Nos. 12-1846 & 12-1917 (Consol.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMIE KALVEN,

Plaintiff-Appellant/
Cross-Appellee,

v.

THE CITY OF CHICAGO and
THE CHICAGO POLICE
DEPARTMENT,

Defendants-Appellees/
Cross-Appellants.

Appeal from the Circuit Court of Cook County, Illinois
Chancery Division
No. 09 CH 51396
The Honorable Neil H. Cohen, Judge Presiding

BRIEF AND APPENDIX OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff-appellant/cross-appellee Jamie Kalven filed suit pursuant to the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140/1, et seq. (2010), seeking disclosure of certain materials related to the discipline of Chicago police officers. Kalven and defendants-appellees/cross-appellants Chicago Police Department ("CPD") and the City of Chicago (collectively, "City") filed cross-motions for summary judgment, and the circuit court granted and denied both motions in part. The circuit court applied amendments to FOIA, which took effect January 1, 2010, to hold that the requested complaint register ("CR") files are exempt from disclosure pursuant to FOIA section 7(1)(n), which exempts information related to the adjudication of employee disciplinary matters. The circuit court also held that certain lists of information related to officers who had received multiple CRs, which were created in response to discovery requests in federal litigation, were not exempt from disclosure. In addition, the court denied Kalven's request for attorneys' fees because it found that Kalven had not "substantially prevailed" as required for a fee award under FOIA section 11(i). Both the City and Kalven filed motions for partial reconsideration, which the circuit court denied. Kalven appeals from the circuit court's ruling that the CR files are exempt from FOIA disclosure and from the denial of attorneys' fees. The City appeals from the court's ruling that the lists are not

exempt from disclosure.[1] No questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the circuit court properly applied the amended FOIA to Kalven's claims.

2. Whether the circuit court properly held that CR files are exempt from FOIA disclosure.

3. Whether the circuit court erred in holding that the Bond and Moore lists are not exempt from FOIA disclosure.

4. Whether the circuit court abused its discretion by denying Kalven attorneys' fees.

JURISDICTION

The circuit court granted and denied in part the parties' cross-motions for summary judgment on January 24, 2012. C. 2136-42.[2] Kalven filed a motion for partial reconsideration on February 21, 2012, C. 2151-75, and the City filed a motion for partial reconsideration on February 22, 2012, 1st Supp. C. 7-21. On May 23, 2012, the circuit court denied both motions for

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[1] Kalven filed an unopposed motion to consolidate the appeals and set a briefing schedule following the procedure under Ill. Sup. Ct. R. 343(b)(1) for cases in which there is a cross-appeal. In his brief, Kalven refers to the City as a cross-appellant. For convenience, we follow the same convention.

[2] We cite the consecutively-paginated, ten-volume common-law record as "C. __," the one-volume first supplemental record as "1st Supp. C. __," and the one-volume second supplemental record as "2d Supp. C. __." We cite the reverse side of record pages as "(r)."

partial reconsideration. C. 2422-25. Kalven filed a notice of appeal on June 19, 2012, C. 2440-41, and the City filed a notice of appeal on June 21, 2012, C. 2444-45. The appeals were consolidated. This court has jurisdiction over these appeals from a final judgment pursuant to Ill. Sup. Ct. R. 303.

STATUTES INVOLVED

Section 4 of the Statute on Statutes, 5 ILCS 70/4 (2010), in relevant part:

> Sec. 4. No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. . . .

Section 1 of FOIA, 5 ILCS 140/1 (2010), in relevant part:

> This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective . . . .

Section 2 of FOIA, 5 ILCS 140/2 (2010), in relevant part:

> (c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

Pre-amendment FOIA section 7, 5 ILCS 140/7 (2008), in relevant part:

> (1) The following shall be exempt from inspection and copying:
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> * * *
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> (b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:
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> * * *
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> (ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions;
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> * * *
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> (f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated . . . .
>
> * * *
>
> (u) Information concerning a university's adjudication of student or employee grievance or disciplinary cases, to the extent that disclosure would reveal the identify of the student or employee and information concerning any public body's adjudication of student or employee grievances or disciplinary cases, except for the final outcome of the cases.

Pre-amendment section 11(i) of FOIA, 5 ILCS 140/11(i) (2008), in relevant part:

> (i) If a person seeking the right to inspect or receive a copy of a public record substantially prevails in a proceeding under this Section, the court may award such person reasonable attorneys' fees and costs. If, however, the court finds that the fundamental purpose of the request was to further the commercial interests of the requestor, the court may award reasonable attorneys' fees and costs if the court finds that the record or records in question

were of clearly significant interest to the general public and that the public body lacked any reasonable basis in law for withholding the record.

Post-amendment section 3(g) of FOIA, 5 ILCS 140/3(g) (2010), in relevant part:

> (g) 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.

Post-amendment section 7 of FOIA, 5 ILCS 140/7 (2010), in relevant part:

> Sec. 7. Exemptions.
>
> (1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:
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> * * *
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> (f) Preliminary drafts, notes, recommendations memoranda and other records in which opinions are expressed, or policies or actions are formulated . . . .
>
> * * *
>
> (n) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

Post-amendment section 11(i) of FOIA, 5 ILCS 140/11(i) (2010):

> (i) If 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 attorneys' fees and costs. In determining what amount of attorneys' fees is reasonable, the court shall consider the degree to which the relief obtained relates to the relief sought. The changes contained in this subsection apply to an action filed on or after the effective date of this amendatory Act of the 96th General Assembly.

STATEMENT OF FACTS

Background. Complaints by members of the public against CPD personnel are investigated and evaluated by the Independent Police Review Authority ("IPRA") or by CPD's Internal Affairs Division ("IAD"). C. 770 ¶ 2; Chicago Police Board, Allegations of Police Misconduct: A Guide to the Complaint and Disciplinary Process 1 (July 2011) available at http://www.cityofchicago.org/content/dam/city/depts/cpb/PoliceDiscipline/AllegMiscond201107.pdf. IPRA and IAD have the authority to investigate complaints against CPD members and to recommend to the Superintendent of CPD disciplinary action for violations of CPD rules and regulations. C. 770 ¶ 2; Municipal Code of Chicago, Ill. § 2-57-040 (2013). IPRA investigates complaints relating to excessive force, police shootings, or domestic violence, and IAD investigates any other complaints against CPD members. Municipal Code of Chicago § 2-57-040. Documents generated by these investigations are commonly referred to as complaint register files or CR files. C. 770-71 ¶ 3. Before the formation of IPRA, the CPD Office of Professional Standards ("OPS") investigated complaints of the type currently assigned to IPRA. C. 770 ¶ 1. IAD and IPRA make findings and disciplinary

recommendations to the Superintendent based upon their investigations. Chicago Police Board, Allegations of Police Misconduct, supra, at 1; Municipal Code of Chicago § 2-57-040.

The Police Board conducts evidentiary hearings in cases involving a recommendation of discharge or suspension of more than 30 days. Municipal Code of Chicago, Ill. § 2-84-030 (2013). The Board also conducts hearings in cases involving lesser disciplinary recommendations when the subject officer requests a hearing. Chicago Police Board, Allegations of Police Misconduct, supra, at 2-3.

In addition to CR files, Kalven also seeks disclosure of lists of CPD officers against whom more than a specific number of complaints had been filed between May 2001 and May 2006 and between May 2002 and December 2008. C. 18-19. The lists contain summaries of information contained in CR files. For example, as the City explained in the circuit court, the Moore lists summarize the following information from CR files related to thousands of CPD officers: (1) a listing of every complaint initiated against each officer within the relevant time period for each list; (2) the category assigned to each complaint (i.e., illegal arrest, search of premise, unnecessary physical contact, failure to submit proper reports, misuse of department equipment, etc.); (3) the finding for each complaint (not sustained, unfounded, exonerated, or sustained); and (4) the discipline imposed for any sustained complaint. 1st Supp. C. 13-14. The City created and produced these lists

subject to protective orders during federal discovery in Bond v. Utreras, No. 04 C 2617 (N.D. Ill.), and Moore v. Smith, No. 07 C 5908 (N.D. Ill.). C. 792-804. Those protective orders prohibited use of the covered materials outside of the litigation or further disclosure of confidential information produced during discovery, including information related to CR files and CR investigations. C. 794 ¶ 3; C. 799 ¶ C.1. The City's Law Department directed IAD to create the lists by searching CPD computer systems to comply with discovery requests in those cases. C. 775 ¶¶ 14-15. IAD performed the directed searches and provided the resulting lists to the Law Department for use in the litigation. Id. ¶ 15. IAD does not normally maintain these lists in the course of its ordinary business, but instead created them at the direction of the Law Department solely to fulfill the City's federal discovery obligations. Id.

Kalven's FOIA Requests. On November 16, 2009, Kalven submitted two FOIA requests to CPD, seeking CR files related to several thousand complaints against CPD officers, as well as the Bond, Moore, and other lists produced by the City in federal litigation. C. 18-24. On November 23, 2009, CPD requested a statutorily-provided seven-working-day extension of time to respond to Kalven's requests. C. 26-29. On December 8, 2009, CPD denied the requests on the ground that they were overly burdensome and, pursuant to section 3(f) of FOIA, asked that Kalven narrow his requests. C. 31-34. CPD also stated that, even if narrowed, Kalven's requests might still contain

information that is exempt from disclosure under multiple FOIA exemptions. C. 32-33. Rather than narrow the requests, Kalven appealed the denial to CPD's then-Superintendent Jody Weis on December 9, 2009. C. 36. On December 16, 2009, CPD requested an additional seven working days to respond to the appeal. C. 44(r). On December 21, 2009, Kalven responded that he believed that he had exhausted his administrative remedies as required by FOIA, C. 46-47, and he filed suit in the circuit court on December 22, 2009, alleging the wrongful denial of his FOIA requests, C. 2-14.

On November 9, 2010, Kalven voluntarily dismissed his complaint in part. C. 461-64. Kalven's remaining claims sought disclosure of the Bond and Moore lists and closed CR files relating to charges against five CPD officers, copies of which the City had produced under a protective order in the Bond litigation. See id.

Both Kalven and the City moved for summary judgment, and the circuit court granted and denied in part those motions on January 24, 2012. C. 2136-42. The court held that section 7(1)(n) of the amended FOIA exempted CR files from disclosure, but ordered the City to produce the Bond and Moore lists. Id. The court also denied Kalven's request for attorneys' fees because it found that Kalven had not "substantially prevailed" as required by FOIA section 11(i). C. 2141. Both sides moved for partial reconsideration of the court's rulings, C. 2151-75; 1st Supp. C. 7-21, which

the court denied, C. 2422-25. Kalven and the City appeal. C. 2440-41; C. 2444-45.

ARGUMENT

The circuit court properly held that CR files are exempt from disclosure under FOIA, but erred when it ordered the disclosure of the Bond and Moore lists, which are summaries of information contained in exempt CR files. Thus, this court should affirm the circuit court's grant of summary judgment in the City's favor on the CR files and reverse the circuit court's ruling on the Bond and Moore lists. In addition, the court should affirm the circuit court's ruling that denied Kalven attorneys' fees on the ground that he did not "substantially prevail" on his claims as required by FOIA section 11(i).

This court reviews de novo the entry of summary judgment in a FOIA case, e.g., BlueStar Energy Services, Inc. v. Illinois Commerce Commission, 374 Ill. App. 3d 990, 994 (1st Dist. 2007), and the decision whether to apply statutory amendments to a pending case, Deicke Center v. Illinois Health Facilities Planning Board, 389 Ill. App. 3d 300, 303 (1st Dist. 2009). Review of a circuit court's decision whether a plaintiff has proven an entitlement to attorneys' fees under FOIA is for abuse of discretion. Callinan v. Prisoner Review Board, 371 Ill. App. 3d 272, 277 (3d Dist. 2007). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., Continental Casualty Co. v.

Law Offices of Melvin James Kaplan, 345 Ill. App. 3d 34, 37 (1st Dist. 2003). "When, as in this case, parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." Id. at 37-38.

Under these standards, the court should affirm the judgment with respect to the CR files and attorneys' fees and reverse with respect to the Bond and Moore lists. To begin, the circuit court correctly determined that the amended FOIA was applicable here. Because Kalven requested prospective relief, the circuit court properly applied the version of the statute in effect at the time that relief would be granted, and thus did not retroactively apply the amendments at all. Regardless, the General Assembly indicated its intent for such retroactivity in the text of the amended FOIA. Because the amended FOIA applies to Kalven's claims, the circuit court properly held that amended section 7(1)(n) exempts CR files from disclosure because they are related to the adjudication of employee disciplinary matters. The CR files are also exempt from disclosure pursuant to the deliberative process privilege contained in section 7(1)(f) of both the amended and prior FOIA. Moreover, if the court disagrees about the applicability of the amended FOIA, the CR files are exempt as "personnel files" under former section 7(1)(b)(ii). In addition, the production of the requested CR files, which would require substantial redactions, would be overly burdensome. And because the Bond and Moore lists consist only of

information derived from exempt CR files, they are likewise exempt from FOIA disclosure for the same reasons, and the circuit court erred by ordering their disclosure. The lists are additionally exempt because they are not public records within the meaning of the amended and prior FOIA. Finally, the circuit court did not abuse its discretion by denying Kalven attorneys' fees because he did not "substantially prevail" on his claims as required by FOIA section 11(i).

I. THE CIRCUIT COURT PROPERLY APPLIED THE AMENDED VERSION OF FOIA TO KALVEN'S CLAIMS.

The circuit court properly recognized that because Kalven's suit sought only prospective relief, the applicable version of FOIA was the one in effect at the time that relief would be granted – the amended FOIA. C. 2137-38. Thus, contrary to Kalven's assertions, Brief of Plaintiff-Appellant, Cross-Appellee 22-24 ["Kalven Br."], the circuit court did not retroactively apply FOIA amendments that became effective after Kalven filed his suit in December 2009. In any event, as the court also recognized, C. 2424, retroactive application of the amended FOIA would be proper because the General Assembly expressed its intent for such retroactive application in the statute's text.

A. The Circuit Court Did Not Retroactively Apply FOIA.

Where a party seeks prospective relief pursuant to a statute, any changes in the applicable statute that are in effect at the time relief is

granted apply. See, e.g., Landgraf v. USI Film Products, 511 U.S. 244, 273 (1994); City of Chicago v. ATF, 423 F.3d 777, 783 (7th Cir. 2005). As the Landgraf Court stated, "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." 511 U.S. at 273. In applying this rule from Landgraf, the Seventh Circuit has explained that where a party does not seek "damages" to compensate for past harms but, instead, seeks only relief from a government agency's alleged wrongful withholding of documents under FOIA, the party's requested relief "operates *in futuro*, rather than retrospectively." ATF, 423 F. 3d at 783. Accordingly, the ATF court held that "the relevant event for assessing retroactivity [in a FOIA case] is the disclosure of the withheld data, which is a potential future event, not a past, completed event." Id. The Illinois Supreme Court has expressly adopted the Landgraf approach to retroactivity, Commonwealth Edison Co. v. Will County Collector, 196 Ill. 2d 27, 38-39 (2001), and, here, the circuit court in turn relied on the Seventh Circuit's application of Landgraf in ATF to hold that the amended FOIA, which became effective January 1, 2010, applied to Kalven's claims for FOIA relief, which would materialize after the effective date of the amendments. C. 2137-38. Because Kalven, as in ATF, sought only prospective relief under FOIA, the circuit court's application of the amended FOIA was appropriate.

Kalven argues that ATF does not apply to his claims under Illinois law because Illinois courts, unlike federal courts, look to the general savings

clause of section 4 of the Statute on Statutes, 5 ILCS 70/4, to avoid retroactive application of substantive statutory amendments. Kalven Br. 27 n.15. This misses the point of ATF, namely, that when prospective relief is sought under FOIA, there is no retroactive application to avoid. See 423 F.3d at 783. Kalven similarly misplaces reliance on Rivard v. Chicago Firefighters Union, Local No. 2, 122 Ill. 2d 303 (1988), to argue that the circuit court erred in looking to the date of disclosure rather than the date his cause of action accrued. Kalven Br. 22 n.8. Kalven asserts that Rivard stands for the proposition that a court may not apply a substantive statutory amendment to a claim that accrued before the amendment occurred, id., and that is certainly the rule for a damages claim for past harm like that at issue in Rivard: "The plaintiffs in the two actions consolidated below sought damages from the defendant, a fire fighters union, for death and injuries suffered in fires which occurred during a strike called by the union in 1980," 122 Ill. 2d at 305. That does not apply to Kalven's claim because he does not seek damages. The ATF court distinguished damages, explaining that they, unlike disclosures under FOIA, are a form of retrospective relief. 423 F.3d at 783. Because, as in ATF, Kalven sought only prospective relief under FOIA, the circuit court's application of the amended FOIA was correct.

B. In Any Event, The Amended FOIA Would Apply Under Illinois Law Regarding Retroactivity.

Even if viewed as a retroactive application of the amended FOIA, the circuit court's ruling is still proper under Illinois law, which applies a two-

step analysis in evaluating retroactivity. First, the court determines whether the General Assembly clearly expressed its intent for retroactive application in the text of the statute. E.g., Commonwealth Edison, 196 Ill. 2d at 38. If it did, then the court gives effect to that legislative intent absent some constitutional bar. E.g., id. Second, if the legislative intent is unclear, the court determines whether there would be some retroactive impact on a party's vested rights that would prevent retroactive application. E.g., id. Because section 4 of the Statute on Statutes contains a default savings clause preventing the retroactive application of substantive statutory provisions, Illinois courts must reconcile that savings clause with any retroactive application of a statute before reaching step two of the analysis. E.g., Caveney v. Bower, 207 Ill. 2d 82, 94-95 (2003). But where the General Assembly has expressed its intent regarding retroactivity in the text of the statute, consideration of section 4 is unnecessary. E.g., Allegis Realty Investors v. Novak, 223 Ill. 2d 318, 332 (2006). As the supreme court explained, "Because it is a *default* standard, section 4 of the Statute on Statutes is inapplicable to situations where the legislature has clearly indicated the temporal reach of a statutory amendment." Id.; accord, e.g., Altenheim German Home v. Bank of America, N.A., 376 Ill. App 3d 26, 35 (2d Dist. 2007). Instead, "the expression of legislative intent must be given effect absent constitutional prohibition." Allegis, 223 Ill. 2d at 332.

As the circuit court properly recognized, C. 2424, the General Assembly clearly indicated its intent that all amendments to FOIA other than the ones concerning attorneys' fees apply retroactively to claims pending at the time the amendments became effective. That is because the General Assembly provided that the amended FOIA would become effective January 1, 2010, 96th General Assembly Public Act 096-0542, § 99, but it specifically provided that the amended attorneys' fees provision of section 11 would apply only to causes of action filed after January 1, 2010, 5 ILCS 140/11(i) (2010). A fundamental principle of statutory construction is that a court should read statutes as a whole and in a manner that does not render any portion of the statute superfluous. E.g., Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255-56 (2004); Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 504 (2000); Heinrich v. Libertyville High School, 186 Ill. 2d 381, 394 (1998). As the circuit court here recognized, the language limiting application of amended section 11(i) "would be superfluous if the 2010 version of FOIA as a whole applied only to actions filed on or after January 1, 2010." C. 2424. Put differently, the General Assembly's specific limitation of the retroactive application of section 11(i) reveals its intent that the remainder of the amended FOIA would apply retroactively. If nothing were to apply retroactively, that limitation would be surplusage.

Kalven asserts that the circuit court erred in reading the temporal limitation on amended section 11(i) as indicative of retroactive intent elsewhere because attorneys' fees are procedural while the other FOIA amendments were substantive. Kalven Br. 26 n.13. He argues that section 4 of the Statute on Statutes prohibits retroactive application of substantive changes absent express legislative intent; thus, he asserts, there was no need for the General Assembly to include a limit on the substantive amendments to FOIA as it did with the changes to the procedural attorneys' fees provision of section 11(i). Id. This argument fails for two reasons. First, it is entirely circular. As we explain above, where the legislature expresses its intent regarding retroactivity in the statute's text, the Statute on Statutes is inapplicable. Allegis, 223 Ill. 2d at 332. Thus, Kalven's arguments regarding the circuit court's purported failure to consider section 4, Kalven Br. 26-27, all of which ignore Allegis and the cases following it, are irrelevant. By relying on the Statute on Statutes, Kalven simply ignores that it is a default rule, and he assumes that the General Assembly's explicit statement in section 11(i) that the amendment concerning attorneys' fees does not express the legislative intent for the remainder of the amendments to apply retroactively. Second, Kalven mistakenly assumes that attorneys' fees statutes are always procedural and, thus, may always be applied retroactively. Kalven relies on Callinan for the proposition that "Illinois generally characterizes attorney fees as procedural for retroactivity purposes

and applies new attorney fees statutes to pending cases." 371 Ill. App. 3d at 275. But he ignores that Callinan continued by explaining that it is not always the case that attorneys' fee provisions are considered procedural and applied retroactively. The court explained that courts will not retroactively apply changes to attorneys' fees statutes where "(1) liability did not exist prior to enactment of the legislation; (2) the conduct giving rise to possible liability occurred before the effective date; and (3) the party against whom expenses were sought could not avoid or limit its liability by any action taken after the statute's effective date." Id. at 275-76. The changes to section 11(i) arguably fit within these factors because the General Assembly changed the threshold for the availability of fees from "substantially prevails" to "prevails" and because it eliminated the limitations on fees where information is sought for "commercial interests." Compare 5 ILCS 140/11(i) (2008), with 5 ILCS 140/11(i) (2010). These changes created the possibility of liability for fees arising from pre-existing denials of FOIA requests where no liability had previously existed. Thus, it is simply not the case that, as Kalven asserts, the General Assembly had to provide an express temporal limit on amended section 11 "because those procedures would apply retroactively by default under Section 4 in the absence of an express legislative statement to the contrary." Kalven Br. 26 n.13.

Kalven also misplaces reliance on decisions holding that delayed implementation of an amended statute's effective date is evidence of

legislative intent that such amendments be applied prospectively. See Kalven Br. 24-25 (citing General Motors Corp. v. Pappas, 242 Ill. 2d 163 (2011); People v. Brown, 225 Ill. 2d 188 (2007); People v. Martinez, 386 Ill. App. 3d 153 (1st Dist. 2008); People v. Blank, 361 Ill. App. 3d 400 (1st Dist. 2005)). None of those decisions addressed an amended statute, like FOIA, in which the General Assembly otherwise indicated its intent for general retroactive application by specifically limiting the retroactive application of a particular provision.

For these reasons, the circuit court correctly held that the General Assembly had expressed its intent for the amended FOIA generally to apply retroactively to claims pending before the amendments became effective. As Commonwealth Edison holds, that intent is controlling absent a constitutional bar. 196 Ill. 2d at 38. Kalven has identified no constitutional limit to the retroactive application of the amended FOIA exemptions, and none exists because it is well established that there is no "constitutionally protected interest" or vested right in "the mere continuation of a law and the legislature has an ongoing right to amend a statute." E.g., New Heights Recovery & Power, LLC v. Bower, 347 Ill. App. 3d 89, 96 (1st Dist. 2004). Therefore, the court should give effect to the General Assembly's intent that the amended FOIA apply after January 1, 2010 to all actions, even those filed before that date.

II. CR FILES ARE EXEMPT FROM DISCLOSURE UNDER FOIA.

The circuit court properly held that CR files are exempt from FOIA disclosure pursuant to amended section 7(1)(n) because they are records relating to a public body's adjudication of disciplinary cases. C. 2138-40. In addition, CR files are exempt from disclosure under section 7(1)(f) of the amended and prior FOIA because they consist of preliminary disciplinary investigations and recommendations. And, if the court rules that pre-amendment FOIA applies to Kalven's claims, the CR files are also exempt under former section 7(1)(b)(ii). In addition, production of the requested CR files would be overly burdensome. Although the circuit court relied only on section 7(1)(n), a reviewing court may affirm on any ground supported by the record. E.g., Urban Sites of Chicago, LLC v. Crown Castle USA, 2012 IL App (1st) 111880 ¶21.

A. The Circuit Court Properly Determined That CR Files Are Exempt Under Section 7(1)(n).

Amended section 7(1)(n) expressly exempts from disclosure "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the outcome of cases in which discipline is imposed." 5 ILCS 140/7(1)(n) (2010). As the circuit court correctly recognized, CR files are exempt from disclosure under section 7(1)(n): they "are 'related to' adjudicatory proceedings because . . . there can be no adjudicatory proceedings without CRs." C. 2139. IPRA and IAD create the information in CR files during their investigations of misconduct

complaints, and these investigations and the resulting disciplinary recommendations form the basis for any discipline imposed by the Superintendent or the Police Board. The Police Board has aptly summarized the role of IPRA and IAD's investigations and recommendations to the Superintendent in the adjudication of police disciplinary matters: "The Board cannot on its own reach out and investigate or hold a disciplinary hearing against a police officer suspected of misconduct; rather, the Board can take action only after the Superintendent of Police files charges against an officer, or suspends an officer who then requests review of the suspension." Chicago Police Board, Allegations of Police Misconduct, supra, at 1. As one federal district court addressing the issue explained, "the [Board] relies heavily on [IPRA's] investigation . . . demonstrating a close connection between the CRs and the adjudication – and at least a sufficiently close connection to satisfy the 'related to' language in the amendment." Pierce v. City of Chicago, No. 09 C 1462, slip op. 3-4 (N.D. Ill. April 16, 2010) (docket #40).[3]

The circuit court recognized that no reviewing court in Illinois has interpreted section 7(1)(n), C. 2139, and, in holding that section 7(1)(n) exempts CR files from disclosure because they are related to adjudications of employee disciplinary matters, relied on a number of federal district court opinions that reached the same conclusion, id. (citing Pierce, slip op. 3-4; Bell

[3] The appendix to this brief contains copies of all unpublished court decisions we cite in this brief.

v. City of Chicago, No. 09 C 0754, 2010 WL 753297, at *3 (N.D. Ill. Feb. 26, 2010); Livingston v. McDevitt, No. 09 C 7725, slip op. 3 (N.D. Ill. May 10, 2010) (docket #23); Alva v. City of Chicago, No. 08 6261 (N.D. Ill. April 16, 2010) (docket #80)). These courts all held that the plain language of section 7(1)(n) exempts not only information from adjudications of disciplinary matters but also information "relating to" the adjudication of such matters. For example, Bell rejected as "specious" an argument similar to Kalven's, Kalven Br. 35-36, that section 7(1)(n) exempts only materials actually used at the Police Board. 2010 WL 753297 at *3. The court explained, "The amendment does not exempt adjudications, but instead expressly protects 'records *relating to*' adjudications." Id. (quoting 5 ILCS 140/7(1)(n)). The Livingston court agreed "that the plain language of the statute includes documents in a CR or disciplinary file because they 'relate to' a public body's adjudications, even if the CR disciplinary documents also pertain to the initial investigation of the disciplinary complaint." Slip op. 3. And the Pierce court explained that CR files "relate to" disciplinary adjudications because any adjudication begins with IPRA's or IAD's investigation of a complaint and subsequent recommendation to the Superintendent based on that investigation. Slip op. 3. The court stated, "Although IPRA's investigation does not involve oaths, cross-examinations, or confrontations, the initial investigation by IPRA triggers the adjudication." Id. at 4. It is therefore "related to" the adjudication.

The circuit court properly rejected other federal district court decisions that Kalven cites for a contrary holding because those decisions "fail to apply the plain and unambiguous language of section 7 of the 2010 version of FOIA." C. 2424; see also Kalven Br. 34-36 (citing Macias v. City of Chicago, 09 C 1240 (N.D. Ill. March 10, 2010) (docket #62); Rangel v. City of Chicago, No. 10 C 2750 (N.D. Ill. Sep. 13, 2010) (docket #34); Fuller v. City of Chicago, No. 09 C 1672 (N.D. Ill. Nov. 10, 2009) (docket #67); Clark v. City of Chicago, No. 10 C 1803, 2010 WL 3419464 (N.D. Ill. Aug. 25, 2010)).[4] Specifically, the circuit court correctly noted that these contrary decisions do "not address the broad construction that must be afforded the term 'related to.'" C. 2139; accord Livingston, slip op. 3 (recognizing broad effect of "relate to" in section 7(1)(n)); Pierce, slip op. 3 (same).[5] Kalven asserts that by broadly

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[4] Kalven also cites Martinez v. City of Chicago, No. 09 C 5938, 2012 WL 1655953 (N.D. Ill. May 10, 2012), and Henry v. Centeno, No. 10 C 6364, 2011 WL 3796749 (N.D. Ill. Aug. 23, 2011), as decisions rejecting section 7(1)(n) as a basis for withholding CR files from disclosure, but, in deciding whether "good cause" for a protective order existed in those cases, neither court actually decided the section 7(1)(n) issue. Martinez, 2012 WL 1655953 at *3 n.3 ("We therefore decline to decide whether § 7(n) applies to CR files."); Henry, 2011 WL 3796749 at *4 ("Because IFOIA does not control the question before the court, however, the court need not reach this difficult question of law.").

[5] In addition to the federal district court decisions addressed below, Kalven also cites on appeal a non-binding opinion letter and FOIA guide from the Illinois Attorney General and a decision from the Circuit Court of Sangamon County. Kalven Br. 34-36 (citing FOIA Request for Review, 2010 PAC 6246 (Ill. Att'y Gen. Sep. 8, 2011); Illinois Attorney General's Office, FOIA Guide for Law Enforcement; Christian v. City of Springfield, No. 2010-MR-461 (Cir. Ct. of Sangamon County June 3, 2011)). Like the federal district court cases rejected by the circuit court, the opinion letter, guide and

interpreting "relating to" in section 7(1)(n), the circuit court contradicted precedent requiring narrow interpretation of FOIA exemptions. Kalven Br. 36-37. He ignores that where the General Assembly employs language that is usually given broad interpretation, this court has given that language its usual interpretation within the exemption. See Kopchar v. City of Chicago, 395 Ill. App. 3d 762, 770-71 (1st Dist. 2009); BlueStar, 374 Ill. App. 3d at 995. And "relating to" is one of those terms that Illinois courts generally interpret broadly. E.g., Goff v. Teachers' Retirement System, 305 Ill. App. 3d 190, 195 (5th Dist. 1999). As the Goff court explained, "The statutory phrases, 'relating to', 'arising out of', and 'in connection with' are very broad terms." Id. Indeed, in Kopchar, this court acknowledged the general rule requiring narrow interpretation of FOIA exemptions, 395 Ill. App. 3d at 766, but still interpreted broadly former section 7(1)(w)'s exemption of "[i]nformation related solely to the internal personnel rules and practices of a public body" to hold that "the fire department's testing criteria and scoring process also relate to personnel practices," id. at 771. Similarly, in BlueStar, this court recognized the general rule regarding narrow interpretation of FOIA exemptions, 374 Ill. App. 3d at 994, but broadly construed section 7(1)(g)'s exemption of "[t]rade secrets" because the "Illinois legislature intended that the term trade secret be construed broadly," id. at 995 (internal

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Christian order fail to account properly for the plain language of section 7(1)(n) exempting all information "relating to" the adjudication of disciplinary matters.

quotation omitted). Thus, the circuit court properly followed the approach giving broad interpretation to the term "relating to" to hold that the plain language of section 7(1)(n) exempts CR files from disclosure.

If any ambiguity remains regarding the General Assembly's intent behind the language of section 7(1)(n)'s exemption for "[r]ecords relating to a public body's adjudication of . . . disciplinary cases," the legislative history establishes beyond doubt the intent for a broad interpretation. Specifically, the transcript of the House debate surrounding the passage of the amended FOIA contains the following discussion:

> Black: . . . The final outcome of a disciplinary case would not be exempt. So, if you fired somebody for malfeasance or for cause, I can get that record. I can say, why was he fired, he was fired for cause, right? That is not exempt.
>
> Madigan: The answer is yes.
>
> Black: All right. But if I want the records that led up to his . . . his or her firing, those personnel records would be exempt. Is that my understanding?
>
> Madigan: Would be exempt?
>
> Black: Yes. All of the details that led to the dismissal.
>
> Madigan: I'm advised that the answer is yes.

State of Illinois 96th General Assembly House of Representatives Transcription Debate 62d Legislative Day, at 103-04 (May 27, 2009) (statements of Speaker Madigan and Representative Black) available at http://www.ilga.gov/house/transcripts/htrans96/09600062.pdf. This legislative history reveals the General Assembly's intent to make the final

disciplinary decision against a public employee available for public disclosure but to protect from disclosure all information "related to" the reasons for that disciplinary decision.

Kalven also argues that the circuit court erred to the extent that its holding exempts CR files in cases in which IPRA or IAD did not sustain the charges against an officer because no adjudication of those charges occurred. Kalven Br. 37-38 n.23. That is not correct. First, both the plain language and the legislative history of section 7(1)(n) discussed above demonstrate that the General Assembly intended that only the final outcomes of cases in which discipline occurred would be subject to disclosure. Thus, where there is no discipline, there is nothing subject to disclosure. Kalven's argument would lead to the absurd result that the CR files containing the investigative results and recommendations in cases in which an officer was disciplined would be exempt from FOIA disclosure while the investigation and recommendations in cases in which no discipline occurred would be subject to disclosure. It is well established that a court should avoid absurd results when interpreting a statute. E.g., Michigan Avenue, 191 Ill. 2d at 504. Second, whether a Police Board hearing occurs or not does not somehow transform the nature of the information in a CR file; the decision whether a hearing will occur is made on the basis of the information in the CR file.

Kalven's also argues that the General Assembly did not intend with its enactment of amended section 7(1)(n) to overrule Gekas v. Williamson, 393

Ill. App. 3d 573 (4th Dist. 2009), which held that materials related to disciplinary investigations of police officer misconduct were not exempt from disclosure under the privacy exemption in former section 7(1)(b)(ii) for "personnel files" because they "bear[] on the public duties" of police officer within the meaning of former section 7(1)(b). See Kalven Br. 33-35. This does not advance the analysis. The circuit court's ruling is based solidly in the statutory language of section 7(1)(n); given that clear language, the court rightly did not delve into the legislative intent to overrule Gekas. C. 2138-39; C. 2424. Kalven also observes that former section 7(1)(u) was worded similarly to amended section 7(1)(n) and was in effect when Gekas was decided, and yet Gekas found police misconduct investigations non-exempt. Kalven Br. 33 (citing 5 ILCS 140/7(1)(u) (2008)). Gekas does not undermine the application of section 7(1)(n) to CR files. Neither Gekas nor any other decision even involved section 7(1)(u), and the legislative history of the amended FOIA that we discuss above expressly demonstrates the General Assembly's intent to exempt from disclosure information related to the reasons for disciplinary decisions. Likewise, Kalven ignores that section 7(1)(n) does not require an agency to demonstrate that CR files meet a privacy exemption as was the case with former section 7(1)(b)(ii), which Gekas addressed. See Bell, 2010 WL 753297 at *2 (recognizing that CR files need not be "a personal and private part of an officer's personnel file" to be exempt under section 7(1)(n)).

Finally, Kalven's arguments regarding the public interests in disclosure of CR files, Kalven Br. 18-21, are beside the point. The CR files are exempt under section 7(1)(n) (as well as others as we explain below). "Where the public body claims that a requested document falls within one of these specifically enumerated categories and is able to prove that claim, no further inquiry by the court is necessary." Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401, 408 (1997); accord Kopchar, 395 Ill. App. 3d at 766-67; Copley Press, Inc. v. Board of Education, 359 Ill. App. 3d 321, 324 (3d Dist. 2005); Bell, 2010 WL 753297 at *2. Thus, whatever the public interest in a particular government record, it is still exempt where the General Assembly has chosen to exempt that record from disclosure.

In short, the circuit court properly held that CR files "relate to" the adjudication of disciplinary matters and are thus exempt from disclosure pursuant to section 7(1)(n). Accordingly, this court should affirm the grant of summary judgment to the City with respect to the CR files.

B. CR Files Are Also Exempt Under Section 7(1)(f).

CR files are also exempt under section 7(1)(f), which is the functional equivalent of the deliberative process privilege and protects pre-decisional governmental discussions of policy decisions. See, e.g., Kopchar, 395 Ill. App. 3d at 775-76; Harwood v. McDonough, 344 Ill. App. 3d 242, 247-48 (1st Dist. 2003). Because the General Assembly did not change section 7(1)(f) in the

amended FOIA, this exemption applies regardless whether the court determines that the prior or amended FOIA applies to Kalven's claims.

Section 7(1)(f) exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated . . . ." 5 ILCS 140/7(1)(f). The deliberative process privilege in section 7(1)(f) "is intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." Harwood, 344 Ill. App. 3d at 248. Here, the City presented the affidavit of Michael Duffy, who explained that CR files include documents from which an investigator prepares a report containing findings and recommendations for resolving the complaint. C. 770-71 ¶¶ 2-7. That report is sent to CPD for review by the Superintendent, who must decide whether to adopt the recommendations in whole or in part. Id. ¶¶ 5-7. Thus, CR files consist of preliminary investigations of misconduct complaints and recommendations for their resolution. Indeed, this court has recognized that "[t]he clear purpose of the OPS [now IPRA] investigation was to determine whether any further disciplinary actions should be taken against" an accused officer. Bauer v. City of Chicago, 137 Ill. App. 3d 228, 234 (1st Dist. 1985). CR files generated during these preliminary investigations should, therefore, be exempt in their entirety under section 7(1)(f).

In Watkins v. McCarthy, 2012 IL App. (1st) 100632, which was issued as a published opinion after final judgment was entered in this case, this court considered the application of section 7(1)(f) to CR files and concluded that although the supporting affidavit offered there did "make a case that the deliberative process exemption may apply," it did not justify withholding the entire CR file under section 7(1)(f); thus, an in camera inspection was warranted to determine whether and to what extent that exemption applied to the CR files. Id. ¶¶ 37-38. Although Kalven argues that CR files are "not the sort of material the deliberative process exemption was designed to protect," Kalven Br. 41, that does not square with Watkins. If the court concludes that the affidavit submitted here does not support the exemption for the entirety of the CR files, then, at a minimum, the same relief ordered in Watkins – in camera review for the circuit court to evaluate whether and to what extent the CR files contain information exempt under section 7(1)(f) – should be ordered here. Indeed, even Kalven agrees that, under Watkins, any parts of CR files that are subject to section 7(1)(f) are exempt from disclosure. See Kalven Br. 42. In addition, Watkins also recognized that factual matters that are "inextricably intertwined" with predecisional policy discussions are also exempt from disclosure. 2012 IL App. (1st) 100632, ¶ 36. In camera review would be necessary for these determinations.

C. CR Files Are Exempt Under Section 7(1)(b)(ii) Of The Pre-Amendment FOIA.

If the court holds that the pre-amendment FOIA applies to Kalven's claims, the CRs are still exempt under former section 7(1)(b)(ii) because they are "personnel files." See 5 ILCS 140/7(1)(b)(ii) (2008).

In Watkins, this court also considered whether CR files were exempt under section 7(1)(b)(ii). The court stated that it was "not readily apparent that CR files are the type of documents that would 'reasonably be expected' to be found in personnel files." 2012 IL App (1st) 100632 ¶ 20 (citing Copley Press, 359 Ill. App. 3d at 324). With respect, we urge the court to reconsider that view. The affidavit in Watkins, id. ¶ 20, and the one in this case support the conclusion that a CR file is a disciplinary record; it is an investigation into a complaint of misconduct with recommendations regarding discipline. See C. 770-71. In Copley Press, the court noted that FOIA does not define the term "personnel file;" to fill that void, the court looked to the definition of "personnel record" in section 2 of the Personnel Records Review Act. See 359 Ill. App. 3d at 324. The court concluded that "[g]iven its plain and ordinary meaning, a 'personnel file' can reasonably be expected to include documents such as . . . performance evaluations and disciplinary records." Id. That analysis is correct – an employee's record of discipline is precisely the sort of personnel information that may be found in a personnel file, and thus CRs should be exempt under former section 7(1)(b)(ii). Although Watkins noted the Gekas court's view that "investigations of complaints of misconduct

differed from performance evaluations," Watkins, 2012 IL App (1st) 100632 ¶ 22; see Kalven Br. 31 (discussing difference between performance evaluations and police misconduct complaints), that does not explain why a CR file is not a kind of disciplinary record or why a disciplinary record is not the sort of information that would be found in a personnel file.

Watkins also noted that Gekas, relying on Stern v. Wheaton-Warrenville Community School District 200, 233 Ill. 2d 396 (2009), determined that investigations of alleged misconduct were not exempt under section 7(1)(b)(ii) because they "dealt with the sheriff's public duties," Watkins, 2012 IL App (1st) 100632 ¶ 22, a reference to language in section 7(1)(b)'s general privacy exemption stating that "disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy," 5 ILCS 140/7(1)(b) (2008). There is reason to question whether that language should be construed, as Gekas did, to be a limitation on the personnel file exemption. Former section 7(1)(b) provided a general exemption for "information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy . . . ." 5 ILCS 140/7(1)(b). As we explain above, in the same section, the statute provides that "[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." Id. But section 7(1)(b) next provides that "[i]nformation exempted under this subsection (b) shall include but is not limited to" a number of

categories, one of which is "personnel files and personal information" of employees. Id. 7(1)(b)(ii). In Lieber, the Illinois Supreme Court held that records within any of the categories enumerated under section 7(1)(b) are per se exempt; thus, if information is in one of those categories, the court need not consider whether there would be an invasion of privacy. 176 Ill. 2d at 408. Consistent with that analysis, the "bears on the public duties" language would modify only the general privacy exemption that precedes it, while everything in the enumerated subcategories would be per se exempt.

In Stern, the supreme court determined that a school superintendent's employment contract constitutes information that "bears on [his] public duties," and thus was subject to disclosure. 233 Ill. 2d at 411. The court found that Copley Press provided "little guidance" on the question whether an employment contract was per se exempt, because that case "did not involve a request for an employment contract and did not consider whether a document, even if normally maintained in a personnel file, is subject to disclosure because it bears on the public employee's public duties." Id. at 409. The court also explained that even though an employment contract may be physically maintained in a personnel file, that "is insufficient to insulate it from disclosure." Id. at 411. But at the same time, the court reaffirmed Lieber, holding that "requiring disclosure of employment contracts does not render the *per se* rule this court adopted in *Lieber* meaningless. The *per se* rule still has general applicability where the information requested falls

within one of the six specific exemptions to disclosure set forth in section 7(1)(b)." Id. at 413. The school district, though, had "simply failed to establish that the *per se* exemption for personnel records encompasses employment contracts." Id. at 413-14. From this approach, it is unclear whether Stern intended to read the "bears on the public duties" language as a limitation on the personnel file exemption, or whether the court believed an employment contract is not a personnel record. The Seventh Circuit has observed that Stern and Gekas are "difficult to reconcile with Lieber and Copley Press. We need not try to predict how the Illinois Supreme Court might resolve the conflict." Bond v. Utreras, 585 F.3d 1061, 1076 (7th Cir. 2009).

At a minimum, even if the court follows Watkins and Gekas, those cases support a remand for in camera review of the requested CR files, to determine, before they are disclosed, whether they involve matters that "bear on the public duties" of the named officer. See Watkins, 2012 IL App (1st) 100632 ¶ 26; Gekas, 393 Ill. App. 3d at 590 (remanding with directions that circuit court "identify, and order defendant to provide to plaintiff, each of the remaining files that bears on allegations of misconduct by Gillette in the performance of his duties as a deputy sheriff").

D. The CR Files Are Exempt From Disclosure Because Compliance Would Be Unduly Burdensome.

The CR files are also exempt under section 3(g) of the amended FOIA (and section 3(f) of the pre-amendment FOIA), because compliance with Kalven's request would be unduly burdensome. Section 3(g) provides:

> (g) 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.

5 ILCS 140/3(g) (2010).[6] As this court recognized in Watkins, the City will be required to redact certain protected information from each CR file before any disclosure, including personal information such as "the officers' social security numbers, birth dates, employee numbers, personal health information, home addresses, and home telephone numbers." 2012 IL App (1st) 100632 ¶ 28.[7] In addition, as we explain above, even Kalven concedes

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[6] The pre-amendment FOIA contained identical language in former section 3(f). 5 ILCS 140/3(f) (2008).

[7] These redactions would include: (i) all complainant, witness and third-party names and other identifying information; (ii) all private and personal information regarding defendant officers, CPD employees and their families, plaintiffs, witnesses or other non-parties, including, but not limited to, social security numbers, dates of birth, home addresses, telephone numbers, medical and financial information, driver's license and employee numbers; (iii) names and identifying information of suspects in police reports who were not arrested or subsequently prosecuted; (iv) narratives where disclosure would constitute an unwarranted invasion of personal privacy

that redactions could be made of any portions of CR files that contain pre-decisional recommendations and are therefore exempt under section 7(1)(f). Making all of these redactions will place an undue burden on the City under section 7(g).

When Kalven first submitted his FOIA request, CPD requested that he narrow the request and explained in its response letter why the request was burdensome. C. 31-34. Rather than narrow his request, Kalven filed this lawsuit. Although Kalven later narrowed his requests during the litigation by voluntarily dismissing some claims, his remaining claims for the CR files of the five officers nevertheless place an undue burden on the City, and he has not proposed to narrow his claims further. Even accepting Kalven's position that public disclosure of the disciplinary history of these police officers would serve the public interest, see Kalven Br. 18-21, a more modest request, even simply more time-limited, could reasonably accomplish the same purpose. As it stands, the request imposes a burden that outweighs the public interest. As the City explained below, a sample set of CR files averaged approximately 87 pages each. C. 775 ¶ 12. It took a Law Department attorney 1.25 minutes per page to redact from CR files simply

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(such as in domestic incidents); (v) in appropriate incidents, graphic descriptions of alleged offenses and graphic photographs (including autopsy photographs); and (vi) any other information that would constitute an unwarranted invasion of personal privacy pursuant to 5 ILCS 140/7(1)(c). See Illinois Attorney General's Office, FOIA Guide for Law Enforcement, available at http://foia.ilattorneygeneral.net/pdf/FOIA_Guide_for_Law_Enforcement.pdf.

the names and other identifying information of complainants and witnesses who had provided information in connection with allegations of police misconduct. C. 790-91. As the City explained in the circuit court, Kalven's amended request seeks nearly 200 CR files. C. 1999. Based on this, it would take approximately 362.5 hours – approximately nine weeks of full-time work – to make even just these redactions. And it will take even longer to make any necessary redactions under section 7(1)(f) of pre-decisional recommendations. As the City argued below, C. 2002, whether the amount of time required to redact these CR files is unduly burdensome requires, at a minimum, in camera review.

III. THE BOND AND MOORE LISTS ARE ALSO EXEMPT.

As we explain above, the circuit court properly held that CR files are exempt from disclosure pursuant to section 7(1)(n). Notwithstanding that conclusion, the court held that the Bond and Moore lists, which merely summarize information contained in exempt CR files, were not exempt from disclosure. C. 2423. That was error. The circuit court reached this conclusion because it determined that the City had waived its argument that section 7(1)(n) applies to the Bond and Moore lists. But as we explain below, the City did not waive that argument because it argued that section 7(1)(n) applied to disciplinary records generally and not only to the CR files. And, section 7(1)(n) applies to the lists to the same extent that it applies to the CR files from which the lists are derived. In addition, the Bond and Moore lists

are not subject to FOIA disclosure because they are not "public records" maintained by CPD. Rather, they are lists that IAD compiled at the direction of the City's Law Department solely for purposes of complying with federal discovery requests and subject to a protective order prohibiting their use or disclosure outside the litigation. Moreover, to the extent that section 7(1)(f) and former section 7(1)(b)(ii) exempt CR files from disclosure, the lists summarizing information contained within those exempt CR files are likewise exempt. We expressly adopt the arguments in Part II of this brief regarding section 7(1)(n), section 7(1)(f), and former section 7(1)(b)(ii) with respect to the lists as well, and raise additional points below.

A. Section 7(1)(n) Applies To The Bond And Moore Lists.

1. The City did not waive its argument that section 7(1)(n) applies to the lists.

The circuit court erred when it ruled that the City waived its argument that section 7(1)(n) exempts the Bond and Moore lists from disclosure. C. 2423. Because the circuit court rested its waiver ruling on the text of the City's summary judgment pleadings, review of that ruling involved no factfinding and therefore no deference is appropriate. Instead, review should be de novo, as it is in other contexts where a court merely construes written language. See, e.g., Area Erectors, Inc. v. Travelers Property Casualty Co. of America, 2012 IL App (1st) 111764, ¶ 20 (interpretation of the text of a contract is a question of law reviewed de novo); In re Estate of Mosquera,

2013 IL App (1st) 120130, ¶ 11 (interpretation of statutory text is question of law reviewed de novo).

The City raised section 7(1)(n) in relation to both the CRs and the lists by arguing on summary judgment that this section applied to disciplinary records generally. C. 755-58. Indeed, the City entitled Part I of its Amended Memorandum in Support of Summary Judgment: "THE CRS AND LITIGATION LISTS ARE EXEMPT FROM PRODUCTION." C. 755 (emphasis added). The City then argued in Part I.A. that the "records" generally were exempt under the current FOIA. Id. And Part I.A.2. argued that "Employee Disciplinary Records Are Specifically Exempted Under Section 140/7(1)(n) of 2010 FOIA." C. 756. To be sure, that part discussed the analyses of federal district courts that had addressed the application of section 7(1)(n) to CR files, but it did so within the broader argument that the "Illinois legislature has seen fit to specifically identify employee disciplinary records as exempt from [disclosure] under the currently applicable FOIA." C. 756 (emphasis added). All told, that should be sufficient to preserve the section 7(1)(n) argument with respect to the lists, which is, after all, the same argument as the one regarding CR files because the lists merely compile information contained in CR files.

Regardless, it is well established that this court has discretion to overlook any waiver. As the Illinois Supreme Court has explained, "The waiver rule is an admonition to litigants and not a limitation upon the

jurisdiction of a reviewing court." Barnett v. Zion Park District, 171 Ill. 2d 378, 389 (1996); accord, e.g., Committee for Educational Rights v. Edgar, 174 Ill. 2d 1, 11 (1996). A court may exercise that discretion where its "responsibility for a just result and for the maintenance of a sound and uniform body of precedent overrides considerations of waiver." Barnett, 171 Ill. 2d at 389. This is particularly true where the issues for consideration "are of substantial public importance." Edgar, 174 Ill. 2d at 12. Here, a just result warrants consideration of the applicability of section 7(1)(n) to the Bond and Moore lists. Otherwise, the City will be required to produce lists summarizing information from CR files even though the CR files themselves are exempt from disclosure. Moreover, once the lists were released here, they would affect cases beyond this one; even those in which there was no waiver. Finally, strong public policy interests underlie the question whether FOIA requires public disclosure of accusations of misconduct against police officers, and the General Assembly's decision to exempt certain categories of records from public disclosure.

Moreover, the usual reasons for enforcing waiver do not apply here. Kalven cannot claim surprise or prejudice. Again, the lists merely compile information from CR files, which, undisputedly, the City vigorously argued were exempt under section 7(1)(n), and Kalven argued were not. Consistent with this, as Kalven concedes, a reviewing court may overlook waiver and address the application of a FOIA exemption as a pure question of law where

the parties fully briefed the issue. Kalven Br. 38 n.24 (citing Edgar, 174 Ill. 2d at 11; Montes v. Mai, 398 Ill. App. 3d 424, 427 (1st Dist. 2010)). Application of section 7(1)(n) requires no fact finding, and the parties fully briefed the legal concepts applicable to the lists below. C. 755-58; 1st Supp. C. 13-15, 47-49, 124-26. Thus, addressing the issue on appeal would not undermine any interest of the courts in orderly presentation of issues. Indeed, overlooking waiver of the legal question of the applicability of a FOIA exemption is in line with section 11 of FOIA, which provides that "[i]n any action considered by the court, the court shall consider the matter de novo." 5 ILCS 140/11(f); see also Kopchar, 395 Ill. App. 3d at 769-70. Indeed, in Kopchar, this court rejected an argument that the City had waived its assertion of certain FOIA exemptions where the City had not raised those exemptions in its response to the plaintiff's FOIA request. 395 Ill. App. 3d at 769-70. This court explained, "We find no provision for forfeiture in the statute, as section 11(f) expressly provides for *de novo* review to determine if any provision applies . . . ." Id. at 770.

2. Section 7(1)(n) exempts the lists to the same extent as the underlying CR files.

As we explain in Part II.A. above, CRs files are exempt pursuant to section 7(1)(n) because they are "[r]ecords relating to a public body's adjudication of . . . disciplinary cases," 5 ILCS 140/7(1)(n), and the Bond and Moore lists, which merely summarize information contained in CR files, are likewise exempt. The Bond and Moore lists are related to the adjudication of

disciplinary cases because they summarize information from CR files related to thousands of CPD officers. For example, as the City explained in the circuit court, the Moore lists summarize the following information from CR files related to thousands of CPD officers: (1) a listing of every complaint initiated against each officer within the relevant time period for each list; (2) the category assigned to each complaint (i.e., illegal arrest, search of premise, unnecessary physical contact, failure to submit proper reports, misuse of department equipment, etc.); (3) the finding for each complaint (not sustained, unfounded, exonerated, or sustained); and (4) the discipline imposed for any sustained complaint. 1st Supp. C. 13-14. In short, the lists simply compile disciplinary information contained within exempt CR files and should be exempt under section 7(1)(n) for the same reasons that the files themselves are exempt. To exempt the underlying CR files but not the lists that summarize the disciplinary data contained in those files is not only inconsistent but also permits an end-run to access information about disciplinary cases that the General Assembly intended to protect from public disclosure. The circuit court's order should be reversed to the extent that it required the City to release the lists.

B. The Bond and Moore Lists Are Not CPD Documents Subject To FOIA.

More fundamental, the Bond and Moore lists are also not subject to FOIA disclosure because they are not documents maintained by CPD in the regular course of its business. C. 775 ¶ 15. The circuit court held that the

lists are subject to disclosure because they are "reports prepared by the CPD," C. 2141, but CPD created and produced the lists at the direction of the City's Law Department to respond to discovery requests in federal litigation subject to guarantees of protection from wider disclosure, id.; C. 794 ¶ 3; C. 799 ¶ C.1. If not for these discovery demands and guarantees of protection from disclosure, these lists would not exist at all. Thus, they should not be considered CPD records for FOIA purposes. Indeed, although FOIA broadly defines "public records," 5 ILCS 140/2(c) (2010), it also provides that it "is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective. . . ," id. 140/1 (2010).[8]

The procedural history of the Moore litigation demonstrates that the lists would not exist, let alone have been produced in that litigation, if it were not for the district court's assurances there that the lists would be produced under a protective order that would shield them from public disclosure. After the district court granted Moore's motion to compel the production of the lists of disciplinary information sought in discovery, former CPD Superintendent Jody Weis appeared before the court to express his continuing objection to the production of such information. The district court assured Superintendent Weis at that time as follows:

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[8] In amending FOIA, the General Assembly did not change this language in section 1; thus, the lists are not CPD documents for FOIA purposes regardless which version of FOIA applies to Kalven's claims.

> There seemed to be at least a misimpression among some people that these lists, in fact, your own affidavit seems to assume that these are the wholesale disclosure of identifying information of police officers' names is particularly disconcerting.
>
> Well, I could almost agree with that statement, at least out of context as a general matter. There was no wholesale disclosure in this case. This is all, this is under a protective order. It's basically plaintiff and attorneys' eyes and experts' eyes only, only for use in this case . . . .
>
> So there was never going to be – if you believed that there was going to be some wholesale public disclosure of these names by the production of the documents that Judge Valdez had ordered, that was a mistake. . . . But the public perception is that's what was going to happen, or maybe that was the rank and file perception. I just want to emphasize that it was not going to be a public disclosure. It is under a protective order.

1st Supp. C. 37-39. The City similarly created and produced the Bond lists in response to discovery requests in that litigation, C. 775 ¶¶ 14-15, and with the assurance of the protective order that the parties would not "use or disclose . . . Confidential Matter released in this proceeding for any other purpose or in any other proceeding," C. 794 ¶ 3. Moreover, Kalven is represented by, among others, the same legal organizations that represented the plaintiffs in Moore and Bond and that required the City to create and produce the lists in discovery pursuant to protective orders. Now that those federal district court cases are over, they have sued in state court under FOIA for release of the very data that they obtained from the City solely for litigation purposes and under a protective order prohibiting further use or disclosure.

In similar circumstances in BlueStar, this court affirmed the grant of summary judgment in a government agency's favor on a FOIA claim for disclosure of a settlement agreement, where the agency had possession of the agreement only because the agency had compelled its production from the regulated entity during regulatory proceedings. 374 Ill. App. 3d at 995-96. This court recognized that the regulated entity had "resisted the ICC's attempts to discover the settlement agreement in the context of the acquisition proceeding" and had "willingly disclosed the settlement agreement to the ICC only after it agreed to treat the disclosures as confidential." Id. at 996. This court held that the agreement should be exempt from FOIA because ordering its disclosure "would have a chilling effect upon the ICC's ability to receive similar information in the future." Id. This court also explained, "it is undisputed that had the agreement not been disclosed to the ICC, BlueStar would have had no claim to the agreement." Id. Similarly here, disclosure of the Bond and Moore lists will discourage government agencies from agreeing to produce information in future discovery pursuant to protective orders for fear that such confidential discovery responses will be subject to later FOIA requests. Moreover, like the plaintiff in BlueStar, who would have had no claim to access the agreement at issue if it had not been ordered to be disclosed to a regulatory agency, Kalven would have no claim to the Bond and Moore lists if the City

had not been compelled to create and produce them in litigation subject to guarantees of protection from wider disclosure.

Thus, lists that were created solely to respond to discovery requests pursuant to assurances that they would not be further used or disclosed should not be considered public records that were "maintained or prepared" by CPD. See 5 ILCS 140/1.

C. Section 7(1)(f) And Former Section 7(1)(b)(ii) Also Exempt The Bond and Moore Lists.

In the circuit court, the City argued that section 7(1)(f) and former section 7(1)(b)(ii) applied to all of the "records" that Kalven sought. C. 758-62; C. 764-65. As we explain in Part III.A. above, the Bond and Moore lists merely summarize information contained in CR files. Thus, because the underlying CR files are partially or entirely exempt from disclosure under section 7(1)(f) or former section 7(1)(b)(ii), the lists are likewise exempt.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DENYING KALVEN ATTORNEYS' FEES.

The circuit court denied Kalven's request for attorneys' fees because it determined that Kalven had not "substantially prevailed" on FOIA claims by obtaining disclosure of only the Bond and Moore lists. C. 2141; C. 2425. If this court agrees that the circuit court erred by ordering the disclosure of even those lists, Kalven's arguments about attorneys' fees will be moot because he will have had no success on any of his claims. But, even under

the circuit court's decision, the circuit court did not abuse its discretion by denying Kalven's request for fees.

Because Kalven filed his lawsuit before January 1, 2010, the pre-amendment FOIA's attorneys' fees provision applies to his claims. The attorneys' fees provision of the amended FOIA, 5 ILCS 140/11(i) (2010), makes this clear: "The changes contained in this subsection apply to an action filed on or after the effective date of this amendatory Act of the 96th General Assembly." Before the amendment, section 11(i) provided, in relevant part, "If a person seeking the right to inspect or receive a copy of a public record substantially prevails in a proceeding under this Section, the court may award such person reasonable attorneys' fees and costs." 5 ILCS 140/11(i) (2008). Contrary to Kalven's assertions, Kalven Br. 43-44, the award of fees is discretionary under the pre-amendment FOIA, see 5 ILCS 140/11(i) (2008) ("the court may award fees"), as the change in language in the amendment reinforces, 5 ILCS 140/11(i) (2010) ("the court shall award" fees). Because the award is discretionary, reviewing courts have held that the denial of attorneys' fees under the pre-amendment FOIA is reviewed for abuse of discretion. Callinan, 371 Ill. App. 3d at 277; People ex rel. Urlich v. Stukel, 294 Ill. App. 3d 193, 202 (1st Dist. 1997).

This court has held that under former section 11(i), "to demonstrate that he substantially prevailed, the party requesting fees must demonstrate (1) that the prosecution of the action could reasonably be regarded as

necessary to obtain the information, and (2) that the action had a substantial causative effect on the delivery of the information." Urlich, 294 Ill. App. 3d at 202 (internal quotations omitted). The circuit court did not abuse its discretion when it determined that Kalven had not "substantially prevailed" as required by the applicable FOIA provision because Kalven succeeded in obtaining disclosure of only the Bond and Moore lists. Kalven's assertion that he succeeded on "fully half" of his claims, Kalven Br. 46, seems to be based on the idea that he had one claim for the files and one for the lists. But that math ignores that Kalven did not receive disclosure of any of the CR files that he sought on summary judgment and that he voluntarily dismissed claims for thousands of additional CR files. Thus, as the circuit court properly recognized, "Prevailing on the smallest portion of his action is not substantially prevailing." C. 2425.

Kalven relies on inapposite federal cases interpreting the attorneys' fees provision of the federal FOIA. See Kalven Br. 45-47. Kalven argues that because the court in Edmonds v. FBI, 417 F.3d 1319 (D.C. Cir. 2005), held that "the substantially prevail language in FOIA [is] the functional equivalent of the prevailing party language found in" other statutes, id. at 1322 (internal quotations omitted), this court should adopt a similar approach to the interpretation of pre-amendment section 11(i). But Kalven cites no Illinois authority adopting such an interpretation, and for good reason. His interpretation deletes the word "substantially" from former

section 11(i) and thus runs contrary to the Illinois Supreme Court's admonition that a court should not construe a statute in a way that renders any term meaningless or superfluous. See, e.g., Raintree Homes, 209 Ill. 2d at 255-56; Michigan Avenue, 191 Ill. 2d at 504; Heinrich, 186 Ill. 2d at 394.

Kalven also asserts that "the degree of [his] success is relevant to the size of a reasonable fee, not to his eligibility for a fee award as a prevailing party." Kalven Br. 46. This argument misses the mark for several reasons. To begin, it again ignores entirely the "substantially prevails" threshold language of pre-amendment section 11(i); it also ignores that in amending section 11(i), the General Assembly specifically added, "In determining what amount of attorneys' fees is reasonable, the court shall consider the degree to which the relief obtained relates to the relief sought." 5 ILCS 140/11(i) (2010). By contrast, the pre-amendment version of section 11(i) contains no such language; it conditions the eligibility for fees entirely on a party's having "substantially prevail[ed]." 5 ILCS 140/11(i) (2008). Thus, although Kalven's argument regarding the degree of his success may be relevant under the current FOIA, it improperly reads in language not present in the pre-amendment FOIA, which governs his claims for attorneys' fees.

For these reasons, the circuit court did not abuse its discretion by denying Kalven attorneys' fees.

CONCLUSION

For the foregoing reasons, this court should affirm the judgment of the circuit court with regard to the CR files. The court should reverse with regard to the Bond and Moore lists and order that they are exempt from disclosure under FOIA. The court should also affirm the circuit court's denial of Kalven's requests for attorneys' fees. At a minimum, the court should remand for in camera review.

Respectfully submitted,

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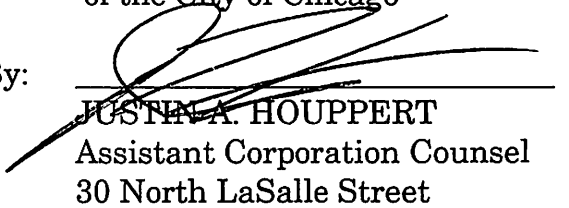
By: 
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