

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

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	Judge Richard J. Billik, Jr.
	)	
vs.	)	No. 2007-CH-01306
	)	
THE OFFICE OF GOVERNOR ROD	)	
R. BLAGOJEVICH,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFF’S RESPONSE TO THE GOVERNOR’S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR APPOINTMENT  
OF SPECIAL COUNSEL**

Plaintiff, JUDICIAL WATCH, INC., by counsel, respectfully submits this response to the Governor’s memorandum of law in support of his motion for appointment of special counsel. As grounds therefor, Plaintiff states as follows:

**MEMORANDUM OF LAW**

1. Plaintiff filed this action against Defendant 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.* Plaintiff requested the records at issue on December 18, 2006. FOIA generally requires production of requested records within seven (7) working days. 5 ILCS 140/3(c).

2. Plaintiff did not name the Governor as a defendant in this lawsuit 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 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).

3. On February 27, 2007, the Office of the Attorney General filed a timely appearance on behalf of Defendant and requested a twenty-eight (28) day extension of time, until and including March 27, 2007, for Defendant to respond to the Complaint. The following day, the Office of the Attorney General requested and Plaintiff agreed to the submission of an agreed order allowing Defendant until and including March 27, 2007 to respond to the Complaint. On March 12, 2007, the Office of the Attorney General requested and Plaintiff agreed to the submission of a second agreed order allowing Defendant until and including April 9, 2007 to respond to the Complaint. As recently as April 3, 2007, the Office of the Attorney General requested and Plaintiff agreed to the entry of an agreed order allowing Defendant fourteen (14) days after the Court issues a ruling with respect to the instant motion to respond to the Complaint. Despite the Attorney General's demonstrated willingness and ability to protect Defendant's interests and represent it in this litigation, the Governor requests the appointment of a special counsel, at taxpayer expense, to represent Defendant in this matter.

4. As the chief legal officer of the State of Illinois, the Attorney General has the constitutional duty to act as legal advisor to and legal representative of the State. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 399 (1977). The Attorney General is "the law officer of the people, as represented in the State Government, and its only legal representative in the courts." *Id.* at 398 (quoting *Fergus v. Russel*, 270 Ill. 304, 337 (1915)). As

such, the Attorney General “has the prerogative of conducting legal affairs for the State.” *Id.* at 399. “[N]either the legislature nor the judiciary may deprive the Attorney General of [her] common law powers under the Constitution.” *Id.*

5. Nonetheless, the Attorney General Act allows for the appointment of a special counsel in special circumstances, none of which are present here:

Whenever the attorney general . . . is interested in any cause, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general would have had if present and attending the same.

15 ILCS 205/6.

6. Recognizing the Attorney General’s constitutional duties to the people of the State of Illinois, the Supreme Court of Illinois has defined the term “interested” very narrowly in applying the Attorney General Act. Specifically, the Supreme Court of Illinois has limited the application of the statute to two situations: (1) where the Attorney General is interested as a private individual; and (2) where the Attorney General is an actual party to the litigation.

*Environmental Protection Agency*, 69 Ill. 2d at 401.

7. The Attorney General is not a party to this litigation, and it cannot be said that she is interested as a private individual. On October 26, 2006, prior to the initiation of any litigation, the Attorney General, by and through her office, issued an opinion regarding Defendant’s withholding under FOIA of the records that provide the basis for this lawsuit. The Attorney General’s opinion stated, in pertinent part: “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 [FOIA].” Complaint at Exhibit C. Rather than reflecting any private, individual interest, the issuance of the opinion was well within the scope of the Attorney General’s constitutional duties as the chief legal officer of the State.

8. Moreover, as the Supreme Court of Illinois set forth in *Environmental Protection Agency*:

It seems to us that if the Attorney General is to have the unqualified role of chief legal officer of the State, he or she must be able to direct the legal affairs of the State and its agencies. Only in this way will the Attorney General properly serve the State and the public interest. To allow the numerous state agencies the liberty to employ private counsel without the approval of the Attorney General would be to invite chaos into the area of legal representation of the State.

69 Ill. 2d at 401-02.

9. The Governor’s request for the appointment of a special counsel to represent Defendant in this action -- not because the Attorney General has any private, individual interest in the litigation or because she is named as a party, but because the Governor apparently disagrees with her October 26, 2006 legal opinion -- would invite chaos into the area of the State’s legal representation. It would create damaging precedent that would allow the Governor to replace the Attorney General as the State’s chief legal officer whenever he disagrees with the Attorney General’s legal advice, and it would seriously undermine the Attorney General’s constitutional duty as the chief legal officer of the State.

10. Not only is it the Attorney General’s constitutional duty to represent Defendant, but she has done so competently so far. It was the Attorney General’s office, not Defendant’s designated special counsel, that arranged for the submission of three (3) agreed orders allowing

extensions of time for Defendant to respond to the Complaint. Had the Attorney General not done so, Defendant would have been at risk of default.

11. The State Employee Indemnification Act, 5 ILCS 350/0.01, *et seq.*, which the Governor asserts applies to Defendant in this case, does not apply because not only has Plaintiff not commenced an action against the Governor personally, but there no risk of personal liability on the part of the Governor in this action. *See* 5 ILCS 350/2(a); *Barnow v. Ryan*, 2001 U.S. Dist. LEXIS 14692, \*7 (N.D. Ill. September 17, 2001). The Governor’s reliance on the State Employee Indemnification Act and cases arising thereunder, including *Tully v. Edgar*, 286 Ill. App. 3d 838 (1st Dist. 1997), is inapposite.<sup>1</sup>

12. Also inapposite are the cases cited by the Governor arising under the “State’s Attorney Act” provision of the Counties Code, 55 ILCS 5/3-9005(a)(4). These cases include *McDonald v. County Board of Kendall County*, 146 Ill. App. 3d 1051 (2d Dist. 1986) and *Suburban Cook County Regional Office of Education v. Cook County Board*, 282 Ill. App. 3d 560 (1st Dist. 1996) (“*Lehman*”). Unlike the Attorney General, State’s Attorneys are not constitutional officers. Again, the Illinois Supreme Court has declared that “neither the legislature nor the judiciary may deprive the Attorney General of [her] common law powers under the Constitution.” *Environmental Protection Agency*, 69 Ill. 2d at 399. These same separation of powers concerns should apply equally to the Governor.

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<sup>1</sup> *Tully* dealt with a unique set of circumstances in which a state official named as a defendant in a lawsuit that challenged the constitutionality of an Illinois statute retained an attorney to assert her own constitutional challenge to the statute, contrary to the wishes of her co-defendants. The plaintiff and the dissenting defendant ultimately prevailed on their constitutional challenges to the statute, and the Court subsequently affirmed both the appointment of the separately retained attorney as a “Special Attorney General” and an order requiring payment of the attorney’s fees and expenses.

13. Nor is this a situation where a State's Attorney, much less an Attorney General, is obligated to represent parties on two opposing sides of a lawsuit, as was the case in *McDonald*, *Lehman*, and *People ex rel. Barrett v. Board of Commissioners*, 11 Ill. App. 3d 666 (1st Dist. 1973).

14. Rather, this case really presents nothing more than a garden variety FOIA dispute in which the Court will likely be called upon to determine the applicability of certain claims of exemption to the records at issue. It is, to Plaintiff's understanding, the type of legal dispute routinely handled by the Attorney General's office. The Governor's effort to make this case into something more significantly overstates the matter and is delaying Plaintiff from having timely access to the records at issue.

WHEREFORE, Plaintiff respectfully requests that the Governor's motion for the appointment of special counsel be denied.

Dated: April 6, 2007

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify that on April 6, 2007 I served a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO THE GOVERNOR'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPOINTMENT OF SPECIAL COUNSEL, via first class U.S. Mail, postage prepaid, on the following:

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