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DOROTHY BROWN
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2018CH06576

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

CHICAGO JUSTICE PROJECT,)
)
Plaintiff,)
) 18 CH 06576
v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
Defendant.)

9956016

PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION TO RECONSIDER

In regards to Plaintiff Chicago Justice Project’s (“CJP”) September 26, 2016 FOIA request for Defendant Chicago Police Department’s (“CPD”) comprehensive staffing analysis into the decision to hire 1,000 new officers (“Count III”), this Court found that the records CPD was claiming to be responsive were not actually responsive to the FOIA request, but then this Court granted summary judgment in CPD’s favor. During the briefings on the cross-motions for summary judgment, it was CPD’s burden to prove beyond a material doubt that its search was adequate. CPD furnished zero affidavits during the cross-motions briefing, and instead made unsupported statements that *all* of the responsive Count III records were entirely contained within the Bromwich Report, which was coincidentally the responsive record to a different request in this lawsuit. This Court conducted *in camera* review of the Bromwich Report and found that it did not contain the responsive comprehensive staffing analysis. Because this Court found the Bromwich Report did not contain the responsive records, it should have granted summary judgment in CJP’s favor and held that CPD failed to conduct an adequate search. CJP brings its Motion to Reconsider to call to the Court’s attention to an error in the application of law to facts. Rather than concede to this error, CPD attempts to now furnish brand new

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affidavits—in its response to a motion to reconsider no less—in a backdoor attempt at justifying its failure to perform an adequate search. Courts do not consider new arguments raised at the motion to reconsider stage that could have been raised earlier because such actions are a “waste of everyone’s time and money,” and those “factual arguments not previously made are subject to waiver.” *Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 25. CJP states as follows:

I. ARGUMENT

Section 2-1203(a) of the Code of Civil Procedure states:

(a) In all cases tried without a jury, any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.

735 ILCS 5/2-1203(a). Motions to reconsider may be brought in order to call the court’s attention to “newly discovered evidence that was not available at the time of the original hearing, changes in existing law, or errors in the court's application of the law.” *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶ 36. “The purpose of a motion to reconsider is to bring to the trial court's attention ... errors in the previous application of existing law to the facts at hand.” *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 492-93 (2009).

The purpose of CJP’s Motion to Reconsider is to bring to the Court’s attention its error in applying the existing law to the facts at hand because through *in camera* review, the Court revealed that CPD had failed to meet its burden of proving it performed an adequate search. However, before CJP can address the existing law as to how a public body can prove it performed an adequate search, CJP must first address CPD’s litany of misrepresentations and FOIA violations throughout this case.

A. CPD's Failure to Comply

At the onset, it must be noted that CPD has failed to comply with FOIA for Count III in every way. First, on September 26, 2016, CJP requested from CPD:

A. The top to bottom comprehensive analysis that top Chicago Police Department officials repeatedly referenced in a September 21, 2016 briefing with alderman at City Hall saying that this comprehensive analysis was the basis for why Superintendent Johnson had requested the hiring of a 1,000 additional officers for the Chicago Police Department.

B. Any analysis, reports, memos, or documents that the Chicago Police maintains on the subject of Chicago Police Department staffing or allocation of Chicago Police Department resources from Jan 1, 2011 - September 26, 2016.

See Pl. MTR Ex. B at 9:3-7; Compl. Ex. D. Prior to this lawsuit, CPD never responded—let alone within the statutory deadline—to CJP's request.¹ Ans. at ¶ 14.

Second, CPD repeatedly represented that all of the responsive records are entirely contained within the Bromwich Report. Ex. A at 3:18-5:5 (June 7, 2019 hearing transcript); Def. MSJ Resp. Reply Br. at 4 (attached as Exhibit C). CJP contested this representation and argued in its Cross-Motion for Partial Summary Judgment that CPD did not conduct an adequate search for the records because they are not in the Bromwich Report and if they are, then they are not exempt under FOIA Section 7(1)(m). Pl. XMPSJ at 5-7, 10-12 (attached as Exhibit B); Pl. XMPSJ Reply at 5-6 (attached as Exhibit D). This Court conducted *in camera* review of the Bromwich Report and found that it did not contain any records responsive to the September 26, 2016 request. Ex. E (Mar. 16, 2020 Order).

Third, in response to CJP's Motion to Reconsider, CPD contends, "Plaintiff forfeited its argument contesting whether the search CPD conducted was adequate because Plaintiff failed to previously raise any such arguments. Plaintiff first raised its challenge to the adequacy of CPD's

¹ Because Count III is the only request at issue in CJP's Motion to Reconsider, CJP will not address the other requests in this lawsuit that CPD failed to timely respond to.

search for documents in its Motion to Reconsider.” That is false. Pl. XMPSJ at 5-7, 10-12; Pl. XMPSJ Reply at 5-6. Indeed, eight of the pages in CJP’s cross-motion briefing challenged the adequacy of CPD’s search. *Id.* CPD never addressed the adequacy of its search in its own cross-motions briefing. *See* Def. MSJ; Def. MSJ Reply. Simply, this issue was properly raised and fully briefed by CJP in its Cross-Motion for Partial Summary Judgment. Therefore, the only party that failed to address the adequate search issue prior to CJP’s Motion to Reconsider is CPD, who also failed to timely respond to CJP’s request and incorrectly asserted that “the analysis are part of the Bromwich’s report.” Def. MSJ Reply at 4.

B. CPD’s Burden of Proof

CPD failed to provide any evidence that it performed an adequate search for the responsive Count III records. CPD has the burden to show that its search was adequate. *See BlueStar Energy Servs., Inc. v. Illinois Commerce Comm’n*, 374 Ill. App. 3d 990, 996-97 (2007). CPD “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *see also, e.g., Lee v. U.S. Attorney for So. Dist. of Fla.*, 289 F. App’x 377, 380 (11th Cir. 2008). CPD “must set forth sufficient information in its affidavits for a court to determine if the search was adequate.” *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).

As CJP addressed in its cross-motions briefing, CPD never provided an affidavit attesting to how CPD searched for the staffing analysis responsive to Count III, nor did CPD provide an affidavit that attested to any portion of the Bromwich Report being responsive to Count III. Pl.

XMSJ at 10-12; Pl. XMSJ Reply at 5-6. The only “evidence” CPD provided was an unsupported statement by its own attorney during the following exchange at the June 7, 2019 hearing²:

MR. WAYNE: Yes, your Honor. There were originally ten counts in dispute in this case. We're down to seven counts which are still in dispute. However, we did not have a chance to brief Count 3 at all.

MR. AUGUSTAVE: The portion --

MR. WAYNE: That's the analysis.

MR. AUGUSTAVE: The analysis record.

THE COURT: So I have that you're -- the comprehensive analysis, the September 26 one, you're agreeing to produce?

MR. AUGUSTAVE: Well, we initially thought we were producing. We had agreed to produce. However, there are some records that he's seeking that fall under the 7(1)(m) exemption, which is -- the records that are responsive to this, that part of that request is part of another part of his request, the Bromwich report, which is what we've claimed 7(1)(m) under.

MR. WAYNE: So what happened --

THE COURT: The September 26, 2016, request.

MR. WAYNE: Yes.

THE COURT: Is part of the Bromwich request?

MR. AUGUSTAVE: Yes. The analysis.

MR. WAYNE: That's what Counsel is saying to us. They did produce records, but none was the analysis. So when we asked to send emails for the analysis, he then told us 7(1)(m), which we dispute.

Ex. A at 3:18-5:5. CPD followed this up with an unsupported assertion in its combined response and reply brief by stating “[b]ecause the analysis are part of the Bromwich’s report, these were also properly withheld pursuant to Section 7(1)(m) of FOIA.” Def. Resp. Reply Br. at 4.

² There were two rounds of cross-motions for summary judgment briefings in this case. The June 7, 2019 hearing was for the first round of briefing. Ex. C. At this hearing, the parties and the Court addressed the status of each of the Counts. Count III was then fully briefed during the second round of cross-motions briefing.

Neither of these statements are evidence. *See* Ill. R. Evid. 401; *People v. Sutherland*, 223 Ill. 2d 187, 209 (2006).

Section 7(1)(m) is no longer an issue in regards to Count III. CPD only asserted Section 7(1)(m) for Count III because it incorrectly claimed that the responsive records were contained within the Bromwich Report. Ex. A at 3:18-5:5. This Court correctly found that the Bromwich Report did not contain the staffing analysis. Ex. E.

The Court's analysis can stop here. However, CPD has decided to present new arguments for the first time in its response brief to CJP's Motion to Reconsider. Def. MTR Resp. at 4-5, Exs. 1-3. While the Court can ignore CPD's new arguments, CJP will address why this new information is also incorrect. As discussed above, CPD incorrectly claimed that CJP had not raised the adequate search issue prior to its Motion to Reconsider. *Id.* at 3-4. Taking this false premise a step further, CPD argued that CJP should not be allowed to raise the issue for the first time. *Id.* CPD is the sole party that is raising new arguments, and this Court should not permit CPD to do so. *Id.* at 4-5, Exs. 1-3; *see also Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 25 ("A reconsideration motion is not the place to raise a new legal theory or factual argument. [citations] Trial courts should not allow litigants to stand mute, lose a motion and then frantically gather new material to show that the court erred in its ruling. [citations] As a result, legal theories and factual arguments not previously made are subject to waiver. [citations]."); *id.* at ¶ 25 ("A motion to reconsider is not the place for the inclusion of new arguments that could have been raised earlier. Actions like that simply waste everyone's time and money[.]"); *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 764-65 (D.C. Cir. 2000) (requiring the government to raise all FOIA exemptions simultaneously before the trial court in order to further FOIA's purpose of efficient and prompt disclosure of complete information).

Recognizing that it did not provide any evidence to meet its burden of proof on the adequacy of its search, and recognizing that this was an error of law warranting reconsideration, CPD has now offered affidavits from Robert Landowski, Sgt. Laurence Odoms, and Vaughn C. Ganiyu purporting to meet that burden. *Id.* But they do not. Rather, the affidavits are untimely, nearly identical, entirely conclusory, and expose gaping holes in CPD's search. Mr. Landowski, Director of Human Resources attested:

5. Because of the records requested, I determined that there was no specific reports regarding this type of analysis which was previously created and left in a location where I was able to retrieve.

6. I searched for responsive records in the filing drawers in my office that have various reports on several subjects. I did not locate any report that shows an analysis of staffing or allocations from the timeframe listed. The databases which we access for these types of reports does not show a completed report for this timeframe that I was aware of.

Id. Ex. 1 at ¶¶ 5-6. Sgt. Odoms, Administrative Sergeant in the Office of the Superintendent, attested:

6. Because of the records requested, I determined that the Office of the Superintendent does not maintain, produce or draft any records associated with officers' allocation or staffing.

7. In an effort to locate any responsive records I searched the records maintained in the file cabinets located in the offices occupied by the Office of the Superintendent and found no responsive records.

Id. Ex. 2 at ¶¶ 6-7. Mr. Ganiyu, Associate Staff Attorney in the CPD's Legal Affairs Division, attested:

6. Because of the records requested, I determined that the Legal Affairs Division does not maintain, produce, or draft any records associated with CPD officers' allocation or staffing.

7. In an effort to locate any responsive records, I searched records maintained in the file cabinets in the office occupied by the Legal Affairs Division and found no responsive records.

Id. Ex. 3 at ¶¶ 6-7.

There are many issues with these affidavits. First, the affidavits attest to limiting the search to file cabinets. *Id.* Ex. 1 at ¶ 6, Ex. 2 at ¶ 7, Ex. 3 at ¶ 7. Sgt. Odoms and Mr. Ganiyu do not attest to performing a search for electronic records, which would reasonably exist for a decision that was made in 2016. Mr. Landowski mentions an unspecified database that could contain these records but provides no clarification on what database this is, what terms were searched in the database, what specific types of records are typically maintained in the database, what records were reviewed, and whether Mr. Landowski performed the search himself or is relying on what someone else made him “aware of.” *Id.* Ex. 1 at ¶ 6. Second, the affiants attesting to searching “file cabinets” lacks any reasonable specificity. They do not explain how the file cabinets are organized, what the affiants were looking for within the file cabinets in order to determine whether the documents were responsive, and why their searches were limited to filing cabinets.

Third, CPD argues that it only needs to conduct a good faith and reasonable search for records. Def. MTR Resp. at 4. Yet, all three affiants conclusively attest that the requested records are not the types that would be stored in their offices. *Id.* Ex. 1 at ¶ 5, Ex. 2 at ¶ 6, Ex. 3 at ¶ 6. If that is the case, then it is not reasonable for CPD to limit its searches to offices that these affiants were readily able to determine do maintain the records.

CPD made a decision on September 21, 2016 to hire 1,000 new police officers, and CJP is seeking the analysis leading to that decision. John Garcia & Eric Horng, Chicago Police Department Announces Plan to Hire Nearly 1,000 New Officers, ABC7 Eyewitness News, ABC7 Chicago (Sept. 21, 2016), <https://abc7chicago.com/cpd-hiring-chicago-police-officers/1520303> (Former Superintendent Eddie Johnson announced the decision to hire the officers). Either CPD and Superintendent Johnson made that decision on a whim and did not

conduct any analysis or CPD has failed to conduct an adequate search for the records. A reasonable search would include the parties involved in making that decision because they would have relied on the requested analysis. Yet, somehow CPD wants this Court to accept the Office of the Superintendent does not maintain the analysis despite the former Superintendent making the announcement. CPD cannot put forth a reasonable explanation for why these records do not exist. Therefore, even taking CPD's brand new affidavits into consideration, CPD has still failed to prove beyond a material doubt that it conducted an adequate search.

II. CONCLUSION

For the foregoing reasons, CJP respectfully asks this honorable Court to reconsider its grant of summary judgment in favor of CPD on Count III and to grant summary judgment in favor of CJP on Count III.

RESPECTFULLY SUBMITTED,

/s/ Merrick J. Wayne

Attorneys for Plaintiff
CHICAGO JUSTICE PROJECT

Matthew Topic
Joshua Burday
Merrick Wayne
LOEVY & LOEVY
311 North Aberdeen, 3rd Floor
Chicago, IL 60607
312-243-5900
foia@loevy.com
Atty. No. 41295

CERTIFICATE OF SERVICE

I, Merrick J. Wayne, certify that on July 31, 2020, I caused the foregoing PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO RECONSIDER to be served via electronic mail on all counsel of record.

/s/ Merrick J. Wayne

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - CHANCERY DIVISION

CHICAGO JUSTICE PROJECT,)

Plaintiff,)

-vs-) No. 18 CH 06576

CHICAGO POLICE DEPARTMENT,)

Defendant.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause in Courtroom 2302 of the Richard J. Daley Center, on the 7th day of June, A.D. 2019, commencing at 10:53 a.m.

BEFORE: HONORABLE CAROLINE KATE MORELAND

FILED DATE: 7/31/2020 11:38 AM 2018CH06576

1 PRESENT:

2 LOEVY & LOEVY

3 (311 North Aberdeen Street, Suite 300

4 Chicago, Illinois 60607

5 (312) 243-5900), by:

6 MR. MERRICK WAYNE

7 merrick@loevy.com

8 appeared on behalf of the Plaintiff;

9

10 CITY OF CHICAGO

11 DEPARTMENT OF LAW

12 (30 North LaSalle Street, Suite 1720

13 Chicago, Illinois 60602

14 (312) 744-8791), by:

15 MR. MARC AUGUSTAVE

16 marc.augustave@cityofchicago.org

17 appeared on behalf of the Defendant.

18

19

20

21

22 REPORTED BY: Cynthia Moreno, C.S.R. No. 84-3635

1 MR. WAYNE: Good morning, Your Honor.
2 Merrick Wayne on behalf of the plaintiff,
3 Chicago Justice Department.

4 MR. AUGUSTAVE: Marc Augustave on
5 behalf of the City of Chicago, Chicago Police
6 Department.

7 THE COURT: Okay.

8 MR. WAYNE: Before we begin, I made a
9 table of all of the counts of the complaint
10 just because it's hard to keep them straight.
11 Would you like a copy for yourself?

12 THE COURT: Sure. Did you give
13 counsel a copy?

14 MR. WAYNE: Yes, I did.

15 THE COURT: Okay. Do you want to
16 start? I have cross complaints -- cross
17 motions for summary judgment.

18 MR. WAYNE: Yes, your Honor. There
19 were originally ten counts in dispute in this
20 case. We're down to seven counts which are
21 still in dispute. However, we did not have a
22 chance to brief Count 3 at all.

1 MR. AUGUSTAVE: The portion --

2 MR. WAYNE: That's the analysis.

3 MR. AUGUSTAVE: The analysis record.

4 THE COURT: So I have that you're --
5 the comprehensive analysis, the September 26
6 one, you're agreeing to produce?

7 MR. AUGUSTAVE: Well, we initially
8 thought we were producing. We had agreed to
9 produce. However, there are some records that
10 he's seeking that fall under the 7(1)(m)
11 exemption, which is -- the records that are
12 responsive to this, that part of that request
13 is part of another part of his request, the
14 Bromwich report, which is what we've claimed
15 7(1)(m) under.

16 MR. WAYNE: So what happened --

17 THE COURT: The September 26, 2016,
18 request.

19 MR. WAYNE: Yes.

20 THE COURT: Is part of the Bromwich
21 request?

22 MR. AUGUSTAVE: Yes. The analysis.

1 MR. WAYNE: That's what Counsel is
2 saying to us. They did produce records, but
3 none was the analysis. So when we asked to
4 send emails for the analysis, he then told us
5 7(1)(m), which we dispute.

6 THE COURT: So you're working on it,
7 or am I ruling on it because in one of your
8 motions, it said I was not going to be ruling
9 on this.

10 MR. AUGUSTAVE: That was under the
11 assumption everything was satisfactory --

12 MR. WAYNE: Yes.

13 MR. AUGUSTAVE: -- however, subsequent
14 to our briefing, it appears that we are
15 contesting that portion of it.

16 THE COURT: Well, then it will have to
17 be put on hold because in your briefing you
18 said it was no longer at issue. In the reply,
19 it was not even addressed.

20 MR. WAYNE: I think I said it was not
21 at issue assuming it was produced properly, but
22 if you don't want to rule on that count, that's

1 fine for today.

2 MR. AUGUSTAVE: And it may be null and
3 void depending on how you rule on the Bromwich
4 report because it covers that.

5 MR. WAYNE: Of course.

6 THE COURT: So than the 2/17/17 one,
7 are you working that one out?

8 MR. AUGUSTAVE: That was done.

9 MR. WAYNE: We withdraw that count.

10 THE COURT: Okay. The 4/10/17 count.

11 MR. WAYNE: They produced records, and
12 we're satisfied.

13 THE COURT: Withdrawn?

14 MR. WAYNE: Yes. That's for Count 7
15 as well.

16 THE COURT: Just so you're aware, I
17 have it all outlined by date. I didn't pay
18 attention by count. That's just how I
19 organized it.

20 MR. WAYNE: That's why I made the
21 table because I think we're all thinking of
22 these differently.

1 THE COURT: So the September 11
2 request, withdrawn?

3 MR. WAYNE: Yes. They produced
4 records.

5 THE COURT: Okay. So other than
6 that -- so the four. So it leaves me with six
7 left, correct?

8 MR. WAYNE: Correct, your Honor.

9 THE COURT: Okay. So, I guess, how do
10 you want to argue it?

11 MR. WAYNE: Do you want us to go by
12 issue or prefer us to go by the request itself?

13 THE COURT: I prefer you would go by
14 the date, the request itself. I also prefer we
15 go in chronological -- I organized it in
16 chronological order. So January 20, which is
17 probably Count No. 4.

18 MR. WAYNE: Yes.

19 THE COURT: May 25, Count No. 2. Then
20 June 14, Count No. 1.

21 MR. WAYNE: Okay.

22 THE COURT: June 23 is Count No. 8.

1 December 19 is Count No. 6, and February 24 is
2 Count No. 10. I think that's it. Is that six?

3 MR. WAYNE: Yes, your Honor.

4 THE COURT: Okay.

5 MR. WAYNE: Your Honor, so for the
6 January 20, 2017, request. The issue mainly
7 here is that they waived their right to claim
8 undue burden which is what they're asserting
9 for these records. They did -- there was a
10 request on January 20.

11 CPD did respond timely to that
12 request denying it as unduly burdensome.
13 However, they did not give my client an
14 opportunity to confer. That was not part of
15 the letter. So from there, they already have
16 failed to properly deny under 3(g).

17 But on top of that, my client did
18 come back on February 18 with another follow-up
19 request that just narrowed it down, and
20 narrowed requests are considered new requests.
21 CPD failed to respond to that request in any
22 way. They waived any opportunity to claim

1 undue burden then to that new request.

2 THE COURT: Okay.

3 MR. AUGUSTAVE: CPD admits that they
4 received a narrowed request, and unfortunately
5 I was not aware of that so I did not brief that
6 in my reply. However, to that end, I could
7 talk to CPD and see if we can get the records
8 responsive to that narrowed request and produce
9 it to the plaintiffs.

10 I was told that it's still unduly
11 burdensome because the records are not all kept
12 electronically. There are records kept
13 electronically and some that are just paper
14 stored like -- as paper.

15 So to that end, if we can provide
16 plaintiff with the electronic records, we will
17 work towards that and discuss what we need to
18 do to go forward with hard copies.

19 MR. WAYNE: We would be open to
20 working through the electronic copies. Our
21 position is that there shouldn't be such great
22 burden for these electronic copies because it's

1 an Excel spreadsheet essentially. If you look
2 at the Frosto affidavit, Ms. Frosto said there
3 were 100 columns between the January 20 and the
4 June 14 request.

5 It shouldn't take -- it shouldn't
6 be unduly burdensome for CPD to review 100
7 columns to determine whether there would be
8 exempt information within that column.

9 THE COURT: So but they're saying they
10 will work with you.

11 MR. WAYNE: Right.

12 THE COURT: Okay. So they're willing
13 to work with you. Do I need to rule on this
14 issue?

15 MR. AUGUSTAVE: It's up to Counsel,
16 but we will work with them to try to get them
17 the records. I have to talk to my client to
18 say what do we need to do to resolve this. In
19 our opinion, burdensome has been waived more or
20 less so it's something we can work with.

21 THE COURT: I can enter and continue.

22 MR. WAYNE: They did waive burden. So

1 if there are records falling under this
2 February 18 request, they have to produce them.
3 There isn't any leeway there.

4 MR. AUGUSTAVE: It could take years.
5 To the extent you want to keep this going on
6 for years, that's fine. But to the extent we
7 can work on giving you what's responsive and we
8 will work towards doing that.

9 MR. WAYNE: Sure. But we've had
10 situations like this where they waived undue
11 burden, and even though it would take a long
12 time, they still have to do it. That's what
13 statute says.

14 THE COURT: I think they are
15 acknowledging they are going to do it.

16 MR. AUGUSTAVE: Yes, your Honor.

17 THE COURT: It's just a matter of
18 coming up with the records. The electronic
19 ones shouldn't be too difficult, but the paper
20 one will take time.

21 MR. WAYNE: Right.

22 THE COURT: Obviously.

1 MR. WAYNE: Yes.

2 THE COURT: Okay. So you are
3 conceding --

4 MR. AUGUSTAVE: We're conceding we
5 will give them the electronic ones, and we can
6 talk with them about paper ones to see how long
7 it will take to produce those.

8 MR. WAYNE: We can work out a
9 production schedule for the paper records if
10 that's what Counsel is --

11 MR. AUGUSTAVE: We'll work on it.

12 THE COURT: So CPD agrees to comply
13 with the January 20 request. Okay.

14 So next one is the May 25,
15 Bromwich report request.

16 MR. WAYNE: Your Honor, CPD hasn't
17 provided any affidavits at all for this request
18 to show why 7(1)(m) applies to the Bromwich
19 report and how they performed an adequate
20 search for the financial records. That went to
21 the second part of that request. They just
22 made these conclusory talisman arguments in

1 their brief. There is no way for them to have
2 met their burden of proof under the statute.

3 MR. AUGUSTAVE: CPD provided the Court
4 and plaintiff with a copy of the agreement
5 letter that was entered into by the law firm
6 that was hired to represent the Chicago Police
7 Department and the City.

8 In that engagement letter, it
9 details why anything -- any work product
10 produced by Bromwich falls under the
11 attorney/client privilege and work product and
12 as such falls squarely within the 7(1)(m)
13 exemption.

14 MR. WAYNE: Your Honor, that's not an
15 adequate meaning of the burden. They can put
16 anything in that agreement. On top of that,
17 they have not shown they are anticipating
18 litigation.

19 MR. AUGUSTAVE: The letter says so.
20 It's an investigation by the department --

21 THE COURT: Let him finish.

22 MR. WAYNE: So they have not -- they

1 need to provide an affidavit that shows they
2 were anticipating litigation; that this
3 contains the mental impression, the thoughts
4 and legal strategies of an attorney. None of
5 that has been done.

6 All we know is CPD had a law
7 firm, had the Bromwich group make this report.
8 There hasn't been this proper showing under
9 7(1)(m) that it does apply.

10 THE COURT: Counsel.

11 MR. AUGUSTAVE: To the extent that the
12 Court would want us to provide an affidavit
13 from someone with knowledge that states that
14 these are attorney work product and
15 attorney/client privileged documents, we will
16 get that to provide to the Court.

17 THE COURT: So as to that request, I
18 did review the letter that was attached. It's
19 an unverified letter. There is no affidavit
20 attached. Counsel is right about that.

21 But in reading the letter, it
22 does bring to my attention there is a genuine

1 issue as to whether this is attorney/client
2 privilege. So based on that, I'm denying both
3 your motions for summary judgment on that
4 issue. So it remains at issue.

5 MR. WAYNE: Okay.

6 THE COURT: Until it can be resolved.

7 Okay. June 14 incident --
8 request. Sorry.

9 MR. WAYNE: This one is also for a
10 database record, which is just essentially an
11 Excel spreadsheet. It's similar to what I
12 argued for January 20 where it is that 100
13 columns.

14 If you go on CPD's website, you
15 can see they have a shortened version of this
16 arrest database. It only has the years 2014 to
17 2017, and it doesn't have all of the columns
18 that should be provided, just 10 of the 100.

19 CPD tries to raise that there is
20 billions of fields, but that's not what's at
21 issue here. That's completely distractive from
22 the issue. Clearly there's 100 columns for

1 them to review and determine if there is that
2 exempt information in these columns.

3 THE COURT: Okay.

4 MR. AUGUSTAVE: We provided the
5 affidavit of subject matter expert on this.
6 She attested to the fact there are 1,457,172
7 individual data which would have to be to
8 searched. This is for a period of 17 years
9 which covers from 1999 to 2016.

10 The sheer volume of this request
11 and trying to comply with this request would
12 bring CPD, more or less, to a standstill. This
13 is according to the research and development
14 section of the Chicago Police Department.

15 MR. WAYNE: Your Honor, that million
16 number that Counsel is providing, that's
17 distracting you from what's at issue. There's
18 a million rows, if that's what I'm
19 understanding it to be --

20 MR. AUGUSTAVE: It's records.
21 Individual record data.

22 MR. WAYNE: So that would be the

1 individual person being arrested, which would
2 then be a million rows. But you just have to
3 review the column because if you have a column
4 that has the race of the person arrested, it's
5 every cell in that column will have just race.

6 That's not exempt. You have to
7 produce that column. However, if you have the
8 arrestees birthday in there, that could
9 possibly be exempt, then you would know
10 everything in that column would be redacted.

11 THE COURT: Any argument?

12 MR. AUGUSTAVE: CPD is not trying to
13 hide anything. CPD has routinely provided
14 plaintiffs as well as other plaintiffs with
15 requests for data that they have and they can
16 readily provide. In this instance, the request
17 is so grand, so wide, that it makes undue
18 burden on CPD. It would be an undue burden on
19 CPD to gather that type of information to
20 provide to the requester.

21 MR. WAYNE: But that also then
22 requires you to make public interest inquiry

1 into that as well. There is a public interest
2 in having the arrest data. The public wants to
3 know what type of people are being arrested for
4 what type of crimes. That is important to
5 know. That should outweigh any burden that it
6 takes to review those 100 columns.

7 MR. AUGUSTAVE: Well, CJP has not
8 delineated the public interest here. In light
9 of the fact that FOIA is so -- it's five days
10 to provide records and at most ten days.
11 During that timeframe, it would be impossible
12 for CPD to provide those responsive records.

13 THE COURT: I've read the response the
14 CPD sent. Looks like it was sent June 20
15 regarding the unduly burdensome. They refer to
16 the Research and Development Division.

17 They state in their letter that
18 after doing -- after research and development
19 did a search, it determined that just in the
20 year 2016 there were 85,000 records of
21 individual arrests.

22 Then to do that for 17 years,

1 they estimate a total of over 1 million
2 arrests. They also said the data is not
3 already composed in a database. A new
4 spreadsheet would have to be created.

5 So based on that, I do find that
6 it is a voluminous amount of records you are
7 requesting. So I find it is unduly burdensome,
8 and I also don't find that the public interest
9 outweighs the -- I find that the burden is not
10 outweighed by the public interest. So how do
11 you want me -- CJP or Chicago Justice?

12 MR. WAYNE: Either is fine.

13 THE COURT: Chicago Justice motion for
14 summary judgment will be denied.

15 CPD motion for summary judgment
16 granted. I will grant your request.

17 However, based on the denial, I
18 will grant your request for an index under
19 Section 11(e).

20 MR. WAYNE: Thank you, your Honor.

21 THE COURT: Okay. That brings us to
22 Count No. 8, the June 23, 2017, request.

1 MR. WAYNE: Yes, your Honor. For this
2 request, CPD needs to prove that they conducted
3 adequate search for these responsive records.
4 They have not provided an affidavit to show
5 that's been the case.

6 MR. AUGUSTAVE: Well, to the extent
7 that's what it takes, CPD will provide an
8 affidavit that will detail the fact that CPD is
9 not the Office of Emergency Management and
10 Communications and that the records that are
11 being requested here are not maintained by CPD,
12 and CPD -- the type of search that CPD
13 conducted to verify that. So I can provide you
14 with an affidavit.

15 THE COURT: Okay. Any further
16 argument on that? I think that's basically --

17 MR. WAYNE: That's basically the
18 argument.

19 THE COURT: I agree. There has been
20 nothing submitted by way of affidavit by the
21 defendant, but I do find that's an issue that
22 they have brought up regarding whether or not

1 they do produce these records. So there is a
2 question of fact. So, therefore, motion for
3 summary judgment on both sides denied.

4 Okay. That brings us to Count
5 No. 6, the 12/19 emails request.

6 MR. WAYNE: Yes, your Honor. At issue
7 here is that CPD is claiming they cannot search
8 -- they cannot look up who was in what position
9 on a certain date. The request listed off
10 higher ranking officials and even named one of
11 them, Superintendent Johnson, for those who
12 would have been in that position on
13 September 21, 2016. The issue here though is
14 that the affidavit that CPD provided is
15 contradictory within itself. Paragraph ten
16 even lists off the history of a specific
17 officer and how they changed.

18 So the affidavit shows they can
19 somehow see the change in positions that
20 officers have. So to the extent they cannot
21 figure out who these high ranking officials
22 were on this date does not sound like it would

1 be unduly burdensome.

2 THE COURT: Counsel.

3 MR. AUGUSTAVE: In response, what that
4 affidavit indicated was that you can search by
5 the individual name. Marc Augustave. This is
6 what position he held during this timeframe.
7 But to the extent Marc Augustave was commanding
8 officer of Unit 6 in 1945, they cannot go --
9 unless they knew Marc Augustave held that
10 position, they cannot find out who held that
11 position.

12 Once the position is vacated and
13 entered into by another person, all of that
14 information is dumped. So you have to have the
15 name of the individual officer in order to know
16 what positions that individual officer held
17 during those timeframes.

18 However, the way their system is
19 now, they cannot go by -- well, superintendent
20 is easy because they have that information.
21 But the other individuals, they can -- that
22 information is not in the database.

1 MR. WAYNE: But even the other
2 positions are easy too. The chief of staff --
3 there are other high ranking officials. It's
4 not like we're asking for who was the police
5 officer on this beat on September 21. This is
6 the actual high ranking people who have a lot
7 of attention at CPD. People know who are in
8 those positions.

9 MR. AUGUSTAVE: They know -- with
10 regard to CPD records, that information is only
11 kept there for that time period that individual
12 held that office. So in order to get the
13 emails of the individual holding these
14 positions, you have to have the name of the
15 individual holding that position.

16 So in order to go back in time,
17 we would have to have the names of the
18 individuals who held those positions and then
19 correlate that with the position and get their
20 emails, and they will provide you with that.
21 But at this time, CPD does not have the names
22 -- without the names of the individuals, they

1 cannot do the search for emails.

2 THE COURT: So it's my understanding
3 that you can put a name in and search, and it
4 will show up that -- all of the positions of
5 that person --

6 MR. AUGUSTAVE: Yes, your Honor.

7 THE COURT: -- or that person held,
8 but you don't have a way of finding out who was
9 superintendent special advisor. You have no
10 way to look that up other than doing a search
11 of memos or --

12 MR. AUGUSTAVE: Yes, your Honor.

13 THE COURT: You provided an affidavit
14 of that.

15 MR. AUGUSTAVE: Yes.

16 THE COURT: However, so I do find that
17 you can provide emails of Superintendent
18 Johnson.

19 MR. AUGUSTAVE: Yes, your Honor.

20 THE COURT: So the Chicago Justice
21 Project's motion for summary judgment will be
22 granted as to Superintendent Johnson. That

1 will be granted.

2 However, the affidavit by -- is
3 it Officer Roche?

4 MR. AUGUSTAVE: Roche, Lieutenant
5 Roche.

6 THE COURT: Lieutenant Roche is
7 sufficient for me to -- is sufficient to show
8 it would be unduly burdensome to find the
9 individuals who held the titles at certain
10 times and, thus, their emails.

11 So your motion for summary
12 judgment -- Chicago Justice Project motion for
13 summary judgment is denied as to that respect
14 but granted for the Chicago Police Department
15 as to that respect and vice versa as to
16 Superintendent Johnson.

17 MR. AUGUSTAVE: Yes, your Honor.

18 THE COURT: All right. No. 10, the
19 2/24 request.

20 MR. WAYNE: Your Honor, this is
21 another one that CPD waived -- they responded
22 on -- April 5 was the date of the email -- they

1 sent the denial letter to, even though the
2 request was in February. So that's way beyond
3 the --

4 MR. AUGUSTAVE: CPD provided a
5 response letter on the 26th and then provided
6 some of those responsive documents April 5.

7 THE COURT: You put in your -- did you
8 not have this in your complaint?

9 MR. WAYNE: Yes, your Honor. It is in
10 the complaint. However, on the other page, it
11 also says it was sent on the 5th. So there
12 must be an issue with the dates of the letter,
13 if that's what it is. But --

14 THE COURT: Okay. It looks to me --
15 and I will give you both the opportunity to
16 explain. The letter was sent February 26 and
17 then emailed April 5. Do you have any comments
18 on that?

19 MR. AUGUSTAVE: No, your Honor.

20 MR. WAYNE: No.

21 MR. AUGUSTAVE: The only thing that I
22 have is they initially responded the 26th and

1 then followed up with some responsive documents
2 on April 5.

3 THE COURT: So I don't have anything
4 disputing this letter wasn't sent on the 26th
5 other than emails. I don't know if this is an
6 email in response to an email. Where is this
7 letter?

8 MR. AUGUSTAVE: CPD acknowledges they
9 also responded on April 5, and on April 5, they
10 provided some records. On the 26th, they
11 provided the initial letter.

12 THE COURT: Okay.

13 MR. WAYNE: In any respect, this does
14 come back to being a database record at the
15 same time. So it would be the same argument
16 that I have already made about the database
17 records where it's easier to redact.

18 If you look at the Heights case,
19 the Court distinguished a database record
20 having many rows. That would be printed onto
21 many pages from an actual list of emails that
22 were thousands of pages.

1 THE COURT: So the waiver issue is no
2 longer. It's just the unduly burdensome.

3 MR. AUGUSTAVE: Yes, your Honor. With
4 regards to the unduly burdensome aspect of it,
5 we provided the affidavit of Sergeant Meghan
6 Remiasz, who is the commanding officer of the
7 Bureau of Internal Affairs of CPD.

8 Aside from the records that were
9 provided to plaintiff, she goes on to confirm
10 in her affidavit that it would take months to
11 search for and provide the other records which
12 are responsive to this particular request.

13 It's not a matter of searching the database.

14 When it comes to Internal
15 Affairs, there are records that were not in the
16 database, and they would have to search those
17 as well and it would be under their duty under
18 FOIA to search all records within their
19 possession.

20 MR. WAYNE: There is an outstanding
21 amount of public interest where this record --
22 this is data showing complaints filed against

1 CPD officers and the status of those complaints
2 after CPD addressed them and whether they
3 addressed them or not.

4 The public has that interest in
5 knowing how CPD is handling complaints against
6 their officers. And if it's in a database,
7 it's not going to be unduly burdensome
8 outweighing that public interest.

9 MR. AUGUSTAVE: Again, given the
10 truncated period of time allowed by FOIA for a
11 public body to respond, when a public body
12 responds with some records and then claims it's
13 unduly burdensome because of time to respond to
14 provide other records, then that's what that
15 provision is in the FOIA for.

16 MR. WAYNE: The timing provision in
17 the FOIA is because of the public policy of
18 giving the public transparency and opportunity
19 to review the government.

20 MR. AUGUSTAVE: We agree. However, to
21 the extent that it would take longer than the
22 time allowed for under FOIA to respond, then a

1 public body can exert a certain exemption or so
2 articulate that it's unduly burdensome.

3 MR. WAYNE: The affidavit does not say
4 how long it would take to provide this database
5 with any redacted columns that need to be
6 redacted.

7 MR. AUGUSTAVE: It's not a matter of
8 redacting the columns. It's a matter of
9 reviewing the records and finding what's
10 responsive and what's not.

11 THE COURT: Okay. So the request is
12 various records related to digital complaint
13 data received by Internal Affairs from 2000 to
14 2017. CPD responded with a letter on
15 February 26 indicating it would be unduly
16 burdensome for several reasons.

17 I also have an affidavit from
18 officer -- she is a sergeant -- Sergeant
19 Remiasz, R-E-M-I-A-S-Z, who also indicated it
20 would be unduly burdensome. It's 17 years'
21 worth of records.

22 They want or you wanted

1 complaints received broken down by category,
2 investigations broken down by category and
3 outcome, number of cases submitted from
4 prosecution, number of cases accepted, number
5 of cases accepted broken down that resulted in
6 conviction, number of cases where there is a
7 recommendation for discipline, outcomes of all
8 cases.

9 I do find this to be unduly
10 burdensome, and I do find the burden outweighs
11 the public interest. While I do agree there is
12 a public interest without a doubt, I do find
13 the burden does not outweigh -- the burden does
14 outweigh the public interest in this matter.
15 Again, I will grant you your request for an
16 11(e) index.

17 MR. WAYNE: Your Honor, could you
18 clarify something please?

19 THE COURT: Sure.

20 MR. WAYNE: Are you saying that Part A
21 of that request is also unduly burdensome
22 because you were listing off Part B portions?

1 THE COURT: Let me check again.
2 Provide all data in Part A relating to
3 complaints of all officers and B is provide
4 aggregate totals. I see. I guess I didn't
5 read it all into the record. Yes. Part A and
6 B.

7 MR. WAYNE: All right.

8 THE COURT: So your motion for summary
9 judgment -- Chicago Justice Project's motion
10 for summary judgment denied as to that request.

11 Chicago Police Department's
12 motion for summary judgment granted as to that
13 request.

14 Again, I am granting you 11(e)
15 index.

16 MR. WAYNE: Thank you, your Honor.

17 THE COURT: Okay. Then we need court
18 dates or what do you want to do from there? We
19 still have motions for summary judgment denied
20 as to both on the Bromwich report, No. 2, and
21 also with the Owens, Count 8. Also your No. 4,
22 they will comply with, and work on complying

1 with that and complaints -- Count No. 3, they
2 are also working on compliance.

3 Any other ones? Just trying to
4 see what issues are outstanding.

5 MR. WAYNE: Count No. 3 will be
6 determined on how it's -- it will come down to
7 whether 7(1)(m) applies to the Bromwich report.

8 THE COURT: So that can be put on the
9 back burner until Count 2 is resolved. Okay.
10 So how do you want to precede from here?

11 MR. WAYNE: We can get a status date
12 Do you want to do 45 days?

13 MR. AUGUSTAVE: That would be fine.
14 And we will work on providing you with records
15 for the data and requests to the other issues.

16 MR. WAYNE: And Superintendent
17 Johnson's emails as well.

18 MR. AUGUSTAVE: Okay.

19 MR. WAYNE: Your Honor, are you
20 ordering production to be done by those 45
21 days, or are you ordering sooner than that?

22 THE COURT: I want to -- I don't mind

1 setting a date in the order but I want a date
2 that everyone comply with it. Then agree to
3 the date and we'll pick a date, and then if you
4 don't comply with the picked date, that's a
5 problem. When do you think you can get that?

6 MR. AUGUSTAVE: Again, because it's so
7 voluminous and I'm not a subject matter expert
8 so I don't know how long it will take. I
9 honestly think 45 days is way too short. In
10 light of the fact it could take years, and we
11 are going back to 1980.

12 THE COURT: We will not do years. So
13 let's do a 45-day date. You can report back in
14 45 days when do you think you will have it
15 completed. If you can start the process now --
16 is that possible to start?

17 MR. AUGUSTAVE: We will comply.

18 THE COURT: Is that satisfactory to
19 you at this time?

20 MR. WAYNE: Yes, your Honor.

21 THE COURT: So 45 days will bring us
22 at -- do you want to come back June 18 for

1 status?

2 MR. AUGUSTAVE: June 18?

3 THE COURT: Yes.

4 MR. AUGUSTAVE: 45 days?

5 THE COURT: Is that 45 days?

6 MR. AUGUSTAVE: That's two weeks.

7 THE COURT: July 18. I'm looking at
8 the wrong month.

9 MR. AUGUSTAVE: What time, your Honor?

10 THE COURT: 10:30.

11 MR. WAYNE: Yes. That should work for
12 me, your Honor.

13 THE COURT: Great. Thank you.

14 MR. WAYNE: Thank you, your Honor.

15

16 (WHEREUPON, the proceedings were concluded.)

17

18

19

20

21

22

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF C O O K)

4 I, Cynthia Moreno, C.S.R. No. 84-3635, a
5 Certified Shorthand Reporter of the State of
6 Illinois, do hereby certify that I reported in
7 shorthand the proceedings had at the hearing
8 aforesaid, and that the foregoing is a true,
9 complete and correct transcript of the
10 proceedings of said hearing as appears from my
11 stenographic notes so taken and transcribed
12 under my personal direction.

13 IN WITNESS WHEREOF, I do hereunto set my
14 hand at Chicago, Illinois, this 11th day of
15 June, 2019.

16
17 *Cynthia Moreno*

18 Cynthia Moreno

19 C.S.R. No. 84-3635

20 Certified Shorthand Reporter
21
22



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COOK COUNTY, IL
2018CH06576

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

CHICAGO JUSTICE PROJECT,)
)
Plaintiff,)
) 18 CH 06576
v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
Defendant.)

6572121

**PLAINTIFF’S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT AND RESPONSE TO DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

This is a Freedom of Information Act (“FOIA”) dispute regarding Chicago Police Department’s (“CPD”) failure to respond to multiple FOIA requests made by Chicago Justice Project (“CJP”). Most of the requests are now resolved. At issue in this motion are the May 25, 2017 (Bromwich Report); September 26, 2016 (comprehensive staffing analysis); and June 23, 2017 (OEMC call for service data) requests. CJP moves for summary judgment, in response to which CPD is required to prove, by clear and convincing evidence, that all of the records withheld or redacted are exempt from disclosure. CJP disputes that CPD will be able to do so.

I. FACTUAL BACKGROUND

For the present purposes of this motion, CJP will limit the facts to the requests that have not been resolved.¹ CPD is a public body under FOIA. Def. Ans. ¶ 6. On May 25, 2017, CJP requested “Michael Bromwich’s report on Chicago Police Department training/training academy

¹ This Court ordered CPD to produce responsive records for Counts IV and VI of the Complaint, but CPD has not produced all of the responsive records yet. See Ex. 1. However, any issues with the production for those two requests are outside of the scope of these cross-motions for summary judgment and will not be further addressed in Plaintiff’s briefs, but rather through a motion for rule to show cause if the records are not produce in the next 14 days. See Ex. 2.

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completed in 2016.”² Def. Ans. ¶ 10. On June 9, 2017, CPD denied the request stating that the Bromwich report is exempt under Section 7(1)(m). Def. Ans. ¶ 11.

On September 26, 2016, CJP requested:

A. The top to bottom comprehensive analysis that top Chicago Police Department officials repeatedly referenced in a September 21, 2016 briefing with alderman at City Hall saying that this comprehensive analysis was the basis for why Superintendent Johnson had requesting the hiring of a 1,000 additional officers for the Chicago Police Department.

B. Any analysis, reports, memos, or documents that the Chicago Police maintains on the subject of Chicago Police Department staffing or allocation of Chicago Police Department resources from Jan 1, 2011 - September 26, 2016.

Def. Ans. ¶ 12. On October 4, 2016, CPD took a five day extension. Def. Ans. ¶ 13. Despite follow up communications from CJP, CPD never responded and never produced any responsive records. Def. Ans. ¶ 14. After this case was filed, CPD did produce records, but these records were not responsive to the September 26, 2016 request. *See* Transcript from June 6, 2019 at 4:7-5:5 (attached and cited hereinafter as Exhibit 3). CPD now claims that Section 7(1)(m) allegedly exempts these records. *Id.*

On June 23, 2017, CJP requested “all call level police call for service data originally created by the Office of Emergency Management and Communications, but maintained by the Chicago Police Department for the years 1999-2016.” Def. Ans. ¶ 28. On June 30, 2017, CPD responded stating that it does not possess records responsive to the request. Def. Ans. ¶ 29.

² *See generally* Michael R. Bromwich, The Bromwich Group, *available at* <https://www.bromwichgroup.com/about-us/michael-r-bromwich> (last visited Sept. 12, 2019) (“In February 2016, [Michael Bromwich] was hired by the City of Chicago and the Chicago Police Department to provide advice and assistance with respect to a broad range of issues involving police department policies, procedures, and training, among many others.”); About Us, The Bromwich Group, *available at* <https://www.bromwichgroup.com/about-us> (last visited Sept. 12, 2019) (“Led by Michael R. Bromwich, The Bromwich Group provides crisis management counseling, strategic advisory services, public affairs and awareness services, and assistance to federal, state and local law enforcement agencies facing urgent systemic and operational challenges. ***The Bromwich Group is not a law firm.***”) (emphasis added).

On July 18, 2019, this Court entered a briefing schedule for the parties to file cross-motions for summary judgment for the May 25, 2017; September 26, 2016; and June 23, 2017 requests. Ex. 2.

II. LEGAL STANDARDS

A. FOIA Generally

The General Assembly and Illinois courts have long recognized that government secrecy is rarely appropriate and often abused:

We are not surprised that governmental entities, including the United States Attorney generally prefer not to reveal their activities to the public. If this were not a truism, no FOIA would be needed. Our legislature enacted the FOIA in recognition that (1) blanket government secrecy does not serve the public interest and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the sunshine of public scrutiny is the best antidote to public corruption, and Illinois courts are duty-bound to enforce that policy.

Better Gov't Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 818 (2008) (requiring disclosure of federal grand jury subpoenas). Because of this, the FOIA statute and interpreting caselaw impose a demanding standard on public bodies seeking to keep records from the public, no matter what the exemption or the nature of the issues.

First, every public record is presumed by law to be open to the public, and so a public record may only be withheld if a specific statutory exemption applies and is proven by clear and convincing evidence. 5 ILCS 140/1.2; *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (2009) (reversing trial court order granting motion to dismiss and collecting cases setting forth demanding standard to withhold records). If records contain both exempt and non-exempt material, the exempt material may be redacted but the remainder must be released. 5 ILCS 140/7(1).

Second, a public body asserting an exemption must “provide a detailed justification for its claimed exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing.” *Id.* at 74 (quoting and citing *Ill. Ed. Ass’n. v. Ill. State Bd. of Ed.*, 204 Ill. 2d 456, 464 (2003)). Public bodies may not treat exemption language “as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. Rather, the public body can meet its burden only by providing some objective indicia that the exemption is applicable under the circumstances.” *Id.* at 73, 75 (“These affidavits are one-size-fits-all, generic and conclusory. . . . That is rubber stamp judicature. We decline to take part in it. The City is asking us, as it did the trial court, to take the affiants’ word for it. For us to do so would be an abdication of our responsibility.”).

Further, FOIA exemptions must be “read narrowly” and in furtherance of the statutory purpose: “to open governmental records to the light of public scrutiny.” *E.g., Day*, 388 Ill. App. 3d at 73; *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997) (“In conducting our analysis, we are guided by the principle that under the Freedom of Information Act, public records are presumed to be open and accessible. The Act does create exceptions to disclosure, but those exceptions are to be read narrowly.”).

Finally, the “function of the courts is to interpret the [FOIA] statute as it is written,” and not to vary from clear statutory text on policy or other grounds, especially when such variation does not further the statutory purpose of transparency. *Fagel v. Dep’t of Transp.*, 2013 IL App (1st) 121841, ¶ 35 (declining to create exemption judicially for electronic data that could be “manipulated”) (citing *Pritza v. Village of Lansing*, 405 Ill.App.3d 634, 645 (2010) (courts may not legislate but must interpret the law where the language of the statute is plain and certain)). The Illinois Supreme Court has repeatedly held that unless records are exempt under a specific

FOIA provision, they must be produced. *Illinois Education Ass 'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463 (2003) (“Thus, when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in section 7 of the Act applies.”); *American Federation of State, County & Municipal Employees (AFSCME), AFL-CIO v. County of Cook*, 136 Ill. 2d 334, 341 (1990) (“The Act, therefore, creates a simple mechanism whereby a public body must comply with a proper request for information unless it can avoid providing the information by invoking one of the narrow exceptions provided in the Act.”).

B. Adequacy Of Search

A public body also bears the “burden of showing that its search was adequate.” *BlueStar Energy Servs., Inc. v. Illinois Commerce Comm’n*, 374 Ill. App. 3d 990, 996-97 (2007). To meet that burden, the public body “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *see also, e.g., Lee v. U.S. Attorney for So. Dist. of Fla.*, 289 F. App'x 377, 380 (11th Cir. 2008). A public body “must set forth sufficient information in its affidavits for a court to determine if the search was adequate.” *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). Affidavits must be reasonably detailed, “setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.” *Id.* “Conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment.” *Id.*

The search must include all places where responsive records “might reasonably be found.” *Miller v. United States*, 779 F.2d 1378, 1383 (8th Cir. 1985). The public body “cannot limit its search to only one record system if there are others that are likely to turn up the

information requested.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). If there is substantial doubt about the adequacy of the search, the public body has not satisfied its obligations. *See, e.g., Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003). Discovery is appropriate when a public body “has not taken adequate steps to uncover responsive documents.” *Schrecker v. Dept. of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002); *see also SafeCard v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991).

C. The Specific FOIA Provisions

CPD only specifically relies on one exemption to withhold all of the records: Section 7(1)(m). Section 7(1)(m) states:

Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

5 ILCS 140/7(1)(m).

D. Summary Judgment

In response to a summary judgment motion, the party bearing the burden of proof (here, CPD), must come forward with supporting evidence and may not rest on mere argument or its own pleadings. *Harrison v. Hardin Cty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). The burden of proof and level of detail required under FOIA are exacting, and CPD must come forward with that proof now.

III. ARGUMENT

For the Bromwich Report (May 25, 2017) and comprehensive staffing analysis (September 26, 2016) requests, the issues in dispute are whether Section 7(1)(m) exempts the Bromwich Report from disclosure in its entirety and whether the comprehensive staffing analysis

is contained within the Bromwich report. *See* CPD Second MSJ at 1; Ans. ¶ 11; Ex. 3 at 3:21-6:4. CJP disputes that CPD has conducted an adequate search for the comprehensive staffing analysis because CJP disputes that all of the responsive staffing analysis records are entirely within the Bromwich Report. CJP also disputes that any portions of the Report discussing staffing could possibly have been more in anticipation of the federal probe, though CPD has not proven the elements of Section 7(1)(m) for any part of the Report. For the OEMC call for service data (June 23, 2017) request, the issue in dispute is whether CPD has performed an adequate search for responsive public records of CPD. *See* CPD First MSJ at 11-12; Ex. 3 at 19:21-21:3. CPD has produced no responsive records to the June 23, 2017 request, but CPD has not furnished any justification for its withholding. Finally, whether CPD acted in bad faith or willfully or intentionally violated FOIA remains in dispute. *See* CPD Second MSJ 5-6.

A. CPD Has Failed to Prove by Clear and Convincing Evidence That FOIA Section 7(1)(m) Applies to the Bromwich Report and the Comprehensive Staffing Analysis.

CPD claims that the May 25, 2017 (“Bromwich Report”) and September 26, 2016 (“comprehensive staffing analysis”) requests are exempt under Section 7(1)(m) as attorney-client privilege and work product. CPD must prove that Section 7(1)(m) applies to the Bromwich Report and to the comprehensive staffing analysis that is allegedly contained within the report. *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 408 (1997). Instead, CPD has done what the Illinois Supreme Court has explicitly said public bodies cannot do: treat “attorney-client” privilege as a talisman to prevent disclosure instead of proving how the exemption actually applies. *See Illinois Educ. Ass’n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 470 (2003) (“But, in meeting its burden, the public body may not simply treat the words ‘attorney-client privilege’ or ‘legal advice’ as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue.”).

The Illinois Supreme Court has defined the elements of attorney-client privilege as:

(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived.

Illinois Educ. Ass'n, 204 Ill. 2d at 470. CPD has provided no evidence to support that the Bromwich Report is legal advice to satisfy the elements of attorney-client privilege.

Similarly, CPD's blanket claim of the work product doctrine assumes the fact that CPD was anticipating litigation without proving that such anticipation was the catalyst for creating the Bromwich Report. Illinois Supreme Court Rule 201(b)(2) defines work product as "[m]aterial prepared by or for a party in preparation for trial" and it is subject to disclosure when "it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2); *see, e.g., Doe v. Twp. High Sch. Dist. 211*, 2015 IL App (1st) 140857, ¶¶ 90, 112. CPD must come forward with proof that the Report was created in anticipation of litigation.

CPD's affidavit fails to prove that each element of attorney-client privilege and work product pertain to each portion, page, sentence, clause, and word of the Bromwich Report. *See* 5 ILCS 140/7(1). Only two paragraphs even address attorney-client privilege and the work product doctrine:

5. The January 28, 2016 consulting services agreement sets forth that the work done by the Bromwich Group is attorney work product and/or covered by the attorney-client privilege. In addition, the agreement obligates the Bromwich Group to maintain the confidentiality of all communications, correspondence, instruments, materials and writings between and among WilmerHale, the City of Chicago, the Chicago Police Department and the Bromwich Group.

6. Further, in my role directing litigation activities and overseeing the attorneys who represent the City of Chicago, I can attest that the work performed by the Bromwich Group related to this agreement and was done for an under the direction of WilmerHale. As such, the report and related materials are confidential

attorney work product and are covered by the attorney-client and work product privileges.

Hill Aff. at ¶¶ 5-6.

CPD's entire basis for claiming Section 7(1)(m) is that WilmerHale and the Bromwich Group contracted to make all writings attorney-client privilege and work product. *See id.* First, the language in Ms. Hill's affidavit epitomizes the generic and conclusory affidavit language previously rejected by the Appellate Court. *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (2009) ("These affidavits are one-size-fits-all, generic and conclusory."); *see also Illinois Educ. Ass'n*, 204 Ill. 2d at 470. Second, contracts cannot create a blanket 7(1)(m) exemption because parties cannot contract to violate public policy or contravene a state law. *Cty. of Jackson v. Mediacom Illinois, LLC*, 2012 IL App (5th) 110350, ¶ 11. It is the public policy of this state that all persons be entitled to full and complete disclosure unless a public body can prove by clear and convincing evidence that an exemption applies. 5 ILCS 140/1; 1.2. To hold otherwise would allow the government to make any record secret simply by executing a contract that says so.

Further, there is no legal basis to extend Section 7(1)(m) to the September 26, 2016 request for comprehensive staffing analysis. Even if, *arguendo*, the Bromwich Report contains portions that are exempt under Section 7(1)(m), CPD provided no evidence to show that the Bromwich Report actually contains the staffing analysis that is responsive to CJP's September 26, 2016 request. Nor has CPD proven—that even if the comprehensive staffing analysis is in the Bromwich Report—whether that analysis is exempt as attorney-client privilege or work product. At the very minimum, CPD has not shown how comprehensive staffing analysis is legal advice or was created in anticipation of litigation. Moreover, even if the Bromwich Report contains advice on the Department of Justice's federal probe, CPD has not even shown how

comprehensive staffing analysis is connected in any way to that advice or the probe. CPD failed to satisfy the most basic requirements of demonstrating that attorney-client privilege and work product apply. Because CPD has not proven any elements of attorney-client privilege and the work product doctrine, summary judgment should be granted to CJP.

B. At the Very Least This Court Should Conduct an *In Camera* Review

While CPD failed to carry its burden of proving that Section 7(1)(m) applies and the Court need go no further, at the very least this Court should perform an *in camera* review of the withheld records. Case law makes clear that *in camera* inspection is the preferred way of resolving FOIA cases, *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 46. CJP requests that the Court conduct an *in camera* inspection of the records. *See generally* 5 ILCS 140/11(j). In doing so, the Court should bear in mind that each sentence, and even each clause and word, must be individually assessed, and any non-exempt information must be provided, with any exempt material redacted. 5 ILCS 140/7(1); *Heinrich v. White*, 2012 IL App (2d) 110564, ¶ 19 (holding that even if the only information that remained after redaction was useless to the requester, it still must be produced). Through *in camera* inspection, this Court should determine (1) whether there is staffing analysis within the Bromwich Report, (2) whether Section 7(1)(m) exempts the Bromwich Report in its entirety, (3) whether the Section 7(1)(m) exempts the staffing analysis that is allegedly in the Bromwich Report, and (4) whether there are any other non-exempt portions in the Bromwich Report.

C. CPD Failed to Perform an Adequate Search for the Responsive Records to the September 26, 2016 and June 23, 2017 Requests.

For the comprehensive staffing analysis and OEMC call for service data requests, CPD has failed to meet its burden that it performed an adequate search. CPD has the burden to show that its search was adequate. *See BlueStar Energy Servs., Inc. v. Illinois Commerce Comm'n*,

374 Ill. App. 3d 990, 996-97 (2007). CPD “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *see also, e.g., Lee v. U.S. Attorney for So. Dist. of Fla.*, 289 F. App'x 377, 380 (11th Cir. 2008). CPD “must set forth sufficient information in its affidavits for a court to determine if the search was adequate.” *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (“Conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment.”). Despite saying that it would, CPD has provided no affidavits to support its claims for the missing OEMC call for service data records. *See* Ex. 3 at 20:6-20:14. CPD has provided no indication that it actually searched to determine the existence of the responsive records, but rather assumed they do not exist and denied CJP as such. It may be true that CPD does not actually maintain some of the responsive records, but CPD cannot simply assume that they do not exist. CPD must come forward with proof that it searched for the responsive records. CPD has not done so.

CPD has indicated to CJP that CPD has access to the OEMC call for service. Public records are defined as records that pertain to public business “having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.” 5 ILCS 140/2(c). If CPD stores the OEMC service call data, then CPD must produce those responsive records. *See* 5 ILCS 140/1.2, 2(c), 3(a). CPD must prove by clear and convincing evidence that it does not possess the responsive OEMC call for service data. *See id.*

Additionally, CPD claims—without a supporting affidavit—that all of the comprehensive staffing analysis, which is responsive to the September 26, 2016 request, is contained entirely within the Bromwich Report. Ex. 3 at 4:20-4:22. CJP disputes that the Bromwich Group conducted any staffing analysis for CPD and that such analysis is actually contained within the

Bromwich Report. CJP's request is for the comprehensive staffing analysis that led to Superintendent Johnson's decision to hire 1,000 new police officers. *See* Compl. Ex. C. The Bromwich Report deals with police officer training. *See* Compl Group Ex. B. There is simply no evidence to show that CPD hired WilmerHale to hire the Bromwich Group to conduct analysis on whether to hire 1,000 new police officers. Because CPD's position is that the comprehensive staffing analysis is entirely contained within the Bromwich Report and because CJP has serious doubts about whether there is any staffing analysis within the Report, CJP disputes that CPD conducted an adequate search for the responsive comprehensive staffing analysis.

CPD has provided no affidavits that prove that CPD conducted an adequate search for the comprehensive staffing analysis and that all of the responsive records are in the Bromwich Report. Because CPD provided no affidavits, the only way to verify if there is comprehensive staffing analysis within the Bromwich Report is through *in camera* review of the Report. If this Court conducts *in camera* review of the Bromwich Report and determines that the staffing analysis is not within the report, then CPD has also failed to conduct an adequate search for the responsive comprehensive staffing analysis because CPD's position is that all of the analysis is contained within the Report. Ex. 3 at 4:20-4:22. CPD has entirely failed to meet its burden by not providing a single affidavit.³ Therefore, the records should be immediately released.

D. There is More Than Enough Evidence to Require Penalties for CPD's Willful and Intentional Violation of the FOIA.

"If the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a

³ CPD did attach the affidavit of Kathleen A. Hill, but Ms. Hill's affidavit does not address the September 26, 2016 and June 23, 2017 requests or the issue of an adequate search.

civil penalty[.]” 5 ILCS 140/11(j). CJP contends that it would make more sense to address this issue separately after the Court rules on the substantive merits of Defendant’s exemption claims.

Because CJP has not yet moved for penalties, the only question is whether, taking the facts in the light most favorable to CJP, there is a basis to conclude that CPD acted in bad faith for each of the FOIA requests in this case. *E.g., McMackin v. Weberpal Roofing, Inc.*, 2011 Ill. App. (2d) 100461, ¶ 19. CPD points to no facts that indicate it did not willfully, intentionally, or otherwise act in bad faith. CPD Second MSJ at 5-6. When a public body asserts a position with no legal justification—here, claiming that a request is unduly burdensome even though CPD waived that exemption when it failed to respond—the violation is willful. *Rock River Times v. Rockford Pub. Sch. Dist. 205*, 2012 IL App (2d) 110879, ¶ 53 (finding that the public body asserting an exemption without a plausible justification to be a willful violation of FOIA). CPD admits that it failed to respond to the September 26, 2016 request. *See* Def. Ans. at ¶ 14. A failure to respond is a willful violation of the FOIA because CPD knew the statutory deadline. *See id.* at ¶ 13; Compl. Ex. D (CPD citing 5 ILCS 140/3(e) and taking a 5-day extension to respond to the request). Additionally, CPD admits that when a public denies a request in order to “save face,” then that violation is willful and intentional. *See* CPD Second MSJ at 6. If this Court determines that there is no staffing analysis within the Bromwich Report, then CPD willfully and intentionally violated FOIA by claiming Section 7(1)(m) after initially failing to conduct an adequate search. *See generally* Ex. 3 at 4:7-5:5.

To the extent that CPD attempts to graft additional requirements beyond a showing that the denial was “willful and intentional,” such as “egregious conduct,” that effort violates well-established rules of statutory construction. *E.g., Fagel v. Dep’t of Transp.*, 2013 IL App (1st) 121841, ¶ 35. Nor would it be consistent with the purpose of the statute or this specific

amendment, both of which CPD ignore entirely. 5 ILCS 150/1 (“It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.”); 96th General Assembly, House of Representatives, May 27, 2009 Debate, at 92, 98 (statement by Speaker Madigan that the purpose of the penalty provision is to “impose stiff, civil penalties for FOIA violations” and that “a good way to compel compliance with the statute is to impose stiff civil penalties for noncompliance”).

Alternatively, under Illinois law, conduct is willful if it is “performed knowingly or with knowledge.” 720 ILCS 5/4-5 (defining “willfully” for purposes of criminal laws); *see* Reply Brief of Defendant-Appellant at 8-9, *NBC v. CPD*, No. 18-1426 (Ill. App. Ct. Mar. 7, 2019) (attached and cited hereinafter as Exhibit 4) (using the criminal definition of willful to determine whether CPD willfully violated the law). Certainly, the standard for criminal liability is not less than the standard of civil penalty. *See Monday v. United States*, 421 F.2d 1210, 1215 (7th Cir. 1970). Thus, as CPD argued in its own appellate brief, a public official who knowingly, but mistakenly, denies a FOIA request has done so willfully in violation of the FOIA. *See* Ex. 4 at 8-9. Here, CPD knew that it was withholding the requested records for some of CJP’s requests at the time that it did so and knew that it was not responding by the deadline for the others. Therefore, those violations were willful.

If the Court finds that some showing of subjective *mens rea* is required, which it should not, Plaintiff should be permitted the opportunity to take discovery to develop that evidence.

IV. CONCLUSION

For these reasons, CJP is entitled to summary judgment and the records should be immediately released.

RESPECTFULLY SUBMITTED,

/s/ Merrick J. Wayne

Attorneys for Plaintiff
CHICAGO JUSTICE PROJECT

Matthew Topic
Joshua Burday
Merrick Wayne
LOEVY & LOEVY
311 North Aberdeen, 3rd Floor
Chicago, IL 60607
312-243-5900
foia@loevy.com
Atty. No. 41295

CERTIFICATE OF SERVICE

I, Merrick J. Wayne, certify that on September 13, 2019, I caused the foregoing PLAINTIFF'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT to be served via electronic mail on all counsel of record.

/s/ Merrick J. Wayne

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

CHICAGO JUSTICE PROJECT,)
)
Plaintiff,)
) 18 CH 06576
v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
Defendant.)

**PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

EXHIBIT 1

FILED DATE 7/8/18 09:15:08 AM 2018CH06576

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CJP

v.

CPD

No.

18 CH 6576

ORDER

This case before the court on hearing for the parties' cross-motions for summary judgment. Court reporter present. The court being duly advised it is hereby ORDERED:

1. Court I - Plaintiff's motion denied, Defendant's motion granted.
 Plaintiff's motion for section 111(e) index granted.
2. Court II - Both parties' motions denied, and the court remains at issue.
3. Court III - No ruling on this court.
4. Court IV - Plaintiff's motion granted, Defendant's motion denied.
5. Court V - Plaintiff withdraws this court.
6. Court VI - Plaintiff's motion granted for superintendent Johnson's emails and denied for all others. Defendant's motion denied for Johnson's emails + granted for all other.
7. Court VII - Plaintiff withdraws this court.
8. Court VIII - Both parties' motions denied, and the court remains at issue.
9. Court IX - Plaintiff withdraws this court.
10. Court X - Plaintiff's motion denied. Defendant's motion granted. Plaintiff motion for section 111(e) index is granted.

Attorney No.: 41295

Name: Merrick Wayne

Atty. for: Plaintiff

Address: 311 N. Aberdeen

City/State/Zip: Chicago, IL 60607

Telephone: 312-243-5900

ENTERED:

Dated: Judge Caroline Kate Moreland

JUN 07 2019

Judge Circuit Court 2033 Judge's No.

11. Case set for status on July 18, 2019 at 10:30 am.

FILED DATE 7/8/18 2:00 PM 2018CH06576

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

CHICAGO JUSTICE PROJECT,)
)
 Plaintiff,)
) 18 CH 06576
 v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
 Defendant.)

**PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

EXHIBIT 2

FILED DATE 7/8/18 09:15 AM 2018CH06576

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CJP

v.

CPD

No.

18CH 6576

ORDER

This case coming before the Court on status, it is hereby ORDERED:

1. Court I - Defendant to produce index on or before July 25, 2019.
2. Court X - Defendant to produce index on or before July 25, 2019.
3. Court VI - Defendant to produce Superintendent Johnson's responsive emails on or before July 25, 2019.
4. Defendant's combined motion for summary judgment on Courts II, III, and VIII and motion to reconsider on Court IV^{due} by August 5, 2019.
5. Plaintiff's combined XMST on Courts II, III, and VIII and response to Defendant's MST and MTR due by August 29, 2019.
6. Defendant's response/reply due by September 12, 2019.
7. Plaintiff's sub-reply due by September 26, 2019.
8. Parties to provide courtesy copies to the clerk via email.

9. Clerk's status set for September 30, 2019 at 9:00 AM. No need to appear if courtesy copies emailed. Indicating parties want hearing.

Attorney No.:

41295

Name:

Merritt Wayne

Atty. for:

Plaintiff

Address:

311 N. Aberdeen

City/State/Zip:

Chicago, IL 60607

Telephone:

312-243-5900

ENTERED:

Dated:

Judge Caroline Kate Moreland

Judge

JUL 18 2019

Judge's No.

Circuit Court 2033

FILED DATE 7/31/2020 9:15:08 AM 2018CH06576

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

CHICAGO JUSTICE PROJECT,)
)
Plaintiff,)
) 18 CH 06576
v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
Defendant.)

**PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

EXHIBIT 3

FILED DATE 7/8/18 09:15:08 AM 2018CH06576

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - CHANCERY DIVISION

CHICAGO JUSTICE PROJECT,)

Plaintiff,)

-vs-) No. 18 CH 06576

CHICAGO POLICE DEPARTMENT,)

Defendant.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause in Courtroom 2302 of the Richard J. Daley Center, on the 7th day of June, A.D. 2019, commencing at 10:53 a.m.

BEFORE: HONORABLE CAROLINE KATE MORELAND

FILED DATE 7/8/19 10:09 AM 2018CH06576

1 PRESENT:

2 LOEVY & LOEVY

3 (311 North Aberdeen Street, Suite 300

4 Chicago, Illinois 60607

5 (312) 243-5900), by:

6 MR. MERRICK WAYNE

7 merrick@loevy.com

8 appeared on behalf of the Plaintiff;

9

10 CITY OF CHICAGO

11 DEPARTMENT OF LAW

12 (30 North LaSalle Street, Suite 1720

13 Chicago, Illinois 60602

14 (312) 744-8791), by:

15 MR. MARC AUGUSTAVE

16 marc.augustave@cityofchicago.org

17 appeared on behalf of the Defendant.

18

19

20

21

22 REPORTED BY: Cynthia Moreno, C.S.R. No. 84-3635

1 MR. WAYNE: Good morning, Your Honor.
2 Merrick Wayne on behalf of the plaintiff,
3 Chicago Justice Department.

4 MR. AUGUSTAVE: Marc Augustave on
5 behalf of the City of Chicago, Chicago Police
6 Department.

7 THE COURT: Okay.

8 MR. WAYNE: Before we begin, I made a
9 table of all of the counts of the complaint
10 just because it's hard to keep them straight.
11 Would you like a copy for yourself?

12 THE COURT: Sure. Did you give
13 counsel a copy?

14 MR. WAYNE: Yes, I did.

15 THE COURT: Okay. Do you want to
16 start? I have cross complaints -- cross
17 motions for summary judgment.

18 MR. WAYNE: Yes, your Honor. There
19 were originally ten counts in dispute in this
20 case. We're down to seven counts which are
21 still in dispute. However, we did not have a
22 chance to brief Count 3 at all.

1 MR. AUGUSTAVE: The portion --

2 MR. WAYNE: That's the analysis.

3 MR. AUGUSTAVE: The analysis record.

4 THE COURT: So I have that you're --
5 the comprehensive analysis, the September 26
6 one, you're agreeing to produce?

7 MR. AUGUSTAVE: Well, we initially
8 thought we were producing. We had agreed to
9 produce. However, there are some records that
10 he's seeking that fall under the 7(1)(m)
11 exemption, which is -- the records that are
12 responsive to this, that part of that request
13 is part of another part of his request, the
14 Bromwich report, which is what we've claimed
15 7(1)(m) under.

16 MR. WAYNE: So what happened --

17 THE COURT: The September 26, 2016,
18 request.

19 MR. WAYNE: Yes.

20 THE COURT: Is part of the Bromwich
21 request?

22 MR. AUGUSTAVE: Yes. The analysis.

1 MR. WAYNE: That's what Counsel is
2 saying to us. They did produce records, but
3 none was the analysis. So when we asked to
4 send emails for the analysis, he then told us
5 7(1)(m), which we dispute.

6 THE COURT: So you're working on it,
7 or am I ruling on it because in one of your
8 motions, it said I was not going to be ruling
9 on this.

10 MR. AUGUSTAVE: That was under the
11 assumption everything was satisfactory --

12 MR. WAYNE: Yes.

13 MR. AUGUSTAVE: -- however, subsequent
14 to our briefing, it appears that we are
15 contesting that portion of it.

16 THE COURT: Well, then it will have to
17 be put on hold because in your briefing you
18 said it was no longer at issue. In the reply,
19 it was not even addressed.

20 MR. WAYNE: I think I said it was not
21 at issue assuming it was produced properly, but
22 if you don't want to rule on that count, that's

1 fine for today.

2 MR. AUGUSTAVE: And it may be null and
3 void depending on how you rule on the Bromwich
4 report because it covers that.

5 MR. WAYNE: Of course.

6 THE COURT: So than the 2/17/17 one,
7 are you working that one out?

8 MR. AUGUSTAVE: That was done.

9 MR. WAYNE: We withdraw that count.

10 THE COURT: Okay. The 4/10/17 count.

11 MR. WAYNE: They produced records, and
12 we're satisfied.

13 THE COURT: Withdrawn?

14 MR. WAYNE: Yes. That's for Count 7
15 as well.

16 THE COURT: Just so you're aware, I
17 have it all outlined by date. I didn't pay
18 attention by count. That's just how I
19 organized it.

20 MR. WAYNE: That's why I made the
21 table because I think we're all thinking of
22 these differently.

1 THE COURT: So the September 11
2 request, withdrawn?

3 MR. WAYNE: Yes. They produced
4 records.

5 THE COURT: Okay. So other than
6 that -- so the four. So it leaves me with six
7 left, correct?

8 MR. WAYNE: Correct, your Honor.

9 THE COURT: Okay. So, I guess, how do
10 you want to argue it?

11 MR. WAYNE: Do you want us to go by
12 issue or prefer us to go by the request itself?

13 THE COURT: I prefer you would go by
14 the date, the request itself. I also prefer we
15 go in chronological -- I organized it in
16 chronological order. So January 20, which is
17 probably Count No. 4.

18 MR. WAYNE: Yes.

19 THE COURT: May 25, Count No. 2. Then
20 June 14, Count No. 1.

21 MR. WAYNE: Okay.

22 THE COURT: June 23 is Count No. 8.

1 December 19 is Count No. 6, and February 24 is
2 Count No. 10. I think that's it. Is that six?

3 MR. WAYNE: Yes, your Honor.

4 THE COURT: Okay.

5 MR. WAYNE: Your Honor, so for the
6 January 20, 2017, request. The issue mainly
7 here is that they waived their right to claim
8 undue burden which is what they're asserting
9 for these records. They did -- there was a
10 request on January 20.

11 CPD did respond timely to that
12 request denying it as unduly burdensome.
13 However, they did not give my client an
14 opportunity to confer. That was not part of
15 the letter. So from there, they already have
16 failed to properly deny under 3(g).

17 But on top of that, my client did
18 come back on February 18 with another follow-up
19 request that just narrowed it down, and
20 narrowed requests are considered new requests.
21 CPD failed to respond to that request in any
22 way. They waived any opportunity to claim

1 undue burden then to that new request.

2 THE COURT: Okay.

3 MR. AUGUSTAVE: CPD admits that they
4 received a narrowed request, and unfortunately
5 I was not aware of that so I did not brief that
6 in my reply. However, to that end, I could
7 talk to CPD and see if we can get the records
8 responsive to that narrowed request and produce
9 it to the plaintiffs.

10 I was told that it's still unduly
11 burdensome because the records are not all kept
12 electronically. There are records kept
13 electronically and some that are just paper
14 stored like -- as paper.

15 So to that end, if we can provide
16 plaintiff with the electronic records, we will
17 work towards that and discuss what we need to
18 do to go forward with hard copies.

19 MR. WAYNE: We would be open to
20 working through the electronic copies. Our
21 position is that there shouldn't be such great
22 burden for these electronic copies because it's

1 an Excel spreadsheet essentially. If you look
2 at the Frosto affidavit, Ms. Frosto said there
3 were 100 columns between the January 20 and the
4 June 14 request.

5 It shouldn't take -- it shouldn't
6 be unduly burdensome for CPD to review 100
7 columns to determine whether there would be
8 exempt information within that column.

9 THE COURT: So but they're saying they
10 will work with you.

11 MR. WAYNE: Right.

12 THE COURT: Okay. So they're willing
13 to work with you. Do I need to rule on this
14 issue?

15 MR. AUGUSTAVE: It's up to Counsel,
16 but we will work with them to try to get them
17 the records. I have to talk to my client to
18 say what do we need to do to resolve this. In
19 our opinion, burdensome has been waived more or
20 less so it's something we can work with.

21 THE COURT: I can enter and continue.

22 MR. WAYNE: They did waive burden. So

1 if there are records falling under this
2 February 18 request, they have to produce them.
3 There isn't any leeway there.

4 MR. AUGUSTAVE: It could take years.
5 To the extent you want to keep this going on
6 for years, that's fine. But to the extent we
7 can work on giving you what's responsive and we
8 will work towards doing that.

9 MR. WAYNE: Sure. But we've had
10 situations like this where they waived undue
11 burden, and even though it would take a long
12 time, they still have to do it. That's what
13 statute says.

14 THE COURT: I think they are
15 acknowledging they are going to do it.

16 MR. AUGUSTAVE: Yes, your Honor.

17 THE COURT: It's just a matter of
18 coming up with the records. The electronic
19 ones shouldn't be too difficult, but the paper
20 one will take time.

21 MR. WAYNE: Right.

22 THE COURT: Obviously.

1 MR. WAYNE: Yes.

2 THE COURT: Okay. So you are
3 conceding --

4 MR. AUGUSTAVE: We're conceding we
5 will give them the electronic ones, and we can
6 talk with them about paper ones to see how long
7 it will take to produce those.

8 MR. WAYNE: We can work out a
9 production schedule for the paper records if
10 that's what Counsel is --

11 MR. AUGUSTAVE: We'll work on it.

12 THE COURT: So CPD agrees to comply
13 with the January 20 request. Okay.

14 So next one is the May 25,
15 Bromwich report request.

16 MR. WAYNE: Your Honor, CPD hasn't
17 provided any affidavits at all for this request
18 to show why 7(1)(m) applies to the Bromwich
19 report and how they performed an adequate
20 search for the financial records. That went to
21 the second part of that request. They just
22 made these conclusory talisman arguments in

1 their brief. There is no way for them to have
2 met their burden of proof under the statute.

3 MR. AUGUSTAVE: CPD provided the Court
4 and plaintiff with a copy of the agreement
5 letter that was entered into by the law firm
6 that was hired to represent the Chicago Police
7 Department and the City.

8 In that engagement letter, it
9 details why anything -- any work product
10 produced by Bromwich falls under the
11 attorney/client privilege and work product and
12 as such falls squarely within the 7(1)(m)
13 exemption.

14 MR. WAYNE: Your Honor, that's not an
15 adequate meaning of the burden. They can put
16 anything in that agreement. On top of that,
17 they have not shown they are anticipating
18 litigation.

19 MR. AUGUSTAVE: The letter says so.
20 It's an investigation by the department --

21 THE COURT: Let him finish.

22 MR. WAYNE: So they have not -- they

1 need to provide an affidavit that shows they
2 were anticipating litigation; that this
3 contains the mental impression, the thoughts
4 and legal strategies of an attorney. None of
5 that has been done.

6 All we know is CPD had a law
7 firm, had the Bromwich group make this report.
8 There hasn't been this proper showing under
9 7(1)(m) that it does apply.

10 THE COURT: Counsel.

11 MR. AUGUSTAVE: To the extent that the
12 Court would want us to provide an affidavit
13 from someone with knowledge that states that
14 these are attorney work product and
15 attorney/client privileged documents, we will
16 get that to provide to the Court.

17 THE COURT: So as to that request, I
18 did review the letter that was attached. It's
19 an unverified letter. There is no affidavit
20 attached. Counsel is right about that.

21 But in reading the letter, it
22 does bring to my attention there is a genuine

1 issue as to whether this is attorney/client
2 privilege. So based on that, I'm denying both
3 your motions for summary judgment on that
4 issue. So it remains at issue.

5 MR. WAYNE: Okay.

6 THE COURT: Until it can be resolved.

7 Okay. June 14 incident --
8 request. Sorry.

9 MR. WAYNE: This one is also for a
10 database record, which is just essentially an
11 Excel spreadsheet. It's similar to what I
12 argued for January 20 where it is that 100
13 columns.

14 If you go on CPD's website, you
15 can see they have a shortened version of this
16 arrest database. It only has the years 2014 to
17 2017, and it doesn't have all of the columns
18 that should be provided, just 10 of the 100.

19 CPD tries to raise that there is
20 billions of fields, but that's not what's at
21 issue here. That's completely distractive from
22 the issue. Clearly there's 100 columns for

1 them to review and determine if there is that
2 exempt information in these columns.

3 THE COURT: Okay.

4 MR. AUGUSTAVE: We provided the
5 affidavit of subject matter expert on this.
6 She attested to the fact there are 1,457,172
7 individual data which would have to be to
8 searched. This is for a period of 17 years
9 which covers from 1999 to 2016.

10 The sheer volume of this request
11 and trying to comply with this request would
12 bring CPD, more or less, to a standstill. This
13 is according to the research and development
14 section of the Chicago Police Department.

15 MR. WAYNE: Your Honor, that million
16 number that Counsel is providing, that's
17 distracting you from what's at issue. There's
18 a million rows, if that's what I'm
19 understanding it to be --

20 MR. AUGUSTAVE: It's records.
21 Individual record data.

22 MR. WAYNE: So that would be the

1 individual person being arrested, which would
2 then be a million rows. But you just have to
3 review the column because if you have a column
4 that has the race of the person arrested, it's
5 every cell in that column will have just race.

6 That's not exempt. You have to
7 produce that column. However, if you have the
8 arrestees birthday in there, that could
9 possibly be exempt, then you would know
10 everything in that column would be redacted.

11 THE COURT: Any argument?

12 MR. AUGUSTAVE: CPD is not trying to
13 hide anything. CPD has routinely provided
14 plaintiffs as well as other plaintiffs with
15 requests for data that they have and they can
16 readily provide. In this instance, the request
17 is so grand, so wide, that it makes undue
18 burden on CPD. It would be an undue burden on
19 CPD to gather that type of information to
20 provide to the requester.

21 MR. WAYNE: But that also then
22 requires you to make public interest inquiry

1 into that as well. There is a public interest
2 in having the arrest data. The public wants to
3 know what type of people are being arrested for
4 what type of crimes. That is important to
5 know. That should outweigh any burden that it
6 takes to review those 100 columns.

7 MR. AUGUSTAVE: Well, CJP has not
8 delineated the public interest here. In light
9 of the fact that FOIA is so -- it's five days
10 to provide records and at most ten days.
11 During that timeframe, it would be impossible
12 for CPD to provide those responsive records.

13 THE COURT: I've read the response the
14 CPD sent. Looks like it was sent June 20
15 regarding the unduly burdensome. They refer to
16 the Research and Development Division.

17 They state in their letter that
18 after doing -- after research and development
19 did a search, it determined that just in the
20 year 2016 there were 85,000 records of
21 individual arrests.

22 Then to do that for 17 years,

1 they estimate a total of over 1 million
2 arrests. They also said the data is not
3 already composed in a database. A new
4 spreadsheet would have to be created.

5 So based on that, I do find that
6 it is a voluminous amount of records you are
7 requesting. So I find it is unduly burdensome,
8 and I also don't find that the public interest
9 outweighs the -- I find that the burden is not
10 outweighed by the public interest. So how do
11 you want me -- CJP or Chicago Justice?

12 MR. WAYNE: Either is fine.

13 THE COURT: Chicago Justice motion for
14 summary judgment will be denied.

15 CPD motion for summary judgment
16 granted. I will grant your request.

17 However, based on the denial, I
18 will grant your request for an index under
19 Section 11(e).

20 MR. WAYNE: Thank you, your Honor.

21 THE COURT: Okay. That brings us to
22 Count No. 8, the June 23, 2017, request.

1 MR. WAYNE: Yes, your Honor. For this
2 request, CPD needs to prove that they conducted
3 adequate search for these responsive records.
4 They have not provided an affidavit to show
5 that's been the case.

6 MR. AUGUSTAVE: Well, to the extent
7 that's what it takes, CPD will provide an
8 affidavit that will detail the fact that CPD is
9 not the Office of Emergency Management and
10 Communications and that the records that are
11 being requested here are not maintained by CPD,
12 and CPD -- the type of search that CPD
13 conducted to verify that. So I can provide you
14 with an affidavit.

15 THE COURT: Okay. Any further
16 argument on that? I think that's basically --

17 MR. WAYNE: That's basically the
18 argument.

19 THE COURT: I agree. There has been
20 nothing submitted by way of affidavit by the
21 defendant, but I do find that's an issue that
22 they have brought up regarding whether or not

1 they do produce these records. So there is a
2 question of fact. So, therefore, motion for
3 summary judgment on both sides denied.

4 Okay. That brings us to Count
5 No. 6, the 12/19 emails request.

6 MR. WAYNE: Yes, your Honor. At issue
7 here is that CPD is claiming they cannot search
8 -- they cannot look up who was in what position
9 on a certain date. The request listed off
10 higher ranking officials and even named one of
11 them, Superintendent Johnson, for those who
12 would have been in that position on
13 September 21, 2016. The issue here though is
14 that the affidavit that CPD provided is
15 contradictory within itself. Paragraph ten
16 even lists off the history of a specific
17 officer and how they changed.

18 So the affidavit shows they can
19 somehow see the change in positions that
20 officers have. So to the extent they cannot
21 figure out who these high ranking officials
22 were on this date does not sound like it would

1 be unduly burdensome.

2 THE COURT: Counsel.

3 MR. AUGUSTAVE: In response, what that
4 affidavit indicated was that you can search by
5 the individual name. Marc Augustave. This is
6 what position he held during this timeframe.
7 But to the extent Marc Augustave was commanding
8 officer of Unit 6 in 1945, they cannot go --
9 unless they knew Marc Augustave held that
10 position, they cannot find out who held that
11 position.

12 Once the position is vacated and
13 entered into by another person, all of that
14 information is dumped. So you have to have the
15 name of the individual officer in order to know
16 what positions that individual officer held
17 during those timeframes.

18 However, the way their system is
19 now, they cannot go by -- well, superintendent
20 is easy because they have that information.
21 But the other individuals, they can -- that
22 information is not in the database.

1 MR. WAYNE: But even the other
2 positions are easy too. The chief of staff --
3 there are other high ranking officials. It's
4 not like we're asking for who was the police
5 officer on this beat on September 21. This is
6 the actual high ranking people who have a lot
7 of attention at CPD. People know who are in
8 those positions.

9 MR. AUGUSTAVE: They know -- with
10 regard to CPD records, that information is only
11 kept there for that time period that individual
12 held that office. So in order to get the
13 emails of the individual holding these
14 positions, you have to have the name of the
15 individual holding that position.

16 So in order to go back in time,
17 we would have to have the names of the
18 individuals who held those positions and then
19 correlate that with the position and get their
20 emails, and they will provide you with that.
21 But at this time, CPD does not have the names
22 -- without the names of the individuals, they

1 cannot do the search for emails.

2 THE COURT: So it's my understanding
3 that you can put a name in and search, and it
4 will show up that -- all of the positions of
5 that person --

6 MR. AUGUSTAVE: Yes, your Honor.

7 THE COURT: -- or that person held,
8 but you don't have a way of finding out who was
9 superintendent special advisor. You have no
10 way to look that up other than doing a search
11 of memos or --

12 MR. AUGUSTAVE: Yes, your Honor.

13 THE COURT: You provided an affidavit
14 of that.

15 MR. AUGUSTAVE: Yes.

16 THE COURT: However, so I do find that
17 you can provide emails of Superintendent
18 Johnson.

19 MR. AUGUSTAVE: Yes, your Honor.

20 THE COURT: So the Chicago Justice
21 Project's motion for summary judgment will be
22 granted as to Superintendent Johnson. That

1 will be granted.

2 However, the affidavit by -- is
3 it Officer Roche?

4 MR. AUGUSTAVE: Roche, Lieutenant
5 Roche.

6 THE COURT: Lieutenant Roche is
7 sufficient for me to -- is sufficient to show
8 it would be unduly burdensome to find the
9 individuals who held the titles at certain
10 times and, thus, their emails.

11 So your motion for summary
12 judgment -- Chicago Justice Project motion for
13 summary judgment is denied as to that respect
14 but granted for the Chicago Police Department
15 as to that respect and vice versa as to
16 Superintendent Johnson.

17 MR. AUGUSTAVE: Yes, your Honor.

18 THE COURT: All right. No. 10, the
19 2/24 request.

20 MR. WAYNE: Your Honor, this is
21 another one that CPD waived -- they responded
22 on -- April 5 was the date of the email -- they

1 sent the denial letter to, even though the
2 request was in February. So that's way beyond
3 the --

4 MR. AUGUSTAVE: CPD provided a
5 response letter on the 26th and then provided
6 some of those responsive documents April 5.

7 THE COURT: You put in your -- did you
8 not have this in your complaint?

9 MR. WAYNE: Yes, your Honor. It is in
10 the complaint. However, on the other page, it
11 also says it was sent on the 5th. So there
12 must be an issue with the dates of the letter,
13 if that's what it is. But --

14 THE COURT: Okay. It looks to me --
15 and I will give you both the opportunity to
16 explain. The letter was sent February 26 and
17 then emailed April 5. Do you have any comments
18 on that?

19 MR. AUGUSTAVE: No, your Honor.

20 MR. WAYNE: No.

21 MR. AUGUSTAVE: The only thing that I
22 have is they initially responded the 26th and

1 then followed up with some responsive documents
2 on April 5.

3 THE COURT: So I don't have anything
4 disputing this letter wasn't sent on the 26th
5 other than emails. I don't know if this is an
6 email in response to an email. Where is this
7 letter?

8 MR. AUGUSTAVE: CPD acknowledges they
9 also responded on April 5, and on April 5, they
10 provided some records. On the 26th, they
11 provided the initial letter.

12 THE COURT: Okay.

13 MR. WAYNE: In any respect, this does
14 come back to being a database record at the
15 same time. So it would be the same argument
16 that I have already made about the database
17 records where it's easier to redact.

18 If you look at the Heights case,
19 the Court distinguished a database record
20 having many rows. That would be printed onto
21 many pages from an actual list of emails that
22 were thousands of pages.

1 THE COURT: So the waiver issue is no
2 longer. It's just the unduly burdensome.

3 MR. AUGUSTAVE: Yes, your Honor. With
4 regards to the unduly burdensome aspect of it,
5 we provided the affidavit of Sergeant Meghan
6 Remiasz, who is the commanding officer of the
7 Bureau of Internal Affairs of CPD.

8 Aside from the records that were
9 provided to plaintiff, she goes on to confirm
10 in her affidavit that it would take months to
11 search for and provide the other records which
12 are responsive to this particular request.

13 It's not a matter of searching the database.

14 When it comes to Internal
15 Affairs, there are records that were not in the
16 database, and they would have to search those
17 as well and it would be under their duty under
18 FOIA to search all records within their
19 possession.

20 MR. WAYNE: There is an outstanding
21 amount of public interest where this record --
22 this is data showing complaints filed against

1 CPD officers and the status of those complaints
2 after CPD addressed them and whether they
3 addressed them or not.

4 The public has that interest in
5 knowing how CPD is handling complaints against
6 their officers. And if it's in a database,
7 it's not going to be unduly burdensome
8 outweighing that public interest.

9 MR. AUGUSTAVE: Again, given the
10 truncated period of time allowed by FOIA for a
11 public body to respond, when a public body
12 responds with some records and then claims it's
13 unduly burdensome because of time to respond to
14 provide other records, then that's what that
15 provision is in the FOIA for.

16 MR. WAYNE: The timing provision in
17 the FOIA is because of the public policy of
18 giving the public transparency and opportunity
19 to review the government.

20 MR. AUGUSTAVE: We agree. However, to
21 the extent that it would take longer than the
22 time allowed for under FOIA to respond, then a

1 public body can exert a certain exemption or so
2 articulate that it's unduly burdensome.

3 MR. WAYNE: The affidavit does not say
4 how long it would take to provide this database
5 with any redacted columns that need to be
6 redacted.

7 MR. AUGUSTAVE: It's not a matter of
8 redacting the columns. It's a matter of
9 reviewing the records and finding what's
10 responsive and what's not.

11 THE COURT: Okay. So the request is
12 various records related to digital complaint
13 data received by Internal Affairs from 2000 to
14 2017. CPD responded with a letter on
15 February 26 indicating it would be unduly
16 burdensome for several reasons.

17 I also have an affidavit from
18 officer -- she is a sergeant -- Sergeant
19 Remiasz, R-E-M-I-A-S-Z, who also indicated it
20 would be unduly burdensome. It's 17 years'
21 worth of records.

22 They want or you wanted

1 complaints received broken down by category,
2 investigations broken down by category and
3 outcome, number of cases submitted from
4 prosecution, number of cases accepted, number
5 of cases accepted broken down that resulted in
6 conviction, number of cases where there is a
7 recommendation for discipline, outcomes of all
8 cases.

9 I do find this to be unduly
10 burdensome, and I do find the burden outweighs
11 the public interest. While I do agree there is
12 a public interest without a doubt, I do find
13 the burden does not outweigh -- the burden does
14 outweigh the public interest in this matter.
15 Again, I will grant you your request for an
16 11(e) index.

17 MR. WAYNE: Your Honor, could you
18 clarify something please?

19 THE COURT: Sure.

20 MR. WAYNE: Are you saying that Part A
21 of that request is also unduly burdensome
22 because you were listing off Part B portions?

1 THE COURT: Let me check again.
2 Provide all data in Part A relating to
3 complaints of all officers and B is provide
4 aggregate totals. I see. I guess I didn't
5 read it all into the record. Yes. Part A and
6 B.

7 MR. WAYNE: All right.

8 THE COURT: So your motion for summary
9 judgment -- Chicago Justice Project's motion
10 for summary judgment denied as to that request.

11 Chicago Police Department's
12 motion for summary judgment granted as to that
13 request.

14 Again, I am granting you 11(e)
15 index.

16 MR. WAYNE: Thank you, your Honor.

17 THE COURT: Okay. Then we need court
18 dates or what do you want to do from there? We
19 still have motions for summary judgment denied
20 as to both on the Bromwich report, No. 2, and
21 also with the Owens, Count 8. Also your No. 4,
22 they will comply with, and work on complying

1 with that and complaints -- Count No. 3, they
2 are also working on compliance.

3 Any other ones? Just trying to
4 see what issues are outstanding.

5 MR. WAYNE: Count No. 3 will be
6 determined on how it's -- it will come down to
7 whether 7(1)(m) applies to the Bromwich report.

8 THE COURT: So that can be put on the
9 back burner until Count 2 is resolved. Okay.
10 So how do you want to precede from here?

11 MR. WAYNE: We can get a status date
12 Do you want to do 45 days?

13 MR. AUGUSTAVE: That would be fine.
14 And we will work on providing you with records
15 for the data and requests to the other issues.

16 MR. WAYNE: And Superintendent
17 Johnson's emails as well.

18 MR. AUGUSTAVE: Okay.

19 MR. WAYNE: Your Honor, are you
20 ordering production to be done by those 45
21 days, or are you ordering sooner than that?

22 THE COURT: I want to -- I don't mind

1 setting a date in the order but I want a date
2 that everyone comply with it. Then agree to
3 the date and we'll pick a date, and then if you
4 don't comply with the picked date, that's a
5 problem. When do you think you can get that?

6 MR. AUGUSTAVE: Again, because it's so
7 voluminous and I'm not a subject matter expert
8 so I don't know how long it will take. I
9 honestly think 45 days is way too short. In
10 light of the fact it could take years, and we
11 are going back to 1980.

12 THE COURT: We will not do years. So
13 let's do a 45-day date. You can report back in
14 45 days when do you think you will have it
15 completed. If you can start the process now --
16 is that possible to start?

17 MR. AUGUSTAVE: We will comply.

18 THE COURT: Is that satisfactory to
19 you at this time?

20 MR. WAYNE: Yes, your Honor.

21 THE COURT: So 45 days will bring us
22 at -- do you want to come back June 18 for

1 status?

2 MR. AUGUSTAVE: June 18?

3 THE COURT: Yes.

4 MR. AUGUSTAVE: 45 days?

5 THE COURT: Is that 45 days?

6 MR. AUGUSTAVE: That's two weeks.

7 THE COURT: July 18. I'm looking at
8 the wrong month.

9 MR. AUGUSTAVE: What time, your Honor?

10 THE COURT: 10:30.

11 MR. WAYNE: Yes. That should work for
12 me, your Honor.

13 THE COURT: Great. Thank you.

14 MR. WAYNE: Thank you, your Honor.

15

16 (WHEREUPON, the proceedings were concluded.)

17

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19

20

21

22

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF C O O K)

4 I, Cynthia Moreno, C.S.R. No. 84-3635, a
5 Certified Shorthand Reporter of the State of
6 Illinois, do hereby certify that I reported in
7 shorthand the proceedings had at the hearing
8 aforesaid, and that the foregoing is a true,
9 complete and correct transcript of the
10 proceedings of said hearing as appears from my
11 stenographic notes so taken and transcribed
12 under my personal direction.

13 IN WITNESS WHEREOF, I do hereunto set my
14 hand at Chicago, Illinois, this 11th day of
15 June, 2019.

17 *Cynthia Moreno*



18 Cynthia Moreno

19 C.S.R. No. 84-3635

20 Certified Shorthand Reporter

21

22

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

CHICAGO JUSTICE PROJECT,)
)
Plaintiff,)
) 18 CH 06576
v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
Defendant.)

**PLAINTIFF'S COMBINED CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT**

EXHIBIT 4

FILED DATE 7/8/18 09:15:08 AM 2018CH06576

No. 18-1426

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

NBC SUBSIDIARY (WMAQ-TV) LLC,

Plaintiff-Appellee,

v.

CHICAGO POLICE DEPARTMENT,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division
No. 17 CH 09589
The Honorable Neil H. Cohen, Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

EDWARD N. SISSEL
Corporation Counsel
of the City of Chicago
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 742-4961
appeals@cityofchicago.org
jonathon.byrer@cityofchicago.org

BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZREZNY KASPER
Chief Assistant Corporation Counsel
JONATHON D. BYRER
Assistant Corporation Counsel
Of Counsel

ORAL ARGUMENT REQUESTED

Exhibit 2

FILED DATE 7/8/18 2:00 PM 2018CH06576

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The JCA prohibits the disclosure to WMAQ of law enforcement records concerning W.R. As we explain in our opening brief, all information protected by the JCA is exempt from disclosure under FOIA, 5 ILCS 140/7.5(bb), and the plain language of the JCA specifically provides that all law enforcement records concerning juveniles are confidential and may be disclosed only with an order of the juvenile court, 705 ILCS 405/1-7(C). WMAQ admitted below that the records it seeks here relate to a juvenile, C. 49, but never obtained an order from the juvenile court. Instead, it filed a FOIA request, which CPD properly denied in the absence of such an order. The circuit court erred when it ordered CPD to disclose those records to WMAQ.

At the outset, the court should reject out of hand WMAQ's assertion that our position seeks to "effectively immunize police officers from scrutiny under FOIA," WMAQ Br. 7; accord id. at 5, by "prohibiting public access . . . to investigations of police officers who have shot and killed a juvenile," id. at 10. That is not remotely accurate. Our position is simply that disclosure is permitted only if a juvenile court first authorizes it. Adhering to the limits that the statute imposes is not "ultra-secrecy." Id. at 8. WMAQ chose not to proceed in the manner required by statute, and the consequence of that choice was that CPD and the circuit court were required to deny WMAQ's FOIA request.

The court should also reject WMAQ's assertion that the JCA does not

cover the records it seeks because those records do not “concern” a minor. E.g., WMAQ Br. 4, 5-6, 9. That is baseless. Indeed, WMAQ itself observes that “concerning” is commonly understood to mean “relating to,” id. at 5, and WMAQ has already agreed that the records it seeks are “related to” a minor, C. 49. And as we explain, CPD Br. 11, a record of the investigation of a police officer involved in the killing of a minor certainly relates to the minor – indeed, it would be impossible to evaluate whether the killing is justified without considering the minor’s own conduct. But regardless, this case does not turn on semantics. The JCA does not say that it covers records concerning minors only if those records exclusively concern minors, or when the minor is himself “the subject of the investigation,” WMAQ Br. 5, and the court should reject WMAQ’s invitation to read exceptions into the JCA’s plain language.

WMAQ also makes a variety of other arguments, but none supports the judgment, as we now explain.

I. THE JCA EXPRESSLY PROHIBITS DISCLOSURE OF LAW ENFORCEMENT RECORDS CONCERNING MINORS ABSENT AN ORDER OF THE JUVENILE COURT.

The plain language of the JCA states that law enforcement records “concerning all minors under 18 years of age . . . may not be open to public inspection or their contents disclosed to the public except by order of the court presiding over matters pursuant to this Act.” 705 ILCS 405/1-7(C). As the court held in In re W.L., 293 Ill. App. 3d 818 (2d Dist. 1997), “[e]ven a

cursory reading of the Act reveals that law enforcement and court records relating to juveniles are presumed confidential and that those records will not be released unless one of the exceptions noted in the Act is met,” *id.* at 820.¹ Thus, under the JCA, all law enforcement records relating to a minor are confidential unless the juvenile court orders otherwise. WMAQ admitted below that the law enforcement records it seeks are “related to the killing of sixteen-year-old [W.R.]” C. 49. And records like these, which concern or relate to a minor, are “presumed confidential” under the JCA. *W.L.*, 293 Ill. App. 3d at 820. While the JCA contains exceptions to that presumption of confidentiality, 705 ILCS 405/1-7(A), the JCA entrusts to the juvenile court the responsibility of determining whether one of those exceptions applies, and prohibits disclosure of law enforcement records relating to a juvenile absent an authorizing order of the juvenile court, *id.* 405/1-7(C). Such an order may be issued only after the juvenile court has weighed “the minor’s interest in confidentiality and rehabilitation over the moving party’s interest in obtaining the information.” *Id.* 405/1-7(C)(3). WMAQ never obtained any

¹ As we explain, CPD Br. 12, because the JCA’s language is unambiguous, it is unnecessary to resort to canons of construction. Regardless, the JCA expressly states that it must be “liberally construed” to carry out its purposes, 705 ILCS 405/1-2(4), which include protecting the privacy of juveniles, *In re Robert K.*, 336 Ill. App. 3d 867, 872 (2d Dist. 2003). WMAQ’s cases, WMAQ Br. 4, 5-6 (citing *Kalven v. City of Chicago*, 2014 IL App (1st) 121846; *State Journal-Register v. University of Illinois*, 2013 IL App (4th) 120881; *Gekas v. Williamson*, 393 Ill. App. 3d 573 (4th Dist. 2009); *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390 (2006)), are not to the contrary. None involves the JCA or any other statute containing a liberal construction requirement.

such order, so CPD properly denied WMAQ's FOIA request.

WMAQ does not dispute that law enforcement records to which the JCA applies may not be publicly disclosed absent an order of the juvenile court. Yet WMAQ asserts that the General Assembly could not possibly have intended records of a police shooting of a minor to be confidential. WMAQ Br. 5, 8-9, 10. But the "best indication of legislative intent is the statutory language, given its plain and ordinary meaning," Krohe v. City of Bloomington, 204 Ill. 2d 392, 395 (2003), and here the plain language is clear – law enforcement records concerning minors may not be publicly disclosed except by order of the juvenile court, 705 ILCS 405/1-7(C). There is no exception for law enforcement records of a police shooting of a minor. The court in W.L. was clear that that the only law enforcement records concerning minors that may be disclosed under the JCA are those that fall within the JCA's exceptions; everything else is confidential. 293 Ill. App. 3d at 820.

In the more than twenty years since W.L. interpreted the JCA, the General Assembly has amended the JCA eighteen times, see P.A. 90-127, § 5; P.A. 91-357, § 236; P.A. 91-368, § 5; P.A. 92-415, § 5; P.A. 94-556, § 1050; P.A. 95-123, § 5; P.A. 96-419, § 5; P.A. 97-700, § 15; P.A. 97-1083, § 10; P.A. 97-1104, § 10; P.A. 97-1150, § 600; P.A. 98-61, § 5; P.A. 98-756, § 690; P.A. 99-298, § 10; P.A. 100-285, § 5; P.A. 100-720, § 5; P.A. 100-863, § 560; P.A. 100-1162, § 5, but has never once disavowed W.L.'s interpretation. When, as

here, the court has interpreted the language of a statute, the General Assembly is presumed to be aware of that interpretation and to have acted with that knowledge when making later amendments to that statute. E.g., Bruso ex rel. Bruso v. Alexian Brothers Hospital, 178 Ill. 2d 445, 458 (1997). Thus, when the General Assembly in amending a statute does not disavow a prior judicial interpretation, that indicates the General Assembly “deemed the judicial interpretation . . . consistent with legislative intent and the plain meaning of the statute.” Bell v. Retirement Board of Firemen’s Annuity & Benefit Fund of Chicago, 398 Ill. App. 3d 758, 769 (1st Dist. 2010). Here, in fact, the General Assembly endorsed the interpretation of W.L. when it clarified the language of the JCA to state that “[a]ll juvenile law enforcement records which have not been expunged are confidential and may never be disclosed to the general public or otherwise made widely available.” 705 ILCS 405/1-7)(A) (2018) (emphasis added).

WMAQ misstates our position and the law by insisting that the confidentiality requirement of the JCA applies only to “law enforcement records’ concerning ‘the investigation of a minor.’” WMAQ Br. 6. The JCA mandates that law enforcement records “concerning all minors . . . may not be open to public inspection or their contents disclosed to the public except by order of the [juvenile] court.” 705 ILCS 405/1-7(C). The language on which WMAQ relies is an exception to that confidentiality requirement, which allows the juvenile court to authorize limited disclosure, to certain

individuals, of records that “relate to a minor who has been investigated.” 705 ILCS 405/1-7(A). Where the terms of that exception are not applicable, the juvenile court may not order disclosure. See, e.g., W.L., 293 Ill. App. 3d at 823; In re J.R., 307 Ill. App. 3d 175, 181 (1st Dist. 1999).²

In any event, WMAQ also rewrites the exception itself, phrasing it as applying to law enforcement records concerning “the investigation of a minor.” WMAQ Br. 6. The circuit court seemed to read the exception this way as well. A4. But the exception does not say that. It says records concerning “a minor who has been investigated,” and this difference is important. Records concerning a minor who has been investigated include records of the investigation of the death of that minor, like the records at issue in this case.

We also explain in our opening brief that the JCA exempts from public disclosure the records “of an independent agency created by ordinance and charged by a unit of local government with the duty of investigating the conduct of law enforcement officers,” to the extent those records concern a

² The most recent amendments to the JCA resolved some drafting issues that may have caused WMAQ’s present confusion about the relationship among the various sections of the JCA. The exception to the presumption of confidentiality, 705 ILCS 405/1-7(A), previously appeared in the statute before both that presumption and the requirement that juvenile law enforcement records never be disclosed absent a judicial order, id. 405/1-7(C), but now the first sentence of the JCA begins with language setting forth the confidentiality presumption and judicial-order requirement, and the exception comes after, id. 405/1-7(A) (2018).

minor. CPD Br. 10-11. WMAQ asserts that this provision “merely imposes secrecy on another agency.” WMAQ Br. 9. WMAQ misses the point. The exemption in the JCA for records of an agency charged with investigating police misconduct makes clear that the General Assembly expected and intended that, where an investigation of the conduct of police officers involves records that concern minors, those records would remain confidential. That defeats WMAQ’s and the circuit court’s position that the JCA could not have meant to keep confidential records concerning the investigation of a police officer’s interaction with a minor.

WMAQ also questions the need for “a ‘bright-line rule’ making secret **all** records involving a juvenile killed by police,” claiming that such a rule is unnecessary to prevent erroneous disclosures by government officials, because “a public official faces potential misdemeanor criminal liability only when a violation of the JCA is ‘willful,’ and every FOIA Officer is required to know the law.” WMAQ Br. 7. It further claims that confidentiality of records about a police shooting of a minor would undermine the “best interests of the community,” *id.* at 6 (quoting 705 ILCS 405/1-2(1)), and FOIA’s policy in favor of public disclosure, *id.* at 8. These arguments are misplaced. At the outset, WMAQ once again misstates the substance of our brief, which explained the reason the JCA requires an order from the juvenile court to breach the confidentiality of law enforcement records relating to juveniles. WMAQ misreads this to describe the reasons the General Assembly granted

juveniles such a right to confidentiality in the first instance – but the reasons for confidentiality are readily apparent, given that juveniles are a uniquely vulnerable population, *e.g.*, Hope Clinic for Women, Ltd. v. Flores, 2013 IL 112673 ¶64, and therefore particularly likely to suffer harm from the disclosure of their personal information in law enforcement records.

Moreover, WMAQ’s assessment of what is necessary or in the best interests of the community is irrelevant. These sorts of policy considerations are for the General Assembly to evaluate when enacting statutes; thereafter, the courts must enforce those statutes as written. Courts

are constrained to apply the law as enacted by the General Assembly. “Under the doctrine of separation of powers, courts may not legislate, rewrite or extend legislation. If the statute as enacted seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to the court.”

Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 522 (2000) (quoting People v. Garner, 147 Ill. 2d 467, 475-76 (1992)). WMAQ’s arguments in this regard are for the General Assembly and are misplaced in this court, which may not ignore or amend a statute’s plain language.

Regardless, WMAQ’s arguments are wrong. We note in our opening brief that the JCA’s rule requiring a court order advances the JCA’s goal of protecting juveniles by eliminating the possibility of mistaken disclosures by government officials. CPD Br. 7. WMAQ observes that public officials may be prosecuted only for willful violations of the JCA, WMAQ Br. 7, but under Illinois law, conduct is willful if it is “performed knowingly or with

knowledge,” 720 ILCS 5/4-5 (defining “willfully” for purposes of criminal laws). Thus, a public official who knowingly, but mistakenly, releases a juvenile’s records could still be exposed to criminal prosecution. And FOIA training, WMAQ Br. 7-8, does not eliminate the risk of mistaken disclosure. No amount of training could eliminate the possibility that officials might make mistakes, and inadvertently breach juveniles’ privacy rights, if left to determine for themselves whether particular information is exempt from disclosure under the JCA.

WMAQ’s assertion that confidentiality is not in the “best interests of the community,” WMAQ Br. 6, is also flawed because the section of the JCA on which WMAQ relies does not concern the JCA’s confidentiality requirements, but rather the removal of juveniles from their families. That section states that the General Assembly sought “to secure for each minor subject hereto such care and guidance, preferably in his or her own home, as will serve the safety and moral, emotional, mental, and physical welfare of the minor and *the best interests of the community*,” and that a minor will be removed from his or her family “only when his or her safety or welfare or the protection of the public cannot be adequately safeguarded without removal.” 705 ILCS 405/1-2(1) (emphasis added). This guideline for removal of minors from their homes does not bear on the General Assembly’s intent regarding confidentiality of law enforcement records.

To the extent WMAQ believes compliance with the JCA’s

confidentiality requirements would undermine FOIA's goal of promoting public disclosure, WMAQ Br. 8, that argument ignores that the General Assembly specifically exempted from disclosure under FOIA all material protected by the JCA, 5 ILCS 140/7.5(bb). That exemption demonstrates that the General Assembly weighed the public's right to access public documents against juveniles' right to privacy in their law enforcement records, and concluded that juveniles' privacy right should prevail except in the narrow circumstances in which the JCA permits public disclosure, and even then only with a determination to that effect by the juvenile court, after balancing the juvenile's interests against the interests of the requesting party. Thus, adherence to the requirements of the JCA would not undermine the General Assembly's purposes, but would advance them.

Finally, WMAQ makes a cursory argument that the provisions requiring that actual notice be given to the minor, his parents or guardians, or his counsel of any request for a juvenile's records "contemplate that a juvenile court case is pending or was pending at some time in the past," which did not occur here; to WMAQ, "this simply highlights that the General Assembly did not intend secrecy over these records." WMAQ Br. 9. WMAQ does not explain this assertion, and cursory arguments are forfeited on appeal. E.g., Sobczak v. General Motors Corp., 373 Ill. App. 3d 910, 924 (1st Dist. 2007). Nor does the assertion make any sense. On WMAQ's view that the notice provisions do not apply unless a juvenile court case is pending or

was pending at some time, that would mean only that W.R. was not entitled to notice of WMAQ's request for his records. That would not somehow also implicitly eliminate section 7(C)'s separate, plain requirement that WMAQ obtain a court order authorizing disclosure of W.R.'s records. A court will not depart from the plain language of a statute on the basis of some "subtle or not readily apparent intention of the legislature." Bruso, 178 Ill. 2d at 455.

II. THE JCA APPLIES TO DECEASED MINORS.

WMAQ also invites this court to engraft onto the JCA an exception to confidentiality for all records relating to deceased juveniles. WMAQ Br. 10-13.³ The circuit court correctly rejected WMAQ's argument, R. 28, and this court should do the same. The plain language of the JCA provides that all law enforcement records relating to a juvenile are protected from disclosure, W.L., 293 Ill. App. 3d at 820, and therefore may not be disclosed absent an authorizing order of the juvenile court, 705 ILCS 405/1-7(C). "Absent express language in the statute providing an exception, [a court] will not depart from the plain language and read into the statute exceptions, limitations, or conditions that the legislature did not express." People v. Shinaul, 2017 IL 120162 ¶17. If the General Assembly meant to exempt from the JCA's confidentiality provisions the records of deceased juveniles, it would have

³ In a similar vein, WMAQ argues that the JCA applies to only investigations conducted before a minor's death. WMAQ Br. 6. But it identifies nothing in the JCA's language creating such an requirement, because there is none.

said so.

Moreover, WMAQ's proposed exception rests on the assumption that deceased juveniles have no statutory privacy interests. WMAQ Br. 10-13.⁴ That is unsupportable. Private information does not cease to be private when a person dies. Indeed, the primary case WMAQ cites, Trent v. Office of Coroner, 349 Ill. App. 3d 276 (3d Dist. 2004), supports just this point. The plaintiffs in Trent included a convicted murderer of a child. He and two others obtained an authorization from the child's mother and filed a FOIA request with the coroner for the deceased child's medical records. Id. at 277-78. The appellate court affirmed the denial of that request, explaining that disclosure of the child's medical records "would constitute a clearly unwarranted invasion of personal privacy" of the child. Id. at 279. In reaching this conclusion, the court necessarily rejected the position of the concurring justice, who contended, as WMAQ does, that "there is no common law or statutory right of privacy surviving beyond death." Id. at 282 (Holdridge, J., specially concurring). Thus, Trent illustrates that deceased children have statutorily protected privacy interests that disclosure of their personal information may violate. Otherwise, the coroner would have been

⁴ In connection with this argument, WMAQ attributes to CPD the notion "that the JCA must be construed only in furtherance of its underlying goals," WMAQ Br. 11 (citing CPD Br. 12). That is not our position. Instead, consistent with well-settled rules of statutory construction and the language of the JCA itself, we argue that any ambiguities in the JCA must be resolved by liberally construing them in light of the General Assembly's underlying purposes. CPD Br. 12.

required to release to a convicted murderer the medical records of the very child he killed.⁵

That sort of situation is, regrettably, not uncommon. As the United States Supreme Court noted in National Archives & Records Administration v. Favish, 541 U.S. 157 (2004), violent criminals and child molesters often make FOIA requests for “autopsies, photographs, and records of their deceased victims,” id. at 170. The Court explained that, because the privacy exemption requires a court to balance privacy interests against the public interest in disclosure, recognizing surviving family members’ right to personal privacy with respect to “death-scene images” of their close relatives “ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases.” Id. at 170-71. The court emphasized that it was “inconceivable that Congress could have intended a definition of ‘personal privacy’ so narrow that it would allow convicted felons to obtain these materials without limitations at the

⁵ To the extent that WMAQ also relies on cases interpreting the common-law torts of invasion of privacy and defamation, WMAQ Br. 12 & n.6, those cases are inapposite because it is well settled that FOIA’s statutory privacy protections “go [] beyond the common law,” National Archives & Records Administration v. Favish, 541 U.S. 157, 170 (2004). Indeed, the courts have specifically rejected attempts to limit FOIA’s privacy protections by reference to “the traditional common law right of privacy doctrine,” explaining that “the privacy exemption under FOIA is not designed to prevent what would be tortious at common law. Congress intended that the privacy interest protected under FOIA extend beyond the common law.” Marzen v. Department of Health & Human Services, 825 F.2d 1148, 1152 (7th Cir. 1987).

expense of surviving family members' personal privacy." Id. at 170. The General Assembly likewise does not intend such absurd or unjust consequences. E.g., People v. Hanna, 207 Ill. 2d 486, 498 (2003).

Finally, WMAQ acknowledges that, even on its view that the JCA does not apply to deceased minors, privacy interests of the deceased minor's family members remain. WMAQ Br. 12. WMAQ suggests, however, that those interests must be evaluated under a different FOIA exemption – not the one exempting material barred from disclosure under the JCA, but the one for documents containing “information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information.” WMAQ Br. 12 (quoting 5 ILCS 140/7(1)(c)). But WMAQ then announces that the exemption does not apply because CPD did not raise it below, and because the public's interest in disclosure of documents involving a police shooting necessarily outweighs the family's privacy interests. Id. at 12-13.

To begin, the court may put the WMAQ's waiver argument to the side. There is no waiver because the City cannot unilaterally waive FOIA's privacy exemption. Illinois FOIA is based on the federal FOIA, and the General Assembly “intended that federal case law should be used in interpreting” its provisions. Chicago Alliance for Neighborhood Safety v. City of Chicago, 348 Ill. App. 3d 188, 202 (1st Dist. 2004). The federal courts have repeatedly recognized that the federal government cannot unilaterally waive FOIA's

protections against the disclosure of an individual's private, confidential information. E.g., Prison Legal News v. Executive Office for U.S. Attorneys, 628 F.3d 1243, 1249 (10th Cir. 2011) ("The government cannot waive individuals' privacy interests under FOIA."); accord Lakin Law Firm, P.C. v. FTC, 352 F.3d 1122, 1124 (7th Cir. 2003); Sherman v. U.S. Department of Army, 244 F.3d 357, 364 (5th Cir. 2001). Illinois FOIA itself supports this interpretation; it provides that, when disclosure of personal information in public records would "constitute a clearly unwarranted invasion of personal privacy," that information may be disclosed only with that individual's "consen[t]. . . in writing." 5 ILCS 140/7(1)(c); see Trent, 349 Ill. App. 3d at 279-80. This limitation on waiver of privacy rights protects the integrity of FOIA proceedings by safeguarding the rights of third parties who may not even know their private information is subject to a FOIA request. See, e.g., August v. FBI, 328 F.3d 697, 701 (D.C. Cir. 2003) ("The law does not require that third parties pay for the Government's mistakes."). As a result, a remand for consideration of privacy interests is appropriate when, as here, they are raised for the first time on appeal. E.g., Sussman v. U.S. Marshals Service, 494 F.3d 1106, 1119 (D.C. Cir. 2007).

The applicability of FOIA's privacy exemption has not been litigated in this case. That exemption requires a balancing of the "subject's right to privacy" against "any legitimate public interest in obtaining the information." 5 ILCS 140/7(1)(c). Such an inquiry depends on the presentation of evidence,

see Favish, 541 U.S. at 175, but, as a court of review, this court does not take evidence in the first instance. Thus, whether the privacy interests of W.R. and his family outweigh the public interest in the records here is a question that may not be decided in this appeal. As a result, if this court were to conclude that the exemption for records barred from disclosure by the JCA does not apply, the case should be remanded to determine the applicability of FOIA's privacy exemption.

CONCLUSION

For the foregoing reasons, this court should reverse the judgment of the circuit court and remand with instructions to enter judgment for CPD.

Respectfully submitted,

EDWARD N. SISSEL
Corporation Counsel
of the City of Chicago

BY: /s/ Jonathon D. Byrer
JONATHON D. BYRER
Assistant Corporation Counsel
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 742-4961
jonathon.byrer@cityofchicago.org
appeals@cityofchicago.org

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) & (b). The length of this brief, excluding the pages containing or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 16 pages.

/s/ Jonathon D. Byrer
JONATHON D. BYRER, Attorney

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the accompanying Notice of Filing was served by emailing a copy, together with the attached reply brief, to the person named on the Notice of Filing at the email address indicated on March 7, 2019.

/s/ Jonathon D. Byrer
JONATHON D. BYRER, Attorney

FILED DATE 7/8/18 09:15:08 AM 2018CH06576

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

| | | |
|-------------------------------|---|-------------------------|
| NBC SUBSIDIARY (WMAQ-TV) LLC, |) | Appeal from the Circuit |
| | |) Court of Cook County, |
| Plaintiff-Appellee, | |) Illinois, |
| | |) County Department, |
| v. | |) Chancery Division |
| | |) |
| CHICAGO POLICE DEPARTMENT, | |) No. 17 CH 09589 |
| | |) |
| Defendant-Appellant. | |) The Honorable |
| | |) Neil H. Cohen, |
| | |) Judge Presiding. |

NOTICE OF FILING

TO: Matthew Topic
Joshua Burday
LOEVY & LOEVY
311 North Aberdeen, 3rd floor
Chicago, IL 60607
matt@loevy.com

PLEASE TAKE NOTICE that on the 7th day of March, 2019, I shall electronically file with the Clerk of the Illinois Appellate Court, First Judicial District, the reply brief of defendant-appellant, a copy of which is attached hereto and herewith served upon you.

EDWARD N. SISKEL
Corporation Counsel
of the City of Chicago

By: s/ Jonathon D. Byrer
JONATHON D. BYRER
Assistant Corporation Counsel
Chicago, Illinois 60602
(312) 742-4961

Jonathon.Byrer@cityofchicago.org
appeals@cityofchicago.org

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS 6656737
COUNTY DEPARTMENT CHANCERY DIVISION**

| | | |
|-----------------------------------|---|----------------------------------|
| CHICAGO JUSTICE PROJECT, |) | |
| |) | |
| Plaintiff, |) | |
| |) | 18 CH 06576 |
| vs. |) | |
| |) | |
| CHICAGO POLICE DEPARTMENT, |) | Hon. Caroline K. Moreland |
| |) | |
| Defendant. |) | |

**DEFENDANT’S RESPONSE TO PLAINTIFF’S
CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT**

Defendant, the Chicago Police Department (“CPD”), by its attorney, Mark A. Flessner, Corporation Counsel of the City of Chicago, submits this Response to Plaintiff’s Cross-Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment. In support, Defendant states as follows:

The only matter at issue, for purposes of this Response to Plaintiff’s Cross-Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment, is CPD’s response to Plaintiff’s May 25, 2017 FOIA request (Count II of Plaintiff’s Complaint) for Michael Bromwich’s report on CPD training completed in 2016 and Plaintiff’s September 26, 2016 FOIA request (Count III of Plaintiff’s Complaint) for comprehensive staffing analysis related to Count II of Plaintiff’s Complaint. CPD has agreed to provide records responsive to Plaintiff’s June 23, 2017 FOIA request (Count VIII of Plaintiff’s Complaint) for OEMC call for service data within its possession.

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ARGUMENT

- A. **Despite Plaintiff's argument to the contrary, CPD properly responded that the Bromwich Report, and its related materials, are protected by the attorney-client /work-product privilege and, as such, are exempt under 5 ILCS 140/7(1)(m).**

Section 7(1)(m) of FOIA exempts:

Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

5 ILCS 140/7(1)(m).

CJP's May 25, 2017 FOIA Request asked for:

“A. Michael Bromwich’s report on Chicago Police Department training / training academy completed in 2016.”

Despite Plaintiff's claim that the Bromwich Group is not a law firm, the work it performed was on behalf of a law firm which was hired by the City of Chicago to represent the City of Chicago and the Chicago Police Department for the purposes of or in preparation of litigation. As such, it is confidential legal information which is protected and was properly withheld pursuant to the Section 7(1)(m) exemption. The relationship between the Bromwich Group and WilmerHale, the attorneys hired to represent the City of Chicago and the Chicago Police Department, is clearly delineated in the Consulting Services Agreement Engagement Letter which was entered into on behalf of the City. Furthermore, the affidavit of DOL First Assistant Corporation Counsel Kathleen Hill clearly explains that the work performed by the Bromwich Group related to the January 28, 2016 agreement was done for and under the direction of WilmerHale.

The Engagement Letter specifically stated that WilmerHale is providing legal services to the City of Chicago and the Chicago Police Department in connection with an investigation. The Engagement Letter goes on to confirm that the work undertaken by the Bromwich Group in connection with “[a]ll communications, correspondence, instruments, and writings between and among WilmerHale, the Clients [here, the City of Chicago and the Chicago Police Department], and The Bromwich Group shall constitute attorney work product and/or attorney-client privileged materials.” As such, these records clearly fall within the exemptions provided under Section 7(1)(m) of FOIA.

Because the withheld records constituted privileged communications between an attorney and clients, they have been properly withheld under this section. Additionally, courts have recognized that “the work product doctrine applies to documents prepared by either client or attorney in anticipation of litigation or trial.” Dalen v. Ozite Corp., 230 Ill. App. 3d, 18, 27 (2d Dist. 1992); see also Mattenson v. Baxter Healthcare Corp., 438 F.3d 763, 767-68 (7th Cir. 2006).

Similarly, CJP’s September 26, 2016 FOIA request (Count III of Plaintiff’s Complaint) for comprehensive staffing analysis, was also properly withheld as exempt under Section 7(1)(m) of FOIA. In its September 26, 2016 FOIA request, CJP sought:

“A. The top to bottom comprehensive analysis that top Chicago Police Department official repeatedly referenced in a September 21, 2016 briefing with alderman at City Hall saying that this comprehensive analysis was the basis for why Superintendent Johnson had requesting the hiring of a 1,000 additional officers for the Chicago Police Department.

B. Any analysis, reports, memos, or documents that the Chicago Police Department maintains on the subject of Chicago Police Department staffing or allocation of Chicago Police Department resources from January 1, 2011 - September 26, 2016.”

Because the analysis are part of the Bromwich's report, these were also properly withheld pursuant to Section 7(1)(m) of FOIA.

In sum, the records presently at issue are the very type of documents which section 7(1)(m) of FOIA was designed to exempt from production. To the extent that the Court deems it necessary, CPD does not object to the Court's *in camera* review of these records to determine whether or not they are subject to production.

B. CPD did not willfully and intentionally violate FOIA and there is no evidence of bad faith.

There is no evidence of any egregious action which would demonstrate a willful and intentional violation of FOIA on the part of CPD that would justify the imposition of liability in this case. It is clear from the record before this Court that there is nothing in this case that would even hint at bad faith on the part of CPD. Plaintiff cannot point to a single instance in its dealings with CPD regarding the FOIA requests at issue that, even if interpreted in the light most favorable to Plaintiff, would show that CPD somehow acted deliberately or with willingness or intent to withhold records from Plaintiff. The record clearly shows that CPD acted diligently to comply with its obligations under FOIA. Accordingly, civil penalties are inappropriate and should not be imposed against CPD. Because CPD did not intentionally and willfully violate FOIA or otherwise acted in bad faith with its responses to Plaintiff's FOIA requests, statutory damages are therefore not warranted and should not be imposed.

CONCLUSION

WHEREFORE, for the above stated reasons, Defendant, the Chicago Police Department, respectfully requests that this Honorable Court grant its Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Partial Summary Judgment, or for such other

relief as this Court deems just and appropriate.

Respectfully Submitted,

MARK A. FLESSNER
Corporation Counsel of the City of Chicago
By: /s/ Marc Augustave
Marc Augustave
Senior Counsel

Legal Information and Prosecutions Division
30 North LaSalle Street, Suite 1720
Chicago, Illinois 60602
(312) 742-2477
Attorney No. 90909

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

CHICAGO JUSTICE PROJECT,)
)
Plaintiff,)
) 18 CH 06576
v.)
) Hon. Caroline K. Moreland
CHICAGO POLICE DEPARTMENT,)
)
Defendant.)

6749163

**PLAINTIFF’S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Chicago Police Department (“CPD”) has been afforded many opportunities, across two rounds of cross-motions, to prove by clear and convincing evidence that the May 25, 2017 (Bromwich Report) and September 26, 2016 (comprehensive staffing analysis) requests are exempt from disclosure. CPD has failed to meet its burden. Instead, CPD has only provided a single conclusory affidavit that does not even address the September 26, 2016 request. And while CPD now agrees that it will produce responsive records for the June 23, 2017 (OEMC call for service data) request, which is the final request still at issue, it has not yet done so and should be ordered to do so if the records have not been produced by the time of the Court’s decision.

I. ARGUMENT

A. CPD Has Failed to Prove by Clear and Convincing Evidence That FOIA Section 7(1)(m) Applies to the Bromwich Report and the Comprehensive Staffing Analysis.

CPD has simply failed to meet its burden of proof that Section 7(1)(m) exempts the May 25, 2017 (“Bromwich Report”) and September 26, 2016 (“comprehensive staffing analysis”) requests in their entirety. CPD must prove by clear and convincing evidence that Section 7(1)(m) exempts the entire Bromwich Report. *See* 5 ILCS 140/1.2, 7(1), 11(f). Despite Chicago

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Justice Project (“CJP”) laying out the elements of the attorney-client privilege¹ and the work production doctrine² in its cross-motion, CPD conducted no analysis in its reply brief as to whether every single one of those elements applies to each portion, page, sentence, clause, and word of the Bromwich Report. *See* CJP Second XMSJ at 8; CPD Second Reply Br. at 2-4. Instead, CPD continues to espouse the very same conclusory language that the Illinois Supreme Court explicitly rejected. *See Illinois Educ. Ass’n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 470 (2003) (“But, in meeting its burden, the public body may not simply treat the words ‘attorney-client privilege’ or ‘legal advice’ as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue.”); CPD Second Reply Br. Ex. A at ¶ 5 (Affidavit of Kathleen A. Hill) (“The January 28, 2016 consulting services agreement sets forth that the work done by the Bromwich Group is attorney work product and/or covered by the attorney-client privilege.”).

CPD’s sole affidavit from Ms. Hill lacks any basis to support CPD’s withholding. First, Ms. Hill’s affidavit fails to address every element of the attorney-client privilege and the work product doctrine. *See* Hill Aff. Rather than address these elements, Ms. Hill’s affidavit is entirely reliant on the existence of the Consulting Services Agreement Engagement Letter and makes only one specific mention of the Bromwich Report. *See* Hill Aff. at ¶¶ 4-6. Instead, most of the affidavit makes general references to the “work performed by the Bromwich Group” and

¹ *Illinois Educ. Ass’n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 470 (2003) (declaring the elements of attorney-client privilege are “(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected, (7) from disclosure by himself or the legal advisor, (8) except the protection be waived.”)

² Ill. S. Ct. R. 201(b)(2) (defining work product as “[m]aterial prepared by or for a party in preparation for trial” that is subject to disclosure when “it does not contain or disclose the theories, mental impressions, or litigation plans of the party’s attorney.”); *see, e.g., Doe v. Twp. High Sch. Dist. 211*, 2015 IL App (1st) 140857, ¶¶ 90, 112.

“all communications, correspondences, instruments, materials, and writings.” *Id.* at ¶¶ 5-6. Plainly, CPD has failed to meet its burden of proof that Section 7(1)(m) applies to any portion of the Bromwich Report, including any comprehensive staffing analysis that is allegedly contained therein.

The only support, outside of Ms. Hill’s conclusory affidavit, upon which CPD relies, is the Consulting Services Agreement Engagement Letter between WilmerHale, the Bromwich Group, and the City of Chicago. CPD repeatedly points to the Consulting Services Agreement Engagement Letter and that the Engagement Letter states that communications can be subject to attorney-client privilege and the work product doctrine. However, it would be untenable for this Court to accept the Consulting Services Agreement Engagement Letter as clear and convincing evidence that Section 7(1)(m) exempts the entire Bromwich Report.

This Court should disregard the Consulting Services Agreement Engagement Letter because parties cannot contract to violate public policy or contravene a state law. *Cty. of Jackson v. Mediacom Illinois, LLC*, 2012 IL App (5th) 110350, ¶ 11. It is the public policy of this state that all persons be entitled to full and complete disclosure unless a public body can prove by clear and convincing evidence that an exemption applies. 5 ILCS 140/1; 1.2. To accept the Engagement Letter as clear and convincing evidence would signal to public bodies throughout this state that as long as the public body executes a contract that states communications are attorney-client privilege and work product, then the public body can keep everything secret. This outcome flies in the face of Illinois’s explicitly stated public policy of entitling all persons “to full and complete information.” *See* 5 ILCS 140/1.

Second, the language in Ms. Hill’s affidavit epitomizes the generic, conclusory, and vague affidavit language previously rejected by the courts. *See Illinois Educ. Ass’n*, 204 Ill. 2d

at 469 (rejecting “contains confidential communication between the Illinois State Board of Education and its Chief Legal Advisor” as a conclusory statement); *Day v. City of Chicago*, 388 Ill. App. 3d 70, 73 (2009) (“These affidavits are one-size-fits-all, generic and conclusory.”). CPD is simply treating the appearance of “attorney client privilege” and “work product” as they appear in the Consulting Services Agreement Engagement Letter as magical talismans that entitle CPD to absolute secrecy.

Third, Ms. Hill’s affidavit makes no mention of the September 26, 2016 FOIA request (or the comprehensive staffing analysis in any capacity), despite CPD’s claim that the comprehensive staffing analysis is entirely contained within the Report. *See Hill Aff.*; CPD Second Reply Br. at 3-4. Nor does CPD provide any other evidence that the Bromwich Group conducted the comprehensive staffing analysis for CPD that led to CPD’s decision to hire 1,000 new police officers.

Additionally, CPD has failed to show how this staffing analysis is privileged legal advice or work product. CPD’s sole reason for withholding the staffing analysis is that it is allegedly contained in the Report. *See CPD Second Reply Br.* at 3-4. But CPD has provided no justification, in any capacity, as to how the elements of the attorney-client privilege and the work product doctrine for a report allegedly prepared in connection with the federal civil rights investigation into CPD apply to any staffing analysis used to hire more officers.

CPD has failed to bring forth any evidence to properly support its withholding of the Bromwich Report. CPD’s entire basis for withholding the entire Bromwich Report is based on one conclusory affidavit and a contract to which the City of Chicago is a party. CPD has simply failed to meet its burden of proof. Therefore, CPD must produce the Bromwich Report immediately.

B. This Court Should Conduct *In Camera* Review of the Bromwich Report

CPD has failed to carry its burden of proving that Section 7(1)(m) applies, and, thus, the Court need go no further. While CJP contends that the Court should grant summary judgment to CJP, in the alternative, the Court should conduct an *in camera* inspection. *See generally* 5 ILCS 140/11(j). Case law makes clear that *in camera* inspection is the preferred way of resolving FOIA cases, *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶ 46.

When reviewing the records *in camera*, the Court should bear in mind that each part of the Report must be individually assessed, and any non-exempt information must be provided, with any exempt material redacted. 5 ILCS 140/7(1); *Heinrich v. White*, 2012 IL App (2d) 110564, ¶ 19 (holding that even if the only information that remained after redaction was useless to the requester, it still must be produced). The primary questions for this Court to consider when reviewing the Report *in camera*, are (1) whether there is staffing analysis within the Bromwich Report because CJP refutes CPD's claim that the analysis is within the Report, (2) whether Section 7(1)(m) exempts the Bromwich Report in its entirety because CPD has failed to meet its burden of proof, (3) whether Section 7(1)(m) exempts the staffing analysis that is allegedly in the Bromwich Report because staffing analysis is not legal advice covered by the attorney-client privilege and the work product doctrine, and (4) whether there are any other non-exempt portions in the Bromwich Report because CPD cannot withhold any non-exempt portions.

C. CPD Failed to Prove It Performed an Adequate Search for the Responsive Records to the September 26, 2016 Request

As discussed above and argued in CJP's cross-motion for partial summary judgment, CPD claims—without a supporting affidavit—that all of the comprehensive staffing analysis, which is responsive to the September 26, 2016 request, is contained entirely within the

Bromwich Report. *See* CPD Second Reply Br. at 4; CJP Second XMPSJ Ex. 3 at 4:20-4:22. For the reasons stated in its cross-motion, CJP continues to dispute that the Bromwich Group conducted any staffing analysis for CPD and that such analysis is actually contained within the Bromwich Report. *See* CJP Second XMSJ at 10-12 (“CJP’s request is for the comprehensive staffing analysis that led to Superintendent Johnson’s decision to hire 1,000 new police officers. The Bromwich Report deals with police officer training. There is simply no evidence to show that CPD hired WilmerHale to hire the Bromwich Group to conduct analysis on whether to hire 1,000 new police officers.”) (internal citations omitted). In response to CJP’s cross-motion, CPD did not address any of CJP’s points, nor did CPD provide a new affidavit that proves that the comprehensive staffing analysis is within the Bromwich Report or that proves there are no other records containing the comprehensive staffing analysis. *See* CPD Second Reply Br. Yet CPD admits that the Bromwich Report is about CPD training. *See id.* at 1. Rather than produce evidence to support its search and withholding, CPD merely claims that “the analysis are part of the Bromwich’s report.” *See* CPD Second Reply Br. at 4. CPD has failed to prove that the Bromwich Report is the only record that contains the comprehensive staffing analysis, or that it conducted a thorough search for all responsive records.

D. For the Records That CPD Has Decided to Produce (June 23, 2017), the Production and Search Issues Will Be Moot After CPD Produces the Responsive Records.

CPD stated in its reply brief that it will be producing responsive records to the June 23, 2017 request. *See* CPD Second Reply Br. at 1. If CPD does not produce the records before the Court hears argument on the parties’ cross-motions, then this Court should order CPD to produce the records within seven days of said hearing. Should there be no challenges to the production, the production and adequate search issues will be moot for this request.

E. There is More Than Enough Evidence to Impose Penalties for CPD's Willful and Intentional Violation of the FOIA.

CPD continues to improperly graft additional requirements beyond a showing that the FOIA violation was willful and intentional. *See* CPD Second Reply Br. at 4 (“egregious action”). *See generally* 5 ILCS 140/11(j). It is telling that CPD continues to ignore the well-established rules of statutory construction and the purpose of the FOIA statute. *See, e.g., Fagel v. Dep't of Transp.*, 2013 IL App (1st) 121841, ¶ 35; 5 ILCS 150/1; 96th General Assembly, House of Representatives, May 27, 2009 Debate, at 92, 98. Moreover, CPD continues to point to no facts that indicate it did not willfully, intentionally, or otherwise act in bad faith. CPD Second Reply Br. at 4. Alternatively, there was bad faith on the part of CPD when it failed to properly respond to the September 26, 2016 request. *See* Ans. ¶ 14. CPD even admits that it failed to properly respond to this request and other requests. *See, e.g., id.* at ¶¶ 14, 19, 27, 31. A failure to respond is a willful violation of the FOIA because CPD knew the statutory deadline. *See, e.g., id.* at ¶ 13; Compl. Ex. D (CPD citing 5 ILCS 140/3(e) and taking a 5-day extension to respond to the request). While the FOIA statute does not contain the word “egregious,” it does state that a court shall impose a penalty “for each occurrence” of the public bodies’ willful and intentional or otherwise in bad faith violation of the FOIA. *See* 5 ILCS 140/11(j).

Because CJP has not yet moved for penalties, the only question is whether, taking the facts in the light most favorable to CJP, there is a basis to conclude that CPD acted in bad faith for each of the FOIA requests in this case. *E.g., McMackin v. Weberpal Roofing, Inc.*, 2011 Ill. App. (2d) 100461, ¶ 19. In the alternative, if the Court finds that some showing of subjective *mens rea* is required, which it should not, Plaintiff should be permitted the opportunity to take discovery to develop that evidence.

II. CONCLUSION

For these reasons, CJP is entitled to summary judgment and the records should be immediately released.

RESPECTFULLY SUBMITTED,

/s/ Merrick J. Wayne

Attorneys for Plaintiff
CHICAGO JUSTICE PROJECT

Matthew Topic
Joshua Burday
Merrick Wayne
LOEVY & LOEVY
311 North Aberdeen, 3rd Floor
Chicago, IL 60607
312-243-5900
foia@loevy.com
Atty. No. 41295

CERTIFICATE OF SERVICE

I, Merrick J. Wayne, certify that on September 27, 2019, I caused the foregoing PLAINTIFF’S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT to be served via electronic mail on all counsel of record.

/s/ Merrick J. Wayne

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

CHICAGO JUSTICE PROJECT,)
)
) Plaintiff,) Case No. 18 CH 6576
 v.) Hon. Caroline K Moreland
) Judge Presiding
CHICAGO POLICE,) Cal. 10
)
) Defendants.)

ORDER

This matter coming before the Court for ruling on Counts II and III. Count II pertains to whether the Bromwich Report is considered attorney-client privilege. Count III pertains to a comprehensive staffing analysis, which, if included in the Bromwich Report, may be subject to attorney-client privilege.

The Bromwich Report was prepared at the request of the Chicago Police Department pursuant to a Department of Justice investigation. Pursuant to an affidavit submitted by Kathleen Hill, Assistant Corporate Counsel of the City of Chicago Department of Law, it was established that the Bromwich Group entered into a consulting services agreement that work done by the Bromwich Group in relation to the Department of Justice investigation would be considered attorney-client privilege. The City has shown by clear and convincing evidence that the Bromwich Report falls within the work-product exemption of attorney-client privilege. The Court grants Count II of the Chicago Police Department's Motion for Summary Judgment.

Pursuant to an *in camera* review of the Bromwich Report, it did not contain any comprehensive staffing analysis; therefore, there is no non-exempt information within the Bromwich Report. The Court grants Count III of the Chicago Police Department's Motion for Summary Judgment.

The Chicago Police Department's Motion for Summary Judgment on Counts II and III are granted.

This matter is continued for status on May 13, 2020 at 10:30 AM.

Judge Caroline Kate Moreland

MAR 16 2020

Circuit Court 2033

Dated

Judge Caroline Kate Moreland No. 2033

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