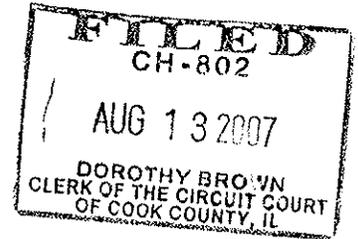


IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JUDICIAL WATCH, INC.,)
)
Plaintiff,)
)
vs.)
)
THE OFFICE OF GOVERNOR ROD)
R. BLAGOJEVICH,)
)
Defendant.)
_____)

Judge Richard J. Billik, Jr.
No. 2007-CH-01306



**PLAINTIFF'S MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT**

Plaintiff, JUDICIAL WATCH, INC., by and through its attorneys and pursuant to the Court's August 1, 2007 Order, hereby moves this Honorable Court for an order granting Plaintiff leave to file an Amended Complaint. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

1. Plaintiff filed this action against Defendant Office of Governor Rod R. Blagojevich ("Office of the Governor") on January 16, 2007 to compel compliance with the Illinois Freedom of Information Act ("FOIA"), 5 ILCS § 140/1, *et seq.*
2. Although Plaintiff filed this action nearly seven (7) months ago, there has been little, if any, progress towards resolving the merits of Plaintiff's FOIA claim because of a dispute over whether the Attorney General or counsel of the Governor's choosing should represent Defendant Office of the Governor in this action. That dispute was finally resolved on August 1, 2007, at which time, and over Plaintiff's objection, the Attorney General was granted leave to withdraw as counsel for Defendant Office of the Governor, and Defendant Officer of the

Governor's motions to disqualify the Attorney General and for appointment of an independent counsel were deemed moot.

3. In the course of adjudicating the representation issue, Defendant Office of the Governor repeatedly argued that Plaintiff could not obtain relief without naming the Governor as a defendant as well. *See, e.g.*, Defendant's Memorandum of Law in Support of its Motion for Appointment of Independent Counsel, dated March 19, 2007, at 5-6; Defendant's Sur-Rejoinder in Support of Motion to Appoint Independent Counsel, dated May 2, 2007, at 3 n.5 ("When Defendant is given leave to file a motion to dismiss, its independent counsel will raise the defense set forth in *Quinn [v. Stone]*, 211 Ill. App. 3d 801 (1st Dist. 1991)): Plaintiff's complaint must be dismissed because Plaintiff has failed to name the head of the public body, *i.e.*, the Governor.").

4. Plaintiff obviously disputes Defendant Office of the Governor's reading of *Quinn*, a case in which a FOIA requester brought suit against a City of Chicago Alderman for failing to respond to a FOIA request. Not surprisingly, the Court held that "[t]he trial court properly dismissed plaintiff's complaint, however, on the basis that defendant is not a 'public body' as defined under the FOIA and is not the proper recipient of the request for records." *Quinn*, 211 Ill. App.3d at 812.¹ Plaintiff also submits that it was not necessary to name the Governor as a defendant because Illinois' FOIA statute expressly states that a circuit court "shall have the jurisdiction to enjoin *the public body* from withholding public records and to order the

¹ Defendant Office of the Governor apparently relies on language appearing elsewhere in *Quinn* for the proposition that it is necessary to name the "head of the public body" as well. 211 Ill. App.3d at 811. Plaintiff submits that the language relied on by Defendant Office of the Governor is merely *dicta* and is not the holding of the case, which has been quoted above.

production of any public records improperly withheld from the person seeking access.” 5 ILCS 140/5(d) (emphasis added). Moreover, FOIA requesters have been granted relief in other cases in which no individual official was named as a defendant. *See, e.g., Birkett v. City of Chicago*, 184 Ill. 2d 521 (1998); *Callinan v. Prisoner Review Board*, 2007 Ill. App. LEXIS 91 (3d Dist. February 7, 2007); *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 188 (1st Dist. 2004).

5. Nonetheless, in order to moot out the issue and to try to avoid any further, unnecessary delay, Plaintiff now seeks to amend its Complaint to name the Governor as a defendant. A copy of Plaintiff’s proposed Amended Complaint is attached hereto as Exhibit 1.

6. Under 735 ILCS § 5/2-616(a), “[a]t any time before final judgement amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant”

7. A trial court has broad discretion in considering motions to amend pleadings prior to entry of a final judgment. *Loyola Academy v. S&S Room Maintenance, Inc.*, 146 Ill.2d 263, 273 (1992). In addition, four (4) factors are relevant in determining whether leave to amend should be granted: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend could be identified. *Id.*

8. All four (4) factors weigh heavily in favor of allowing Plaintiff’s proposed amendment. First, the proposed amendment obviously cures the alleged “defect” in the original

Complaint, although, again, Plaintiff disputes that its Complaint is deficient in any regard or that it is even necessary to name the Governor as a defendant in this action. Plaintiff seeks leave to amend purely to moot out any issue about the matter and to try to avoid any further unnecessary delay. Second, there certainly can be no prejudice or surprise to Defendant Office of the Governor or the Governor by allowing the proposed amendment. It was Defendant Office of the Governor that first raised the issue of whether the Governor should have been named as a defendant; Plaintiff believed, and still believes, it is unnecessary. Nonetheless, as no answer or motion to dismiss has been filed, and as adjudication of the merits of Plaintiff's FOIA claim had been on hold until the representation issue was resolved on August 1, 2007, there can be no prejudice to Defendant Office of the Governor or the Governor if Plaintiff's Complaint is now amended to name the Governor as a defendant as well. Third, the proposed amendment is timely, as, again, the issue of who would represent Defendant Office of the Governor in this lawsuit was only resolved on August 1, 2007, and there has been little, if any, activity in this matter to date regarding the merits of Plaintiff's FOIA claim. Fourth, and finally, there was no realistic opportunity for Plaintiff to amend its complaint previously. Until the representation issue was resolved, no meaningful action towards the ultimate resolution of this matter was possible. Because all four (4) factors weigh heavily in favor of allowing Plaintiff leave to amend its Complaint to name the Governor as a defendant, Plaintiff respectfully submits that its motion should be granted.

WHEREFORE, Plaintiff respectfully requests that its motion for leave to file an Amended Complaint be granted.

Dated: August 9, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul J. Orlandes", is written over a horizontal line.

Paul J. Orlandes

Ill. Bar No. 6205255

Cook County Attorney ID No. 43158

JUDICIAL WATCH, INC.

501 School Street, S.W., Suite 500

Washington, DC 20024

Tel.: (202) 646-5172

Fax.: (202) 646-5199

Attorney for Plaintiff

EXHIBIT 1

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

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	Judge Richard J. Billik, Jr.
)	
vs.)	Case No.: 07 CH 1306
)	
THE OFFICE OF GOVERNOR,)	
)	
and)	
)	
ROD R. BLAGOJEVICH, in his)	
official capacity as Governor of)	
the State of Illinois,)	
)	
Defendants.)	
)	
<hr style="border: 0.5px solid black;"/>		

**AMENDED COMPLAINT IN CHANCERY FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF**

NOW COMES the Plaintiff, Judicial Watch, Inc., by and through its attorney, and prays this Court render a declaratory judgment and grant injunctive relief under the Freedom of Information Act (“FOIA”), 5 ILCS § 140/1, *et seq.* For its Amended Complaint, the Plaintiff states as follows:

1. Plaintiff is a non-profit, educational organization that seeks to promote integrity, transparency, and accountability in government by obtaining public records under state and federal “open records” laws, analyzing those records, and disseminating them to the public, among other means.

2. Defendants are the Office of Governor, a “public body” as that term is defined by 5 ILCS § 140/2(a), and Rod R. Blagojevich, who is being sued in his official capacity as Governor of the State of Illinois.

3. On or about November 27, 2006, Plaintiff served a FOIA request on Defendant Office of the Governor seeking access to the following three (3) categories of public records:

1. All federal grand jury subpoenas issued to Governor Rod Blagojevich, the Office of the Governor, or any state agencies under the Governor’s control.
2. A copy of Attorney General Lisa Madigan’s letter to the Governor dated on or about October 26, 2006 regarding the production of federal grand jury subpoenas requested pursuant to the Illinois Freedom of Information Act, 5 ILCS § 140/1 *et seq.* See, e.g., Bruce Rushton, “Madigan: Release Subpoenas; Governor’s Spokeswoman Says They’ll Stay Secret,” *State Journal-Register*, October 27, 2006, attached hereto.
3. All federal grand jury subpoenas that were the subject of the Attorney General’s letter to the Governor dated on or about October 26, 2006.

The time period of the request was identified as being from “January 13, 2003 to the present.” A true and correct copy of the request is attached hereto and incorporated herein as Exhibit A.

4. Defendants denied Plaintiff’s request on December 7, 2006. A true and correct copy of Defendants’ denial is attached hereto and incorporated herein as Exhibit B.

5. On December 18, 2006, Plaintiff took a timely administrative appeal of Defendants’ December 7, 2006 denial. The appeal was served by facsimile and received by Defendants on that same date. The appeal also was served by certified, U.S. mail, return receipt requested, which, according to U.S. Postal Service Records, was received by Defendants on

December 26, 2006. True and correct copies of Plaintiff's administrative appeal and documentation demonstrating Defendants' receipt of Plaintiff's administrative appeal are attached hereto and incorporated herein as Exhibit C.

6. Pursuant to ILCS § 140/10(a), Defendants were required to notify Plaintiff of the outcome of Plaintiff's administrative appeal within seven (7) working days, or by January 5, 2007 at the latest.

7. Defendants failed to notify Plaintiff of the outcome of Plaintiff's administrative appeal. Consequently, Plaintiff is deemed to have exhausted its administrative remedies pursuant to ILCS § 140/10(b).

8. Nonetheless, for the reasons set forth in the October 26, 2006 letter from Attorney General Lisa Madigan attached to Plaintiff's administrative appeal (Exhibit C), Defendants' refusal to make the requested public records available is unlawful.

COUNT ONE

(Violation of the Illinois Freedom of Information Act, 5 ILCS § 140/1, *et seq.*)

9. Plaintiff reaffirms paragraphs 1-8 as though fully restated herein.

10. Plaintiff is being irreparably harmed by Defendants' failure to produce the requested records, as Plaintiff is being denied its legal right to inspect public records.

11. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays that the Court:

A. Declare Defendants to be in violation of the Illinois Freedom of Information Act, 5 ILSC §140/1, *et seq.*;

B. Enjoin Defendants from continuing to withhold access to any and all non-exempt public records responsive to Plaintiff's November 27, 2006 FOIA request and further enjoin Defendants to produce any and all such records to Plaintiff without further delay;

C. Enjoin Defendants to prepare, forthwith, an affidavit declaring that they have fully and completely complied with Plaintiff's November 27, 2006 FOIA request and further declaring that any and all non-exempt public records responsive to the request have been produced to Plaintiff;

D. Order Defendants to prepare, forthwith, an affidavit identifying with specificity any and all public records responsive to Plaintiff's November 27, 2006 FOIA request that are claimed to be subject to legal exemption from disclosure and further identifying with specificity the reason(s) for any such claim of exemption.

E. Award Plaintiff reasonable attorney's fees and costs; and

F. Order such other and further relief as the Court finds just and equitable.

Dated: August 9, 2007

Respectfully submitted,



Paul J. Orlandes

Ill. Bar No. 6205255

Cook County Attorney ID No. 43158

JUDICIAL WACTH, INC.

501 School Street, S.W., Suite 500

Washington, DC 20024

Tel.: (202) 646-5172

Fax.: (202) 646-5199

Attorneys for Plaintiff

EXHIBIT A



Judicial Watch

Because no one is above the law!

**VIA FACSIMILE (217-524-4049) AND
CERTIFIED U.S. MAIL (7005 1160
0001 5011 3881)**

November 27, 2006

Office of the Governor
207 State House
Springfield, IL 62706

Re: Illinois Freedom of Information Act Request

Dear Sir/Madam:

Judicial Watch, Inc. hereby requests that the Office of the Governor produce the following public records pursuant to the provisions of the Illinois Freedom of Information Act, 5 ILCS §140/1 *et seq.*:

1. All federal grand jury subpoenas issued to Governor Rod Blagojevich, the Office of the Governor, or any state agencies under the Governor's control.

2. A copy of Attorney General Lisa Madigan's letter to the Governor dated on or about October 26, 2006 regarding the production of federal grand jury subpoenas requested pursuant to the Illinois Freedom of Information Act, 5 ILCS § 140/1 *et seq.* See, e.g., Bruce Rushton, "Madigan: Release Subpoenas; Governor's Spokeswoman Says They'll Stay Secret," *State Journal-Register*, October 27, 2006, attached hereto.

3. All federal grand jury subpoenas that were the subject of the Attorney General's letter to the Governor dated on or about October 26, 2006.

The time period of this request is January 13, 2003 to the present.

Please produce the requested record(s) to us at our Washington, DC office, located at 501 School Street, S.W., Suite 500, Washington, DC 20024, within seven (7) working days of your receipt of this request. 5 ILCS § 140/3(c). If the requested record(s) cannot be produced within seven (7) working days, please notify us in writing of the reason(s) for the delay and the date by which the requested record(s) will be available.

Office of the Governor
November 27, 2006
Page 2

If any fee is to be charged for copying the requested records, please advise us in advance if the expected cost of the copying is likely to exceed \$250.00.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request, or any portion thereof, please contact us at (202) 646-5172.

Thank you for your attention to this matter.

Sincerely,

JUDICIAL WATCH, INC.



Paul J. Orfanedes

Enclosure

16 of 23 DOCUMENTS

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The State Journal-Register (Springfield, IL)

October 27, 2006 Friday

SECTION: NEWS; Pg. 1

LENGTH: 806 words

HEADLINE: Madigan: Release subpoenas ;
Governor's spokeswoman says they'll stay secret

BYLINE: BRUCE RUSHTON STAFF WRITER

BODY:

Subpoenas are public records.

That's what attorney general Lisa Madigan said to Gov. Rod Blagojevich Thursday in telling the governor's office that subpoenas received by his administration must be disclosed under the state Freedom of Information Act.

"There's no magical meaning to subpoenas when it comes to the FOIA," said Terry Mutchler, Madigan's public-records expert.

Mutchler drafted a letter to the governor's lawyer telling him that federal subpoenas must be released to a government watchdog group in Chicago.

"It's clear from the letter that, as the lawyer for the state of Illinois, the attorney general is advising the governor that failure to provide these (subpoenas) is a failure to comply with the law."

A Blagojevich spokeswoman said via e-mail Thursday evening that the records will remain secret.

"We didn't request an opinion on this topic, but we appreciate the attorney general office's advisory input," wrote Abby Ottenhoff, Blagojevich spokeswoman. "The subpoenas issued by their own office state that they should not be released, so we'll continue to comply with that original expectation and the request of the U.S. attorney to keep all matters that are related to federal investigations confidential."

Cara Smith, Madigan spokeswoman, said there isn't much room for argument.

"We took our time and did a very thorough analysis," Smith said. "At the end of the day, this is a very straightforward issue."

Madigan's office acted after the Better Government Association requested the subpoenas in July. The governor, who is under federal investigation on several fronts, including questionable hiring practices, refused.

Public disclosure of the subpoenas could provide more details about the investigations.

Blagojevich is not required to follow Madigan's directions, as he would be if the ruling came from a judge. But

Madigan. Release subpoenas ; Governor's spokeswoman says ...y'

Madigan's office said Blagojevich should pay attention to an opinion from the state's top legal officer.

"What I can say is, after the governor responds to this issue, we will consider all options available under the FOIA," Smith said.

In answering the association's request, the governor's office said it could neither confirm nor deny the existence of subpoenas. But if the governor did have such documents, his lawyer told the association, the Freedom of Information Act includes a provision that bars the release of information specifically prohibited from disclosure under state or federal law.

That's wrong, wrote Mutchler, who noted that the governor's office never cited a state or federal statute that says subpoenas are secret.

Although the governor has said grand jury proceedings are confidential, Mutchler said, federal courts have declared that those rules don't apply to witnesses or others who aren't jurors or who don't work in the courtroom. The rule actually is aimed at lawyers, stenographers, jurors and others with direct roles in the operations of the grand jury, Mutchler wrote.

Mutchler also dismissed claims by the governor that the subpoenas are preliminary drafts, notes or memos that are exempt from disclosure under a section of the law intended to protect work products that aren't final. Similarly, she rejected the governor's contention that subpoenas are "communications between a public body and an attorney," a section of the FOIA usually reserved for protecting attorney-client privilege.

"Federal grand jury subpoenas issued to the Office of the Governor or any State agencies under the Governor's control are not communications between those entities and an attorney representing them," Mutchler wrote.

Federal prosecutors have delivered at least three subpoenas seeking information about hiring practices in the Department of Corrections, the Department of Children and Family Services and the Department of Transportation.

U.S. Attorney Patrick Fitzgerald is also investigating allegations that Blagojevich associates pressured private-equity firms into making payouts in order to get business with the Teachers Retirement System. So far, two people have pleaded guilty in that investigation and another two, including one of Blagojevich's top fundraisers, have been charged.

Thursday marked the second occasion in as many days that Madigan has told the governor that documents he's tried to keep secret are a matter of public record.

On Wednesday, the attorney general said lists of unsuccessful job applicants requested by the media are public documents that need to be disclosed. The Associated Press requested those records to help determine whether the governor has hired politically connected people instead of veterans and others who are supposed to be given preference under state law.

A Blagojevich aide said earlier that the governor will not disclose the hiring lists sought by AP, although future lists will be available to the public.

GRAPHIC: Attorney General Lisa Madigan ruled against Gov. Rod Blagojevich.

LOAD-DATE: October 30, 2006

Judicial Watch, Inc.

501 School Street, S.W.
Suite 725
Washington, D.C. 20024

Telephone 202-646-5172
Facsimile 202-646-5199

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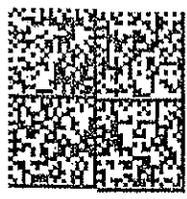
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EXHIBIT B



OFFICE OF THE GOVERNOR

JRTC, 100 W. RANDOLPH, SUITE 16
CHICAGO, ILLINOIS, 60601

ROD R. BLAGOJEVICH
GOVERNOR

December 7, 2006

Paul J. Orfanedes
Judicial Watch, Inc.
501 School Street, SW
Suite 725
Washington, D.C. 20024

Dear Mr. Orfanedes:

This letter is in response to your Freedom of Information Act request dated November 27, 2006 and received by the Governor's Office of Citizens Assistance on November 28, 2006.

Your first request seeking copies of all "federal grand jury subpoenas issued to Governor Rod Blagojevich, the Office of the Governor, or any state agencies under the Governor's control" is denied. This Office cannot confirm or deny the existence of the documents requested. Even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) of the Freedom of Information Act.

Your second request for a "copy of Attorney General Lisa Madigan's letter to the Governor dated on or about October 26, 2006 regarding the production of federal grand jury subpoenas requested pursuant to the Illinois Freedom of Information Act" is denied. We believe that Attorney General Madigan's letter to our Office may be a privileged communication between attorney and client and therefore exempt pursuant to Section 7(1)(n) of the Act. However, our Office is not in a position to opine on the capacity in which Attorney General Madigan wrote the letter you reference. Any requests seeking the disclosure of Attorney General Madigan's letter or any response should be directed to the Attorney General.

Your request for all "federal grand jury subpoenas that were the subject of the Attorney General's letter to the Governor dated on or about October 26, 2006" is denied. Again, this Office cannot confirm or deny the existence of the documents requested, and even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) of the Freedom of Information Act.

You have a right to appeal this denial to the Governor's Office.

Please contact me with any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Allison M. Benway".

Allison M. Benway
Legal Counsel

EXHIBIT C



Judicial Watch

Because no one is above the law!

VIA FACSIMILE (312-814-5512) AND
CERTIFIED U.S. MAIL (7005 1160
0001 5011 3959)

December 18, 2006

Office of the Governor
James R. Thompson Center
100 W. Randolph, Suite 16
Chicago, IL 60601

Re: Illinois Freedom of Information Act Request

Dear Sir/Madam:

Judicial Watch, Inc. hereby submits this appeal from the December 7, 2006 denial of its November 27, 2006 Illinois Freedom of Information Act ("FOIA") request to the Office of the Governor. The denial was received in our offices on or about December 12, 2006.

The request seeks access to the following three (3) categories of records:

1. All federal grand jury subpoenas issued to Governor Rod Blagojevich, the Office of the Governor, or any state agencies under the Governor's control.
2. A copy of Attorney General Lisa Madigan's letter to the Governor dated on or about October 26, 2006 regarding the production of federal grand jury subpoenas requested pursuant to the Illinois Freedom of Information Act, 5 ILCS § 140/1 *et seq.*
3. All federal grand jury subpoenas that were the subject of the Attorney General's letter to the Governor dated on or about October 26, 2006.

The time period of this request is January 13, 2003 to the present.

Office of the Governor
December 18, 2006
Page 2

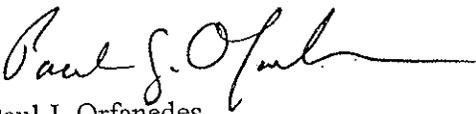
We were able to obtain a copy of the Office of the Attorney General's October 26, 2006 letter through a FOIA request to that office. Consequently, we no longer need to have that document produced to us by the Office of the Governor.

However, we note that the Office of the Governor denied our request for items 1 and 3 based upon an assertion that the records at issue are exempt from production under Section 7(1)(a). In the Office of the Attorney General's October 26, 2006 letter, a copy of which is attached hereto, the assertion that these items are exempt from production under Section 7(1)(a) was rejected expressly. For the reasons set forth in the Office of the Attorney General's October 26, 2006 letter, we respectfully request that the denial of our November 27, 2006 FOIA request be reversed and that the records responsive to items 1 and 3 be produced to us without further delay.

Thank you for your attention to this matter.

Sincerely,

JUDICIAL WATCH, INC.


Paul J. Orfanedes

Enclosure



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 26, 2006

Via Facsimile & U.S. Mail

Mr. William Quinlan
General Counsel
Office of the Governor
James R. Thompson Center
100 West Randolph Street, 16th Floor
Chicago, Illinois 60601

Dear Mr. Quinlan:

The Office of the Attorney General has received numerous inquiries regarding whether the Office of the Governor and agencies under the Governor's control must produce Federal grand jury subpoenas for inspection and copying pursuant to the provisions of the Freedom of Information Act (the Act) (5 ILCS 140/1 *et seq.* (West 2004)). Among those who have inquired is the Better Government Association (BGA), whose request for copies of certain Federal subpoenas was denied by the Office of the Governor. Based upon the information with which we have been furnished, the exceptions to the disclosure requirements of the Act cited by the Governor's office do not authorize withholding the subpoenas. The purpose of this letter is to ensure that the Office of the Governor and the agencies under the Governor's control properly respond to requests for information pursuant to the Act.

During the period from July through October 17, 2006, the BGA and the Office of the Governor have exchanged a number of letters concerning the BGA's request for copies of the Federal grand jury subpoenas. (Copies of these letters are attached.) On July 24, 2006, the BGA filed its initial request for information with the Office of the Governor seeking, among other documents, copies of any and all subpoenas for records or testimony issued to the State of Illinois by the United States Attorney's office between January 1, 2006, and July 24, 2006. On August 7, 2006, Ms. Allison Benway, Legal Counsel for the Office of the Governor, responded to the BGA by stating that the Office of the Governor "cannot confirm or deny the existence of the documents requested," and that "even if the Office were to have documents responsive to your

request, such documents would be exempt from release per Section 7(1)(a) of the Freedom of Information Act." On August, 31, 2006, the BGA appealed the denial of its request.

The Office of the Governor denied this appeal on September 15, 2006. In that letter, in response to the BGA's request for other documents relating to subpoenas issued by the United States Attorney's office, Ms. Benway stated that the Governor's office would consider a request for such records if the BGA was interested in "re-styling" it. The denial letter failed to indicate, as required by the Act, that the requestor has a right to seek relief in the Circuit Court. 5 ILCS 140/9(a) (West 2004).

The BGA then sent a revised Freedom of Information Act request (FOIA request) to the Office of the Governor on September 22, 2006. This revised FOIA request sought "all public records *** related to any subpoenas issued by the United States Attorney's Office." Ms. Benway responded to the revised FOIA request on October 17, 2006, by providing some responsive documents, but stating without further elaboration, that "[c]ertain documents have been withheld pursuant to 7(1)(f) and 7(1)(n) of the Act." The BGA has indicated that the response did not include the Federal subpoenas sought in both their original and revised FOIA requests.

The Act requires that "[e]ach public body shall, promptly, either comply with or deny a written request for public records" (5 ILCS 140/3(c) (West 2004)) and, if denying the request, shall provide the "reasons for the denial." 5 ILCS 140/9(a) (West 2004). In its August 7, 2006, response to the BGA's request for copies of the Federal subpoenas, the Office of the Governor stated, "this Office cannot confirm or deny the existence of the documents requested. Nonetheless, even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) [5 ILCS 140/7(1)(a) (West 2004)] of the Freedom of Information Act." A response refusing to confirm or deny the existence of requested records does not comply with the requirements of the Act.

The Act also provides that "[e]ach public body shall make available to any person for inspection or copying all public records," unless excepted by the Act. 5 ILCS 140/3(a) (West 2004). The Act defines "public records" to include all records and other documentary materials "having been prepared, or having been or being used, received, possessed or under the control of any public body." 5 ILCS 140/2(c) (West 2004). Federal grand jury subpoenas received by a public body, including the Office of the Governor or other State agencies, are not excluded from the expansive definition of "public records." Thus, they may be withheld from disclosure only if they fall within one of the narrow exceptions contained in the Act.

The Act states that its exemptions "should be seen as limited exceptions to the general rule that the people have a right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." 5 ILCS 140/1 (West 2004). Illinois courts have repeatedly upheld this view, holding that "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." *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463 (2003). A public body withholding records has the burden of proving that the records in question fall within the exemption that it has claimed. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 198 (2004). Thus, in responding to the request for information under the Act, the Office of the Governor was required to enunciate its legal basis for withholding the requested records from disclosure. Ms. Benway's August 7, 2006, denial letter cited only subsection 7(1)(a) of the Act as the basis for withholding copies of any Federal grand jury subpoenas received by the Office of the Governor or any State agencies under the Governor's control. The mere citation to subsection 7(1)(a) of the Act without more does not satisfy that requirement.

Subsection 7(1)(a) of the Act exempts from disclosure records that are "specifically prohibited from disclosure by federal or State law or rules and regulations adopted under Federal or State law." 5 ILCS 140/7(1)(a) (West 2004). In her denial of the BGA request, Ms. Benway cited no State or Federal laws or regulatory provisions which would except Federal subpoenas from disclosure under subsection 7(1)(a), nor did she provide any further explanation as to the legal basis upon which the Office of the Governor was precluded from even identifying the existence of subpoenas responsive to the BGA's request. Based on the clear language of subsection 7(1)(a), unless the Federal grand jury subpoenas are "specifically prohibited from disclosure" by Federal or State law, rule, or regulation, this exemption is not applicable.

Our research has disclosed no Federal or State statute, rule, or regulation that specifically prohibits an officer or agency of the State of Illinois from releasing a Federal grand jury subpoena pursuant to a FOIA request.

In her October 17, 2006, response to the BGA's request for "a copy of all public records *** related to any subpoenas issued by the United States Attorney's office," Ms. Benway stated that "[c]ertain documents have been withheld pursuant to Sections 7(1)(f) and 7(1)(n) of the Act." Although the BGA request encompasses the subpoenas as well as all related documents, it is not clear from her response whether Ms. Benway intended to assert subsections 7(1)(f) and 7(1)(n) as a reason for withholding copies of the subpoenas. To the extent that the Office of the Governor was relying on the exemptions in subsections 7(1)(f) and 7(1)(n) of the Act as a basis for withholding copies of Federal grand jury subpoenas, these subsections clearly do not apply.

Federal grand jury subpoenas do not fall within the category of documents described in subsection 7(1)(f), which exempts "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated," 5 ILCS 140/7(1)(f) (West 2004). Subsection 7(1)(n) covers:

[c]ommunications 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)(n) (West 2004).

Federal grand jury subpoenas issued to the Office of the Governor or any State agencies under the Governor's control are not communications between those entities and an attorney representing them. Likewise, these subpoenas were not "prepared or compiled by or for" the Office of the Governor or any State agencies under the Governor's control.

In addition to Ms. Benway's written denials of the BGA's requests, the Office of the Governor has made public statements indicating that its basis for refusing to release copies of subpoenas may relate to the secrecy requirements surrounding Federal grand jury proceedings. In considering this argument, we analyzed Federal Rule of Criminal Procedure 6(e)(2), which codifies the traditional rule of secrecy of Federal grand jury proceedings. Our review of the law has failed to find support for the position that the Federal grand jury secrecy rules preclude the Office of the Governor or state agencies under the Governor's control from releasing subpoenas under the Act.

Rule 6(e)(2) generally prohibits a specified group of persons – grand jurors, interpreters, stenographers, operators of recording devices, typists, government attorneys, and government personnel who assist government attorneys in the enforcement of Federal criminal law – from disclosing "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). The group of persons covered by the rule's obligation of secrecy does not include witnesses called upon to testify or provide documents to the grand jury. The rule also clearly provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." Fed. R. Crim. P. 6(e)(2).

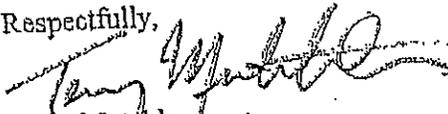
Courts interpreting Rule 6(e)(2) have held repeatedly that the prohibition against disclosure does not extend to grand jury witnesses or other persons who are not directly engaged in the operations of the grand jury. *Butterworth v. Smith*, 494 U.S. 624, 634-35 (1990); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *Halperin v. Berlandi*, 114 F.R.D. 8,

Mr. William Quinlan
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15 (D. Mass. 1986); *In re Langswager*, 392 F. Supp. 783, 788 (N.D. Ill. 1975); Fed. R. Crim. P. 6(e)(2) advisory committee's note. Thus, grand jury witnesses are not precluded from disclosing any knowledge they may have concerning the subject or scope of inquiry of a Federal grand jury. *In re Caremark International, Inc. Securities Litigation*, 94 C 4751 (N.D. Ill. July 24, 1997). Likewise, a recipient of a Federal grand jury subpoena is not precluded from disclosing the subpoena to others. See *In re Grand Jury Subpoena Duces Tecum, Dated December 9, 1983*, 575 F. Supp. 1219, 1221 (E.D. Pa., 1983); *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979). Thus, the rules governing grand jury secrecy do not prohibit the Governor's Office or agencies under the Governor's control from disclosing Federal subpoenas in response to a request under the Act.

The responses of the Office of the Governor to the BGA's requests for disclosure of copies of Federal grand jury subpoenas clearly do not satisfy the requirements of the Act. The Office of the Governor has failed to establish that the Federal grand jury subpoenas fall within the exemptions in subsections 7(1)(a), 7(1)(f), or 7(1)(n) of the Act or that the United States Attorney has taken steps to mandate secrecy of the grand jury subpoenas. Without legal support, the Office of the Governor and the agencies under his control cannot withhold Federal grand jury subpoenas in their possession and must release these documents pursuant to a FOIA request.

Respectfully,



Terry Mutenler
Public Access Counselor
Assistant Attorney General

cc: Dan Sprehe, Better Government Association

Judicial Watch, Inc.

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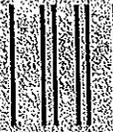
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I certify that on August 9, 2007 I served a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, via first class U.S. Mail, postage prepaid, on the following:

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