the power to order CPD to produce public records of police misconduct in response to a FOIA lawsuit after the preliminary injunction that temporarily blocked their release was set aside?

FOIA's plain text and explicit policy directives, Illinois and federal cases, and common sense all dictate that the Circuit Court had such authority. CPD's response brief has little answer for these dispositive authorities. Rather, it primarily counters with a string of unconvincing policy arguments about the purported difficulty agencies will face if the court evaluates the withholding as of its order's date.

CPD posits scenarios premised on one basic fact pattern: a public body undertakes significant burdens to (a) evaluate a FOIA request; (b) review records; (c) reach a reasoned, written decision on the request; and perhaps even

[1] Capitalized terms not defined in this Reply have the meanings given to them in the Brief and Appendix of Plaintiff-Appellant Charles Green.

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redact and produce documents—only for a subsequent change in circumstances to remove the grounds on which the agency withheld records. CPD complains that public bodies will have to redo this burdensome work if changed circumstances can reopen completed withholding decisions.

But that fact pattern is not the one presented in this case so CPD's concerns are misplaced. CPD ignored Green's FOIA request outright and made no effort to process the requested records until ordered ***multiple times*** to do so by the court. Despite its claims that it "denied" Green's request in November 2015, CPD made no conscious, reasoned, documented decision to deny Green's request or even to withhold any records. CPD Br. at 16, 42. CPD utterly ignored Green's request—despite FOIA's express mandate that CPD provide a written decision within five days—until Green filed this litigation to enforce his statutory rights.

CPD's failure to provide the statutorily mandated response distinguishes its attempt to shoehorn this case into the non-binding federal cases on which it depends in order to avoid Illinois law. In any event, the federal case law upon which CPD asks this Court to rely is grounded in pragmatism: after the public body has invested resources in evaluating and processing its records based on circumstances as they exist at the time of the FOIA request, the public body should not have to redo that work, at significant expense, when circumstances later change.

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Here, CPD undertook no effort and no expense to respond to Green's FOIA request initially. CPD reviewed no CR files (pre- or post-dating 2011). It simply ignored Green's request and then refused to comply with the Circuit Court's orders that CPD honor its FOIA obligations. Well before CPD actually began to process records, the Appellate Court had lifted the Preliminary Injunction that had barred the disclosure of pre-2011 CR files when Green submitted his request. In other words, by the time CPD made any effort to process records, the circumstances had already changed, and nothing barred CPD's disclosure. No efficiency considerations counseled in favor of disregarding the changed circumstances. On those facts, even the federal case law would require disclosure.

CPD's "Green Rule" is simply a straw man that falsely construes Green as attempting to move beyond FOIA's explicit language and impose unwarranted burdens on agencies. Nothing could be further from the truth. Green requests an outcome in this case that is limited to records that CPD is obliged to release under FOIA, and that makes good sense on this case's facts.

CPD also wants this Court to ignore the legislature's unambiguous mandate that public bodies forfeit the undue burden defense when they fail to timely respond to FOIA requests. On the facts actually presented here, *CPD's* rule would directly contradict FOIA's plain text. CPD ignored Green's request, even as to the post-2011 records CPD concedes it was obliged to produce. It supported delaying litigation of Green's case to allow the Appellate Court to

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rule on the propriety of the Preliminary Injunction, and then delayed for nearly two years following the Preliminary Injunction's vacatur under the guise of preparing records for production. Then, years into litigation, CPD argued that it was now entitled to summary judgment based on an injunction that had long since been vacated. And CPD continued to avoid producing any of the post-2011 records in the face of its admitted legal obligations and multiple court orders to do so (behavior for which it was ultimately sanctioned). CPD's conduct is emblematic of the reasons the legislature denied public bodies the ability to later assert undue burden. CPD would thus have this Court excuse a public body's blatant disregard for FOIA's express instructions that the public body (1) evaluate FOIA requests, (2) respond in writing within five days, and (3) provide speedy, transparent access to public records (with only narrow, limited exceptions). CPD's rule reduces FOIA to nothing but impotent suggestions.

CPD has already undermined the purposes of transparency and speed enshrined in FOIA's express policy directives. Green submitted his FOIA request seven years ago and still waits for the files he requested. CPD would now tack more years onto this saga by forcing Green to file a new FOIA request and litigate CPD's burden objection that it is prohibited from raising here. FOIA demands better from the government.

I. ARGUMENT

The Circuit Court had the authority to compel CPD to produce the requested records. FOIA's plain language permits courts to consider post-

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response developments. Furthermore, limiting courts' powers to weigh current events is incompatible with the explicit aims and policy directives of FOIA. Moreover, both Illinois and federal case law support the power of the courts to examine post-filing events, including the vacatur of a previous injunction.

What CPD characterizes as a jurisdictional issue is, in actuality, yet another tactic to delay the release of records that are of great importance to Green and to the Illinois public. From May 2015 to July 2016, a preliminary injunction issued in the FOP litigation barred CPD from disclosing the pre-2011 police records Green seeks. Yet, a preliminary injunction is just that: preliminary. Once that preliminary injunction was vacated, so too were its effects. Vacated court orders do not retain their power over public records whose production FOIA otherwise presumptively demands absent clear and convincing evidence to the contrary.

A. The Circuit Court Had Authority to Order CPD to Produce All of the Records Green Requested

CPD's proposed categorical rule to confine court review of a FOIA request to the date on which it was filed is not supported by the law. Nothing in FOIA's plain language compels this result, nor does it align with FOIA's stated aim of promoting fast and efficient disclosure of public information.

1. CPD Ignores that FOIA's Plain Language Permits Courts to Consider Post-Response Developments

The crux of CPD's argument is that FOIA prohibits circuit courts from ordering the production of records unless the decision to withhold those records was improper at the time of the public body's initial response. CPD Br. at 18.

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CPD fails to cite to any statutory provision or case law suggesting that FOIA imposes this temporal limitation, and none exists. Instead, FOIA indicates that the Circuit Court should consider a public body's continued withholding of records:

> In any action considered by the court, ***the court shall consider the matter de novo***, and shall . . . determine if such records or any part thereof ***may be withheld*** . . . . The burden shall be on the public body to establish that its refusal to permit public inspection or copying is in accordance with the provisions of this Act.

5 ILCS 140/11(f) (emphasis added).

Ignoring this plain language, CPD argues that the Circuit Court's "task is necessarily a ***backward-looking inquiry*** into the propriety of the public body's response." CPD Br. at 19 (emphasis added). Not so. FOIA expressly provides the Circuit Court with jurisdiction to enjoin the withholding of public records, 5 ILCS 140/11(d), and such injunctive relief is, by definition, ***forward-looking*** and intended to remedy current violations of the law. *See Bridgeview Bank Grp. v. Meyer*, 2016 IL App (1st) 160042, ¶ 20. Indeed, CPD admits that an agency is ***still actively withholding*** the documents during any FOIA litigation. CPD Br. at 26. FOIA gives the court jurisdiction to enjoin that ***ongoing*** withholding or to order the withheld records' production—without indicating whether the withholding must have been proper when it started or at the time of the court's order. Consider the following scenario: a public body denies a FOIA request, the plaintiff files a lawsuit seeking the records; then the public body responds by immediately producing the records voluntarily. Under CPD's

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approach—whereby the court may not consider developments after the initial response—the plaintiff could pursue this litigation, obtain an order requiring the public body to reproduce the already-produced records, and could then seek fees and costs after "prevailing" in this litigation. It would make no sense to prohibit the court from considering this change of circumstance when granting a forward-looking remedy. That the Circuit Court has authority to provide injunctive relief necessarily means that the court must address whether the public body's ***ongoing*** withholding of records constitutes a ***current*** violation of the law.

CPD also complains that it would be unfair to make public bodies pay requesters' legal expenses under FOIA's fee-shifting provision when the public body had a valid exemption claim at the time of the request and lost it mid-litigation. CPD Br. at 24. But a public body can freely choose whether to litigate a FOIA suit to a final judgment after its basis for withholding disappears. The public body could moot the ongoing suit by providing the prompt disclosure that FOIA demands and produce the records that the body no longer has a valid basis to withhold.[2] After that production, the requester may no longer qualify as a prevailing party within the meaning of FOIA's fee-shifting provision. *See* 5 ILCS 140/11(i); *Rock River Times v. Rockford Public Sch. Dist. 205*, 2012 IL App (2d) 110879, ¶¶ 35-42 (newspaper was not "prevailing party"

[2] CPD represented to the Circuit Court that their intention was to take this exact approach and release CR records via a public portal on a rolling basis. *See* C550–551.

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under FOIA attorneys' fees provision when school voluntarily produced records mid-suit); *but see Uptown People's Law Center v. Dept. of Corrections*, 2014 IL App (1st) 130161, ¶ 8 (holding that FOIA plaintiff can recover litigation expenses if lawsuit—not post-response events—was catalyst for public body's production). If the public body continues to withhold the records after the injunction is lifted, as CPD did here, thus pointlessly forcing the requester to continue incurring the expense of prosecuting the FOIA lawsuit to a final judgment, then the public body should be subject to a fee award if it loses. Awarding fees in those circumstances is entirely consistent with the fee-shifting provision's purposes: to "prevent the sometimes insurmountable barriers presented by attorney's fees from hindering an individual's request for information and from enabling the government to escape compliance with the law." *Callinan v. Prisoner Review Bd.*, 371 Ill. App. 3d 272, 276 (3d Dist. 2007); *see also Hamer v. Lentz*, 132 Ill.2d 49, 61–62 (1989); *Uptown*, 2014 IL App (1st) 130161, ¶¶ 15, 23.

2. CPD's Constrained View of the Circuit Court's Authority Is Incompatible with FOIA's Express Policy Directives, and Is Unwarranted in Light of CPD's Conduct in This Litigation

CPD's various policy arguments are incompatible with FOIA's expressly stated policy favoring disclosure. And those policy arguments are inapplicable to this case's circumstances in any event. Furthermore, and as explained below, CPD's conduct in this and other cases undermines any claim that FOIA's goals would be supported by CPD's proposed limitation on the Circuit Court's authority. *See, e.g.*, *Florez v. Cent. Intel. Agency*, 829 F.3d 178, 187-88

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(2d Cir. 2016) (requiring requester to refile "makes little sense and would merely set in motion a multi-year chain of events leading inexorably back to a new panel of this Court considering the precise question presented here"). CPD's contrary arguments miss the mark by either ignoring or outright misstating the record in this case (or both).

CPD purports to be concerned about efficiency. However, it was decidedly inefficient to force Green to bring this lawsuit to even learn about the Preliminary Injunction, or to obtain the post-2011 records that were never subject to any injunction. Nor would it be efficient to require Green to file a new FOIA request, and inevitably a second lawsuit, when nothing prevented CPD from producing the pre-2011 CR files that Green seeks at the time CPD actually undertook to process and produce responsive records. CPD boasts that it informed Green about the Preliminary Injunction "just three months after [Green] submitted his request," when CPD filed its answer to Green's complaint. CPD Br. at 21. This observation ignores that CPD initially chose silence in the face of Green's FOIA request, forcing him to initiate this action to extract the response that FOIA instructed CPD to provide months earlier.

CPD's claim that allowing courts to consider post-response events would "encourage[] cases to linger" proves too much. CPD Br. at 27. FOIA is primarily concerned with providing citizens speedy access to public records and promoting government transparency. 5 ILCS 140/1 ("It is a fundamental obligation of government to operate openly and provide public records ***as***

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expediently and efficiently as possible in compliance with this Act . . . . This Act shall be construed to require disclosure of requested information as expediently and efficiently as possible and ***adherence to the deadlines established*** in this Act.") (emphasis added). To that end, FOIA is also concerned with expeditious enforcement of FOIA requests—but only as a means of serving FOIA's primary purposes. *See* 5 ILCS 140/11(h) ("proceedings arising under this Section 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").

CPD's rule directly undermines these purposes by forcing a requester to spend months or even years litigating a lawsuit to get any response to his original request, and then have to restart the FOIA process when the agency finally discloses its grounds for withholding records—even when those grounds no longer prevent the records' disclosure at the time the court rules. The relief Green requests, in contrast, best serves FOIA's primary purposes by accelerating public access ***to the records sought*** by enforcing the request when circumstances reveal an unlawful withholding and thus avoiding a pointless retread of the entire FOIA request process. Moreover, CPD's claim that this would somehow prolong FOIA litigation is groundless. A plaintiff cannot unilaterally delay a case in the hope that circumstances might one day change. The Circuit Court has full discretion and power to decide how quickly or slowly a case moves. *VC & M, Ltd. v. Andrews*, 2013 IL 114445, ¶ 26 ("[T]he trial court

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[has] inherent authority to control matters before it as necessary to prevent undue delays or disruption in the disposition of cases on its docket.").

While CPD blames the Circuit Court for delaying the disposition of Green's case, CPD fails to acknowledge that it supported staying the case until the Preliminary Injunction was resolved. Both parties agreed that the Preliminary Injunction went to the heart of the matter of this case, implying that the ruling in FOP would be dispositive here. C. 475, 650–651. Indeed, CPD itself initiated many of the requests to extend deadlines during the FOP litigation's pendency. *See* C. 83, 98-105. All the while, CPD continued to refuse to produce the post-2011 records that it admits it improperly withheld.

Indeed, upholding the Circuit Court's order that CPD produce the requested records only further promotes FOIA's purposes of enforcing government compliance and transparency: CPD's delay tactics and evasion of its responsibilities here are part of its well-documented history of FOIA abuse.[3]

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[3] *See* City of Chi. Office of Inspector Gen., *Follow-Up: Review of the Chicago Police Department's Management and Production of Records* (Sept. 16, 2021), https://igchicago.org/wp-content/uploads/2021/09/CPD-Records-Management-Follow-Up.pdf ("CPD is now—just as it was when OIG published its 2020 report—unable to ensure that it can meet legal and constitutional obligations which are at the core of its function as a law enforcement agency."); Annum Haider, *Analysis: Illinois Law Hasn't Stopped Public Agencies from Withholding Records*, Better Gov't Ass'n (Jan. 10, 2019), https://www.bettergov.org/news/analysis-illinois-law-hasnt-stopped-public-agencies-from-withholding-records ("[O]ut of the top 14 public bodies that incorrectly applied exemptions to deny FOIA requests . . . the Chicago Police Department [was in violation] 43 percent of the time."); Matt Chapman, *CPD Routinely Denies FOIA Requests for Dubious Reasons*, South Side Weekly (Mar. 8, 2022), https://southsideweekly.com/cpd-routinely-denies-foia-requests-for-dubious-reasons/ ("[O]f the 350 requests I reviewed, around forty

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And CPD's complaints about the administrative burdens ring particularly hollow in light of its history and conduct here. *See, e.g.*, CPD Br. at 23, 27, 29.

CPD mistakenly suggests that a ruling in Green's favor would impose a general duty to supplement responses. In reality, a ruling in Green's favor would only require a public body to supplement responses in a narrow sense and in specific circumstances: a public body would only have to produce *additional* records never before processed by the public body, when the public body's basis for previously withholding the records ends.

CPD's claim that they would have to track ongoing litigation of injunctions makes no sense—one should hope CPD already tracks those injunctions, since it must comply with their terms. Under the circumstances at issue here, where a FOIA request is actively being litigated and an injunction is relevant to the question of whether records may be withheld, tracking the status of such injunctions places no additional burden on CPD.

Finally, CPD impugns Green's motive for bringing this action, arguing that Green seeks to use the burden of responding to the request as leverage to advance his efforts at clemency. This argument is unavailing for several reasons. Most critically, Green's motive for filing a FOIA request has no bearing on whether CPD improperly withheld records; any citizen has the right to submit FOIA requests and seek access to public records for any reason. *See*

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percent were completed after the time limits allowed under state law, with twenty of those taking longer than 120 days to complete.").

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Lieber v. Bd. of Trustees of S. Ill. Univ., 176 Ill. 2d 401, 413 (1997). Also, CPD badly misstates the record, which provides no support for CPD's characterization of its counsel's discussions with Green's counsel. *See* CPD Br. at 47. CPD attempts to paint Green as exploiting FOIA to extort the City, but the record reflects that Green's motives are pure: Green has always been motivated by a desire to heal the great wrong done to him and to help others similarly subjected to police misconduct.[4] As to the conference that CPD's counsel one-sidedly (and self-servingly) described in the record, Green had no reason to negotiate with CPD to narrow his request during a conference directed solely at setting a production schedule after the Circuit Court fully granted summary judgment for Green. R. 50-51.

[4] For instance, in correspondence after the conference CPD describes, Green's counsel wrote, "[A]s part of that struggle [to prove Mr. Green's innocence], he sought to help others wrongfully convicted along the way by forcing the City to publish its investigative files on police officers." C. 843. In fact, CPD's counsel invited Greens' counsel to the conference to "discuss [the] potential to resolve the entire case" and stated during the meeting that Green's claims of innocence "are compelling in their nature and substance." C840, 843. CPD has a long history of wrongful convictions and has paid over $500 million to settle police corruption and abuse cases. *See* National Registry of Exonerations, *2021 Annual Report* (Apr. 12, 2022), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf (finding that Illinois leads the country in exonerations from wrongful convictions). The officer in Green's case, specifically, has a notorious history of coercing inculpatory statements and was ultimately convicted of sexual assault. *See, e.g., Steward v. Summerville*, No. 90 C 6956, 1992 U.S. Dist. Lexis 15690 (N.D. Ill. Oct. 14, 1992); *Washington v. Summerville*, 127 F.3d 552 (7th Cir. 1997); *Seaton v, Kato*, No. 94 C 5691, 1995 U.S. Dist. LEXIS 2380 (N.D. Ill. Feb. 28, 1995).

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B. Illinois and Federal Case Law Supports the Circuit Court's Authority to Consider the Preliminary Injunction's Vacatur When Evaluating the Propriety of CPD's Ongoing Withholding

CPD misreads both Illinois and federal case law to support its argument that the Circuit Court lacked authority to consider the Preliminary Injunction's vacatur. The clear weight of both Illinois and federal authority supports Green's position and affords reviewing courts the discretion to consider post-denial developments under the circumstances at issue here.

1. Special Prosecutor Acknowledged that a FOIA Request Can Be Enforced upon the Lifting of an Injunction, and Necessarily Requires Courts to Consider Certain Post-Response Developments

This Court's decision in *Special Prosecutor* disproves CPD's claim that courts are prohibited from considering post-response developments. 2019 IL 122949, ¶ 64. If the events in this case were reversed—that is, if no injunction existed when Green submitted his FOIA request and CPD ignored it, but one was entered thereafter—then CPD would be required to withhold records pursuant to the later-issued injunction. CPD's initial disregard of the request and subsequent withholding would have been incorrect as of the time that it received the FOIA request, but the Circuit Court still could not order CPD to produce the records in blatant disregard for the injunction. Indeed, that conclusion is *Special Prosecutor*'s core holding: the public body must comply with the injunction unless and until it is vacated. 2019 IL 122949, ¶ 64. Remarkably, CPD appears to take the position that in the above circumstances, CPD would be required under FOIA to produce records in

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contempt of the injunction. CPD Br. at 31-32. Surely, CPD does not seriously contend that it would do so.

Squaring CPD's reasoning in a manner consistent with this Court's holding in *Special Prosecutor* would result in a rule that circuit courts are permitted to consider post-response events only where those developments limit a public body's disclosure obligations, but not when they expand those obligations. Such a rule finds no support in FOIA's text and instead cuts directly against FOIA's express calls for liberal disclosure. *See* 5 ILCS 140/1, 140/1.2; *Special Prosecutor*, 2019 IL 122949, ¶ 25 ("Based on this clear expression of legislative intent, this court has held that public records are presumed to be open and accessible," and "FOIA is to be liberally construed to achieve the goal of providing the public with easy access to government information.").

CPD's other arguments relying on *Special Prosecutor* are similarly mistaken. CPD implies that Green mounted what it calls a "collateral attack" on the Preliminary Injunction through this lawsuit. CPD Br. at 21. Green did nothing of the kind. Green did not try to modify or vacate the Preliminary Injunction through his FOIA case, and Green had no stake or interest in the FOP litigation. Indeed, Green was forced to bring this action in order to even discover that CPD justified their non-response based on the Preliminary Injunction.

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CPD also claims Green had the "responsibility to seek the injunction's vacatur" and that Green (a nonparty to the FOP litigation) should have kept track of the Preliminary Injunction's survival and submitted a new FOIA request when it was eventually vacated.[5] CPD Br. at 21. Nothing in *Special Prosecutor* requires that a FOIA requester intervene in a separate action to vacate an injunction. Given that the Preliminary Injunction was being actively litigated when Green learned about it, Green would not have been entitled to intervene as-of-right in those separate proceedings to seek to vacate the Preliminary Injunction. *See RTS Plumbing Co. v. DeFazio*, 180 Ill. App. 3d 1037, 1043 (1st Dist. 1989) (finding that intervention petition filed two years after the initiation of proceedings was not timely). Moreover, given FOIA's express policies favoring speed, efficiency, and broad disclosure of records, *see infra* at Part A.2, the burden should not be placed on requesters to identify and clear all possible obstacles prior to making a public records request. By bringing this action, Green did all he was required—indeed, all he was permitted—to do to vindicate his FOIA rights. Nothing in FOIA, *Special Prosecutor*, or any other authority supports CPD's responsibility-dodging theory of the law.

[5] This claim ignores CPD's representations early in the litigation that the lifting of the Preliminary Injunction would resolve Green's case. *See, e.g.*, C. 650–651.

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2. The Circuit Court's Decision Comports with the Federal Case Law that CPD Relies upon

At the outset, Illinois FOIA is broader than its federal counterpart, containing clear policy directives in favor of disclosure. *See* 5 ILCS 140/1; *Green*, 2021 IL App (1st) 200574, ¶ 37 (Delort, J., dissenting). But to the extent that federal authorities are persuasive, they support Green's position. Critically, none of the authorities that CPD relies on involved agencies that initially fell short of their FOIA obligations by failing to provide any response. CPD devotes a single paragraph in its brief to this threshold issue, and the best argument it can muster is that its non-response to Green's request is not meaningfully different than if CPD had timely sent a denial letter. CPD Br. at 36. But forcing Green to bring this action to even learn about the Preliminary Injunction does meaningfully distinguish CPD's non-response from the proper written denial called for by FOIA.

Contrary to CPD's unsupported position that federal courts must ignore post-response events, federal courts have regularly considered post-response events that "go to the heart of the contested issue"—*i.e.*, bear directly on the question of whether the records may be withheld, as no doubt the vacatur of the Preliminary Injunction does. *New York Times Co. v. U.S. Dep't of Just.*, 756 F.3d 100, 110 n.8 (2d Cir. 2014), *opn. amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014) (rejecting application of "time of request" rule where government made post-decision disclosures that went "to the heart of the contested issue"); *see also, e.g., ACLU*

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v. Cent. Intel. Agency, 710 F.3d 422, 431 (D.C. Cir. 2013) (taking notice of CIA's post-decision statements acknowledging existence of records the agency had previously denied were in its possession); *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 (D.C. Cir. 1991) (subsequent release of part of withheld record justified part's disclosure over agency objection that entire record was exempt); *Florez*, 829 F.3d at 187 (2d Cir. 2016) (remanding case where disclosures made during litigation rendered requested records non-exempt). CPD's attempts to distinguish these cases fail.

CPD mistakenly attempts to distinguish *Florez* on grounds that it involved a *Glomar* response, ignoring what a *Glomar* response entails. Rather than evaluate each requested document against the disclosure exemptions to prepare a more traditional FOIA response, the agency ***categorically*** refused to answer the request because it sought highly classified information.

But CPD fails to appreciate that those circumstances make Green's case far more similar to *Florez* than to *Bonner v. U.S. Dep't of State*, 928 F.2d 1148 (D.C. Cir. 1991). Here, too, CPD had not begun to process responsive pre-2011 records when the circumstances changed. *Fraternal Ord. of Police v. Chi. Police Sergeants Ass'n*, 60 N.E. 3d 872 (Ill. 2016) (vacating injunction). Like in *Florez*, CPD simply categorically refused to even examine pre-2011 CR files. After Green filed his lawsuit, CPD justified its refusal by citing the Preliminary Injunction, which categorically covered pre-2011 CR files. Once the Preliminary Injunction lifted, CPD was no longer barred from producing those

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files. In nearly identical circumstances, the *Florez* court required the public body to undertake the processing it had never undertaken in the first place and to produce the requested records. *Florez*, 829 F.3d at 187-88. CPD is wrong that Green somehow seeks the "judicially mandated reprocessing" absent in *Florez*. CPD Br. at 39. Green seeks an order directing CPD to process pre-2011 files in the first instance.

Bonner presented distinct circumstances that likewise support Green, not CPD. *Bonner* provides a prudential rule that limits a court's review to the time of initial response where the agency has gone to great trouble to process potentially responsive records.[6] *Bonner*, 928 F.2d at 1154. CPD has not processed any pre-2011 CR files, so there is no concern about duplicative work. And, critically, even under *Bonner*, if the initial response was improper, the agency must reprocess the records, and "[t]he operative standards for disclosure . . . will be those in effect when the files are reprocessed." *Id.* (quoting *Meeropol v. Meese*, 790 F.2d 942, 960 (D.C. Cir. 1986)). CPD is simply incorrect that its initial response was proper when made. A proper response would have consisted of the prompt production of ***post-2011*** records, which

[6] The reasons for this prudential rule are straightforward: an agency that spends time and resources processing requested records is not required to constantly update that response if circumstances later change. *See, e.g., Shapiro v. U.S. Dep't of Just.*, No. CV 13-555 (RDM), 2020 WL 7318014, at *31 (D.D.C. Dec. 11, 2020) (*Bonner* "stand[s] for the proposition that an agency may properly stop searching at a date certain so that it may prepare its response without having to execute further searches in an infinite loop."); *Florez*, 829 F.3d at 188 (*Bonner*'s "general rule" applies to judicially mandated reprocessing).

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CPD concedes are properly producible, CPD Br. at 7, along with a written explanation for CPD's denial of Green's request for pre-2011 records. Thus, *Bonner*, far from supporting the position taken by CPD, is consistent with the Circuit Court's consideration of the Preliminary Injunction's vacatur.[7]

CPD argues that several other cases are distinguishable because they involved post-response disclosures by the government that waived the agencies' claimed exemptions, whereas in this case the changed circumstance "is beyond the public body's control." CPD Br. at 40 (citing *New York Times Co. v. United States Department of Justice*, 756 F.3d 100 (2d Cir. 2014), and *Am. Civ. Liberties Union v. Cent. Intel. Agency.*, 710 F.3d 422 (D.C. Cir. 2013)). This is a distinction without a difference. These cases still demonstrate that courts routinely consider post-response developments in assessing whether to order an agency to produce records. Nothing in the opinions suggests that the courts' holdings turned primarily on the fact that the agency itself had contributed to the changed circumstances. And the CIA in *Florez* could not control whether the FBI would take a contrary view of the CIA's classification decisions and publicly release the records the CIA had withheld. *See Florez*, 829 F.3d at 184-185, 190.

[7] CPD's reliance on *State News v. Mich. State Univ.* is likewise misplaced. As in *Bonner*, and unlike here, the public body in *State News* had already undertaken the burden and expense of processing records and formally responding to the request. 753 N.W.2d 20, 22 (Mich. 2008).

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Finally, CPD dismisses *Nat'l Sec. Couns. v. Cent. Intel. Agency*, 898 F. Supp. 2d 233 (D.D.C. 2012) as "not remotely resembl[ing] any issue at stake in this case," CPD Br. at 42. But *NSC* is directly on point. The court there rejected an agency's argument that it could cut off its production as of the date of the agency's response and thus withhold records that were subject to disclosure as of the date that the agency actually searched for the records. 898 F. Supp. 2d at 283 (citing *Public Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002)). Clearly, FOIA requests are not frozen in time as of the date of an agency's response; the date at which the agency actually began processing records is relevant to an assessment of the propriety of their response. Here, CPD did not begin "getting ready for the eventual production" of records until December 2016, when the Preliminary Injunction already had been lifted. C650–51. Thus, the line of federal case law that CPD principally relies upon makes clear that the Circuit Court properly accounted for the Preliminary Injunction's vacatur, which occurred before CPD actually processed and produced records in response to Green's request.

C. CPD Unequivocally Forfeited an Undue Burden Defense and Cannot Assert It on Remand

FOIA is clear 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).[8]

[8] This is yet another instance in which Illinois FOIA favors disclosure more strongly than its federal counterpart. The federal statute does not include a provision forfeiting undue burden objections by public bodies that fail to respond to requests. Indeed, the undue burden exemption under the federal statute is a judicial creation. *See Am. Fed'n of Gov't Emps., Local 2782 v. U.S.*

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CPD not only failed to respond to Green's FOIA request, thus forfeiting its right to claim undue burden; CPD also acknowledged the forfeiture on multiple occasions throughout this litigation, C. 125, 325, 398-99, and did not attempt to raise the undue burden exemption until December 2019 in its briefing on its motion for reconsideration. C594. Allowing CPD to raise an undue burden exemption on remand directly contravenes FOIA's explicit text. *See Kunkel v. Walton*, 179 Ill. 2d 519, 534 (1997) ("There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports."); *Ralston v. Plogger*, 132 Ill. App. 3d 90, 98 (4th Dist. 1985) ("A court's only legitimate function is to declare and enforce the law as enacted by the legislature, to interpret the language when necessary, and not to enact new provisions or substitute different ones.").

CPD improperly relies on *Kelly v. Vill. of Kenilworth*, in which the majority of the defendants had responded to the FOIA requests in a timely fashion and raised a number of exemptions, but had neglected to raise the undue burden exemption in their initial responses. 2019 IL App (1st) 170780, ¶ 5. Whereas the Court gave leeway to those defendants because they had reserved the right to raise additional exemptions, here, CPD never responded to Green's request at all. These are precisely the circumstances contemplated by and warned against in FOIA's forfeiture provision. 5 ILCS 140/3(d).

Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990) ("An agency need not honor a request that requires 'an unreasonably burdensome search.'" (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir.1978))).

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CPD's claim regarding extraordinary burden also vastly overstates the likely burden to CPD. CPD arrives at its estimate by extrapolating based on production of post-2011 files, assuming that earlier years will have a similar volume of files. CPD has provided no data showing this to be the case. *See* C860 ("As recently as the November 22 [2019] hearing, CPD maintained that it is not possible to estimate how many such files there are . . . . This position strains credulity.").

CONCLUSION

In light of FOIA's plain text and explicit policy directives and the relevant Illinois and federal case law, Green respectfully requests that the Court reverse the Appellate Court's ruling and affirm the Circuit Court's order directing CPD to produce the pre-2011 records to which Green is entitled under FOIA.

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Respectfully Submitted,

Dated: April 28, 2022

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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 or words contained in the Rule 341(d) cover, 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 5,953 words.

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PLEASE TAKE NOTICE that on the 28th day of April, 2022, we filed and served electronically on the Clerk's Office of the Supreme Court of Illinois the attached Reply Brief of Plaintiff-Appellant Charles Green, a copy of which is hereby served upon you and attached hereto.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is one of the attorneys for Plaintiff-Appellant and that she caused the foregoing Notice of Filing and Reply Brief of Plaintiff-Appellant Charles Green to be served on all counsel of record on April 28, 2022, by filing said documents electronically via Odyssey eFile and designating the following counsel for service at the email addresses listed below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

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