No. 124552

In the

Supreme Court of Illinois

BRUCE RUSHTON AND THE ILLINOIS TIMES,

Plaintiffs-Appellees,

v.

ILLINOIS DEPARTMENT OF CORRECTIONS, AND JOHN R. BALDWIN, IN HIS CAPACITY AS DIRECTOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

and

WEXFORD HEALTH SOURCES, INC.,

Intervenor-Appellant.

On Grant of an Appeal From the Appellate Court of Illinois,
Fourth Judicial District, Case No. 04-18-0206
There heard on Appeal From the Circuit Court of Sangamon County,
Case No. 17 MR 324, Honorable Otwell, J., Presiding

REPLY BRIEF OF INTERVENOR-APPELLANT WEXFORD HEALTH SOURCES, INC.

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TABLE OF POINTS AND AUTHORITIES

TABLE OF POINTS AND AUTHORITIES CONTINUED

Page

TABLE OF POINTS AND AUTHORITIES CONTINUED

Page

I. INTRODUCTION

There is much that Plaintiffs and Wexford agree on: the State of Illinois is required to provide inmates with healthcare, Wexford has contracted to perform that governmental function on behalf of the State, and Wexford receives State funds for doing so. Though Plaintiffs dedicate a substantial portion of their responsive brief to litigating these undisputed facts, they do not answer the question before this Court.

The question before this Court presumes these facts and asks whether a third party who has, unquestionably, contracted to perform a governmental function is required by FOIA to produce its private settlement agreement between exclusively private parties when the document at issue, on its face, has no bearing on the performance of the governmental function.

As Wexford demonstrated in its opening brief, the text, structure, legislative history and intent, and caselaw regarding the relevant provisions of the FOIA statute all lead to the same conclusion: Wexford is not required to produce the Confidential Franco Settlement Agreement. Plaintiffs' responsive brief does not show otherwise.

II. ARGUMENT

The FOIA statue lays out, in great detail, exactly what types of documents must be made publicly available, the circumstances under which those documents must be disclosed, the applicability of exceptions to disclosure, and what, if any, redactions are appropriate for documents that must otherwise be disclosed. The statute provides this guidance in over 16,000

words, comprising 28 separate sections, many with subparts. Plaintiffs would cast aside all of the Illinois Legislature's careful work in crafting, negotiating, and repeatedly revising this statute, and instead reduce FOIA to a single provision: its preliminary statement of policy. No principle of law permits a court to reject specific statutory provisions and instead substitute its own view of the best method for achieving the preamble statement of policy. Instead, the legislature's clearly-stated standards must be given their full effect, as written and as enacted.

A. A Private Party Does Not Assume All of the Disclosure Obligations of A State Entity for Purposes of FOIA By Contracting to Perform a Governmental Function.

Plaintiffs argue outright that "Wexford ***is*** the State" (emphasis in original), both to the inmates under its care and in the "view of Mr. Rushton in filing his FOIA request." Pl. Br. at 9. This is not the legal reality for purposes of FOIA.

To the contrary, under FOIA, "[t]he fact that a private company's acts may be connected with a governmental function does not create a public body where none existed before." *Chi. Tribune v. College of DuPage*, 2017 IL App (2d) 160274 at ¶ 53. Most importantly, this fact is undeniably clear from the face of the FOIA statute, which explicitly requires that "in order for relief to be granted under section 7(2), a record must 'directly relate' to the governmental function performed on behalf of a public body." *Id.* (quoting 5 ILCS 140/7(2)). As the Appellate Court explained in *Chicago Tribune*, "This requirement makes clear the legislature's intention that the general public may not access

all of a third party's records merely because it has contracted with a public body to perform a governmental function. FOIA is not concerned with private affairs." *Id.*

Plaintiffs do not answer, or even address, this FOIA precedent. Instead, Plaintiffs shift the focus to other types of legal actions not governed by the FOIA statute. Namely, Plaintiffs focus on actions brought under the Eighth Amendment of the United States Constitution. ***But the Eighth Amendment standard for the treatment of those in custody is entirely irrelevant to the applicability of the Illinois FOIA statute***. And Plaintiffs do not cite ***any*** legal authority to support their bald assertion suggesting otherwise.

As *Chicago Tribune* held, and as Wexford explained in its opening brief, Sections 2.20 and 7(2) of the FOIA statute deliberately set a specific standard for the disclosure of documents from private parties performing a governmental function. These provisions address both settlement agreements and other documents held by these third parties. There is no legitimate basis to discard this clearly-applicable and unambiguous statutory framework, and instead focus on unrelated constitutional claims filed by different parties on different legal and factual grounds.

B. Section 2.20 of FOIA, Which Addresses Settlement Agreements, Does Not Require Disclosure of Private Parties' Settlement Agreements.

There is a single provision of FOIA that speaks squarely to settlement agreements: Section 2.20. In its opening brief, Wexford presented a detailed analysis and application of this dipositive Section. *See* Wexford Opening Br. at

16-18. Plaintiffs' ***only*** response regarding Section 2.20 (mistakenly identified as Section 2(c) in their brief) is to characterize the Section as irrelevant—despite its specific applicability to settlement agreements.

First, Plaintiffs say that Section 2.20 "is a legislative response to ongoing struggles to reach settlement agreements reached by or on behalf of public bodies" and thus, "[n]othing more can or should be read into it." Pl. Br. at 20. Plaintiffs offer no citation for this view of the statute's background. Nevertheless, this response actually concedes that in enacting Section 2.20, the legislature intentionally targeted disclosure of settlement agreements of public bodies ***only***—and, by corollary, omits private parties from the scope of such disclosure obligations.

Additionally, as discussed in Wexford's opening brief at 22-24, the legislature limited the disclosure to public-entity settlement agreements ***at the very same time*** that it drafted and passed Section 7(2), which specifically set forth the disclosure obligations for ***other*** documents held by private parties. *See* Wexford Opening Brief at 22-24. This only reinforces the understanding that the legislature intended that private settlement agreements not be subject to disclosure. Section 7(2) cannot logically be read to undo or override the clear standards imposed—by that same legislature at the same time—in Section 2.20 regarding settlement agreements.

While they disregard the clear import of Section 2.20, Plaintiffs nevertheless continue to rely on Attorney General Public Access Opinions that

invoke Section 2.20 to require disclosure of public bodies' settlement agreements. S*ee* Pl. Br. at 22-24. ***Critically***, all of these opinions require disclosure ***exclusively*** in the context of settlement agreements entered into by or on behalf of ***public bodies.*** Indeed, ***none*** of Plaintiffs' citations even suggest that Section 2.20 applies to settlements exclusively between private parties. This is not surprising given the provision's clear language limiting its applicability to public bodies.

Plaintiffs deflect discussion of Section 2.20 by challenging the applicability of *expressio unius est exclusio alterius*, a canon of statutory construction cited by Wexford in support of its analysis of this provision. *See* Wexford Opening Br. at 17-18. Plaintiffs cite caselaw stating that this tool of statutory construction "is subordinate to the legislative intent, and applies only when legislative intent is unclear." Pl. Br. at 20-21. This argument misses the point.

Wexford agrees that legislative intent is paramount. The *expressio unius est exclusio alterius* canon identifies legislative intent and resolves the parties' apparent disagreement with respect to the purpose behind the legislature's choice of language in FOIA. This Court has often relied on this "familiar maxim" as an aid to "put to rest" "any lingering doubts" of statutory construction when determining the import of omissions from a statute or contrasting language in a statute. *See People v. Lisa (In re D.W.)*, 214 Ill. 2d 289, 308 (2005) (noting that the Court had also "recently employed that

maxim" in *Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004) (relying on the maxim to hold that a statute conferring a private right of action for a specific section of the statute should be read to exclude private rights of action under other sections of the same statute)). Here, this maxim reinforces the legislature's intent to omit private parties' settlement agreements from disclosure under Section 2.20.

In challenging Wexford's interpretation of Section 2.20, Plaintiffs actually underscore the utility of such maxims of statutory construction to assist with the proper interpretation of the legislative intent. And applying the canon here, as discussed in Wexford's opening brief (at 17-18), it is clear that Section 2.20 is the legislature's expression of its desire to require the production of ***only*** those settlement agreements entered into by or on behalf of public bodies.

C. The Confidential Franco Settlement Agreement Does Not Meet Section 7(2)'s Heightened Nexus Requirement.

Even if Section 2.20 is not dispositive, the Confidential Franco Settlement Agreement is not disclosable under Section 7(2) of FOIA because it does not "directly relate" to Wexford's governmental function of providing healthcare to IDOC inmates.

The parties agree that the Section 7(2) analysis should be a "fact-specific inquiry." *See* Pl. Br. at 15 (quoting Appellate Court opinion at ¶ 30). This is not in dispute. Rather, the question before this Court is the proper understanding and application of the "directly relates" statutory standard that should be

applied to this fact-specific inquiry. On that question, Wexford disagrees with the Appellate Court's "liberal" construction of the disclosure standard (A 007-08, Appellate Court opinion at ¶ 30), as this draws a false equivalency between the "directly relate" nexus applicable to privately-held documents and the "pertain to" nexus applicable to publicly-held documents under Section 2(c). Wexford asks this Court to recognize that the "directly relate" language evinces a higher nexus requirement than the "pertains to" standard.

1. Plaintiffs Fail to Address the Actual Document at Issue.

In their response, Plaintiffs provide no argument as to why the Confidential Franco Settlement, ***by its actual contents***, "directly relates" to the governmental function of providing healthcare to inmates, as the standard set forth in Section 7(2) requires. Nor do Plaintiffs dispute, or even address, the fact that the Agreement makes no mention of inmate healthcare (or indeed even Mr. Franco's healthcare), and therefore simply does not address, let alone "directly relate" to, the governmental function. *See* Wexford Opening Br. at 7-8. These undisputed characteristics of the document (or, indeed, lack thereof) are dispositive for purposes of Section 7(2).

Rather than discussing the document they actually seek to disclose, Plaintiffs try to focus this Court's attention, in general terms, on the subject matter of the underlying Franco lawsuit and the nature of Wexford's overall role in providing healthcare. *See, e.g.*, Pl. Br. at 15. This is all undisputed and, more importantly, irrelevant. It is nothing more than Plaintiffs' attempt to have this Court treat all of Wexford's documents as uniformly subject to

disclosure merely as a result of Wexford's overall role, regardless of the conclusions of any document-by-document analysis. But that is not how FOIA operates.

Indeed, Plaintiffs do not dispute that FOIA must be applied on a ***document-by-document*** basis (and in fact, sometimes on line-by-line or word-by-word basis, as is common with the application of FOIA's statutory exceptions and redactions). *See* Wexford Opening Br. at 21. The relevant question then, is whether the contents of ***this document*** "directly relate" to the provision of healthcare. At the document level, as Wexford has demonstrated, the Confidential Franco Settlement Agreement does not meet the "directly relates" standard required by Section 7(2).

2. Plaintiffs Provide No Meaningful Rebuttal To Wexford's Recitation of the Clear, Instructive Legislative History and Intent.

In its opening brief, Wexford provided a detailed recitation of legislative debate and history regarding the ***simultaneous*** passage and revision of the three critical FOIA provisions at issue in this case—Sections 2.20, 7(2), and 2(c). *See* Wexford Opening Br. at 18-21; 22-24. Specifically, Wexford highlighted the legislature's simultaneous (1) enactment of Section 2.20, providing only for the disclosure of public settlement agreements; (2) enactment of Section 7(2), establishing a "directly relate" standard for the production of documents from private parties performing a government function; and (3) amendment of Section 2(c) to add the "pertain to" standard for the disclosure of documents directly from public bodies. *See id.* Taken

together, ***as this Court has made clear they must be*** (*see, e.g.*, *Better Gov't Ass'n v. Office of the Special Prosecutor (In re Appointment of Special Prosecutor)*, 2019 IL 122949 at ¶ 23), these changes readily demonstrate the legislature's intent with respect to the scope—and limits—of FOIA as applied to private parties' settlement agreements.

Tellingly, Plaintiffs offer this Court no meaningful alternative understanding of the legislature's actions or intentions, which both sides agree is the paramount principle and consideration that ought to drive this Court's analysis.

3. Plaintiffs' Dictionary Definitions Are Not Instructive and Cannot Answer The Central Question of Why the Legislature Chose *Different* Language To Create Two *Different* Standards In Two *Simultaneously-Enacted* Provisions in Sections 7(2) and 2(c).

Rather than analyzing the plain text of the FOIA statute, the legislative history, or the results of well-established canons of statutory construction, Plaintiffs rely on the dictionary to support their claims. Specifically, Plaintiffs provide the Merriam-Webster's definitions of the words "direct" and "relate" to support their assertion that there is no difference between Sections 2(c) and 7(2). *See* Pl. Br. at 15.

Despite Plaintiffs' arguments, the dictionary's definitions actually illustrate that the legislature's use of "direct" established a heightened nexus in Section 7(2). While "relate" only requires a "logical or causal connection" between two things, "direct" requires a "***close*** logical, causal, or ***consequential relationship***." *Id.* (emphasis added). These definitions plainly demonstrate

that ***"directly" requires more—a greater degree of connection***. This contrast supports the understanding that the term "directly relates" used in Section 7(2) was intended by the legislature to convey a heightened nexus requirement.

More fundamentally, Wexford disagrees that dictionary definitions should be used, as Plaintiffs suggest, in isolation and apart from the FOIA statute's content, structure, and legislative history. As this Court explained in *Corbett v. Cty. of Lake*, 2017 IL 121536, ¶ 27, "It is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" Instead, "the words and phrases in a statute must be construed in light of the statute as a whole, with each provision construed in connection with every other section." *Id.* (internal citations omitted). Accordingly, "dissecting an individual word or phrase from a statutory provision and mechanically applying to it a dictionary definition is clearly not the best way of ascertaining legislative intent." *Id.* at ¶ 28.

The same type of analysis should be employed here. The legislature simultaneously created two different standards using two different sets of terminology. It would upend this clear history and intent to conclude, on the basis of isolated dictionary definitions, that these two different phrases were intended to be synonyms. This argument should be rejected.

4. Pennsylvania Caselaw Interpreting Nearly Identical Statutory Language Is Instructive Authority Meriting Consideration.

Plaintiffs wrongly assert that Wexford's "sole authority for a 'heightened nexus' standard" is Pennsylvania caselaw. *See* Pl. Br. at 17. In fact, the statutory language, statutory structure, and legislative history of the Illinois FOIA statute all demonstrate that this is the only possible understanding of Section 7(2)'s "directly relate" requirement. *See* Wexford Opening Br. at 20-26.

In its opening brief, Wexford referenced Pennsylvania law, which has nearly identical language in its version of the state FOIA statute, simply because it underscores this analysis. *See* Wexford Opening Br. at 25-26. Plaintiffs fail to effectively distinguish the three cases Wexford cited, all of which, ***as Plaintiffs do not and cannot dispute***, clearly express the higher standard that is to be applied, under the "directly relate" language, to the disclosure of records of private parties performing a governmental function. *E.g. Allegheny Cty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013) (noting that the parallel provision "prescribes more restricted access precisely because it applies to private entities.").

Plaintiffs' reliance on *SWB Yankees LLC v. Wintermantel*, 615 Pa. 640 (2012) (Pl. Br. at 18-19) neither undercuts Wexford's cases or advances Plaintiffs' argument. In *SWB Yankees LLC*, competing vendors' bid documents were held to be subject to disclosure because they governed the sums that the state agency would collect under a revenue-sharing agreement. *See id.* at 643.

There is no such connection between Wexford's private settlement agreement and the State of Illinois.

Plaintiffs also cite a Florida case, *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992), which they say provides factors for determining discoverability of documents held by contractors providing services to a public body. *See* Pl. Br. at 19-20. Significantly, however, unlike Pennsylvania, the Florida statute does not have any language comparable to Section 7(2). *See* 596 So. 2d at 1031. Thus, the analysis of the Florida statute is not instructive for Illinois or this case.

D. Plaintiffs' Suggestion That Wexford's Receipt of Government Funds Is A Dispositive Factor Is False And, If Accepted, Would Render Moot Many of the Carefully-Constructed Provisions of the FOIA Statute.

Plaintiffs repeatedly assert the undisputed fact that Wexford receives government funds in exchange for its contractual provision of healthcare to IDOC inmates. *See, e.g.*, Pl. Br. at 10-13. They observe that there are public costs associated both with the provision of healthcare to inmates and with any alleged shortcomings in the same. *See id.* Plaintiffs' suggestion, ***without citation to any actual provisions of the FOIA statute or relevant caselaw***, is that FOIA should apply simply because there is, they claim, a public interest in knowing how Wexford used the public funds that it received pursuant to contract. This is a drastic overreach.

As the *Chicago Tribune* case recognized (*see supra* at 2), the fact that Wexford receives public funds for its services does not answer the question

before this Court. To hold otherwise would render moot many (if not most) of the carefully-crafted provisions of the lengthy, detailed FOIA statute. This sweeping misreading would be nearly limitless, reaching, for example, the private records of every government contractor, vendor, employee, public benefits recipient, victorious plaintiff in suits against the government, and lottery winner, simply because they received government funds. Since money is fungible, there would be no limiting principle, and essentially any expenditure by an entity receiving public funds would be subject to public disclosure, without any showing that expenditure was in fact paid with the public funds. This is not, and cannot be, the law.

Moreover, as Plaintiffs do not and cannot dispute, the cost of the Wexford contract—*i.e.* the dollar amount that Wexford receives pursuant to contract from the State for its services—is a matter of public record. (In fact, Plaintiffs discussed and attached portions of Wexford's contract to their pleadings below. *See, e.g.*, C 90, C 113-15.) Thus the cost to the taxpayers of performing the government function is already publicly known. The cost to Wexford of incidental legal claims is wholly separate from the agreed-upon fee structure for performing the governmental function of providing healthcare to inmates—as Plaintiffs concede (*see* A 036-37; A 048-49)—and is not subject to disclosure.

At bottom, as they have throughout the course of this case, Plaintiffs, ***without any legal support***, resort to a bare policy argument regarding the

purported impact of Wexford's private settlement agreement on public funds and services. Indeed, in the Circuit Court, when faced with the reality that ***all available legal authority and legislative history*** ran counter to their assertion that Section 2.20 somehow applied to private settlement agreements, Plaintiffs made this same argument regarding the impact of such agreements on "the amount of money paid by taxpayers for services either by public bodies or contractors for public bodies." A 044. However, the Circuit Court rightly recognized that this was a "policy argument," that any such impact was "speculative," and an "indirect result" of the settlement agreement. A 048-49. The Circuit Court further recognized, perhaps most importantly, that Plaintiffs' argument did not change the fact that Wexford's settlement agreement was "not directly related to the provision of medical services pursuant to the contract between Wexford and IDOC" as required by Section 7(2). A 049.

As the Circuit Court rightly concluded, Plaintiffs' vague and unsupported arguments must cede to the contrary specific language in the statute.

E. Plaintiffs' Further Policy Arguments Are Both Unavailing and More Properly Directed to the Legislature.

Plaintiffs' remaining public policy arguments are little more than aspirational expressions that are more appropriately presented to the legislature, not this Court. Despite its complete irrelevance to the question at issue in this case, Plaintiffs go so far as to both block quote the order from

Rasho v. Walker, No. 07-1298 (C.D. Ill) (Pl. Br. at 12-13) and also include it as an appendix to their brief (Supplementary Appx. at A-2–A-51). To be clear, *Rasho* is an Eighth Amendment case challenging certain mental healthcare practices at IDOC facilities, to which Wexford is not a party. It has no bearing whatsoever on the matter before this Court. Moreover, the very public litigation of that action is only one example of the many different means of public oversight to which inmate healthcare services are already accountable, apart from FOIA.

Moreover, Plaintiffs' undisguised desire to use FOIA as a weapon to expose the private documents of private parties with whom it disagrees would very likely chill the willingness of vendors to do business with the State of Illinois at the risk of undefined, potentially limitless exposure of their confidential information. The damage that would be done by overriding the clear intention of the legislature on this point is not mere speculation. Indeed, as Wexford noted in its opening brief, the original drafters of the FOIA statute ***explicitly identified this kind of chilling effect as a concern***. *See* Wexford Opening Br. at 23-24.

The important policy decisions that underlie the FOIA statute are not for Plaintiffs to make. Instead, as this Court has repeatedly recognized, such decisions are solely the responsibility of the legislature. The legislature has already struck these careful balances in debating, drafting, and revising the FOIA statute. Wexford respectfully submits that this Court should give effect

to those precise decisions, rather than allowing Plaintiffs to upend those choices through their sweeping misreading of the statute.

III. CONCLUSION

For the foregoing reasons, Wexford respectfully seeks this Court's recognition that Section 2.20 is the exclusive statutory authority for the disclosure of settlement agreements pursuant to FOIA, and this section does not permit disclosure of the Confidential Franco Settlement Agreement. If this Court concludes that Section 7(2) could apply to settlement agreements, Wexford asks this Court to hold that it would not so apply here. The Confidential Franco Settlement Agreement does not meet Section 7(2)'s heightened nexus test because it does not "directly relate" to Wexford's governmental function. Wexford therefore respectfully asks this Court to reverse the Fourth District's decision.

Dated: August 14, 2019

Respectfully submitted,

By: /s/ *Andrew R. DeVooght*

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 3,745 words.

/s/ *Andrew R. DeVooght*
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on August 14, 2019, Reply Brief of Intervenor-Appellant Wexford Health Sources, Inc. was electronically filed with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

The undersigned further certifies that a copy of the same was served via electronic mail to the parties listed below, on August 14, 2019:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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