No. 122949

IN THE SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,	)	Appeal from the Appellate
	)	Court, First District, No. 1-16-1376
	)	
Plaintiff-Appellant,	)	
	)	
-vs-	)	There on appeal from the Circuit
	)	Court of Cook County, Chancery
	)	Division, Illinois
	)	No. 15 CH 4183
CITY OF CHICAGO LAW DEPARTMENT,	)	
CITY OF CHICAGO MAYOR'S OFFICE,	)	
CHICAGO POLICE DEPARTMENT,	)	
OFFICE OF THE SPECIAL PROSECUTOR,	)	
	)	
	)	Hon. Mary L. Mikva, Judge
	)	Presiding
Defendants-Appellees.	)	

REPLY BRIEF FOR PLAINTIFF-APPELLANT BETTER GOVERNMENT ASSOCIATION

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E-FILED
9/11/2018 10:44 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. THE COURT SHOULD NOT ALLOW CIRCUIT COURT JUDGES TO THWART RELEASE OF NON-EXEMPT RECORDS BY COURT ORDER

The City has not asserted any substantive FOIA exemptions over the requested records, and thus concedes that absent the order, it must produce them. Therefore, the Court faces the discrete question of whether an individual judge can prohibit release of non-exempt public records, which was not directly addressed in *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980), and for which the answer can only be "no."

A. The Improper Withholding Clause Does Not Authorize Such Orders

There has long been a straightforward approach to FOIA cases: records may only be withheld if an exemption applies, and if so, there is no further argument despite any public interest in release. *See* BGA Br. at 15-17. The City would upend this approach and grant individual judges the power to compel additional secrecy through court orders not subject to FOIA's evidentiary or appellate-review standards.

The City acknowledges that there must be "some close parallel between our language and language in the Federal [FOIA]" and no "material textual differences" before federal cases like *GTE Sylvania* serve as a "guide"[1] under Illinois FOIA. City Br. at 15-17. The City's fundamental problem, however, is that it relies on language in isolation and violates the principle of statutory construction that all provisions must be read in context. *E.g. Bayer v. Panduit Corp.*, 2016 IL 119553, ¶ 18. Here, the differences in the statutory structures are manifold and material. *See* BGA Br. at 19-21. While the City brushes off these differences, which BGA will address, it cannot dispute the cornerstone text of our statute: "Each public body shall make available to any person for

[1] That other federal courts followed *GTE Sylvania* is irrelevant: unlike this Court, they had no choice. *See* City Br. at 20-23. The D.C. Circuit had reached the opposite decision in *GTE Sylvania*, so reasonable judicial minds can certainly differ. *Consumers Union of the U.S., Inc. v. GTE Sylvania*, 590 F.2d 1209 (D.C. Cir. 1978).

inspection or copying ***all*** public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 5 ILCS 140/3(a) (emphasis added). There is no ambiguity in this provision, and the federal statute has no corollary. *See* BGA Br. at 19. It leaves open no room for the judicial creation of additional exceptions, and makes the only reasoned interpretation of "improperly withheld" that the records are "not exempt."

That alone is dispositive, but the City's other arguments are meritless:

Settlement Agreements: The City does not dispute that its interpretation would make a public body's settlement agreement secret if the dismissal order purported to prohibit release, nor that the General Assembly added Section 2.20 to ensure they would be disclosed. City Br. at 28. The City's only substantive response is that this case does not involve a settlement agreement. But that misses the point: the City's interpretation would dictate that result for settlement agreements in violation of Sections 2.20 and 3(a).

The Index Requirement: The plain text of Section 11(e) states that the index "shall include" a "statement of the exemption or exemptions claimed for each such deletion or withheld document." 5 ILCS 140/11(e). Certainly "include" can be interpreted to allow courts to require ***more*** information in an index, but there is no interpretation of "shall include" that renders inclusion optional. *See* City Br. at 26. And unlike the judicially created index doctrine under federal FOIA,[2] this provision is statutory in Illinois and must be reconciled when interpreting the statute as a whole.

The PAC Provision: There is no dispute that the PAC has different powers than the courts, such as the inability to review commercial requests. City Br. at 26-27. But

[2] *See* Dep't of Justice Guide to the Freedom of Information Act, Litigation Considerations, at 75, *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf (last accessed Aug. 29, 2018).

that is exactly BGA's point. The PAC has only statutorily created authority, and the City concedes that "improper withholding" is found only in the judicial authority section, not in the PAC provision or in the statute's generally applicable provisions. Thus, there is no authority to apply it before the PAC, resulting in an absurd dichotomy that the General Assembly could not have intended. This, again, has no corollary under federal FOIA.

In addition to statutory differences,[3] the City overlooks those between Illinois and federal contempt case law. *GTE Sylvania* found "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." City Br. at 19-20 (quoting *GTE Sylvania*, 445 U.S. at 386). Be that as it may, Illinois law holds that no court can punish a party for contempt for refusing to violate the law, *see* BGA Br. at 22-23, and the City's only response attacks a straw man, claiming that a party must follow a court order even if it is "erroneous," City Br. at 31, which is something else entirely. *GTE Sylvania* did not address this issue, and had it faced decisions holding that "there can be no contempt finding where compliance with an order would require a party to violate the law," *In re Marriage of Kneitz*, 341 Ill. App. 3d 299, 304 (2003), it could not have been decided as it was. *See GTE Sylvania*, 445 U.S. at 387 ("There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to

[3] The City also argues that a denial can occur when "the public body does not have possession of the records[.]" City Br. at 25. While not relevant here, but only to the threshold question of what is a "public record" under Section 3(a), the argument reflects a misunderstanding of the scope of the definition of "public records," which also includes records about public business "having been prepared by or for, or having been or being used by, received by," or "under the control of any public body." 5 ILCS 140/2(c).

commit contempt of court in order to release documents."); *see also* 5 Nichols Ill. Civ. Prac. § 87:6 (no contempt where compliance "would require a party to violate the law").

Similarly, the City argues that the criminal court had jurisdiction in the underlying case, so it was free to order the City to violate FOIA. City Br. at 31. To the contrary, it also needed the "power or authority" to prohibit release of non-exempt public records. *See* 12 A.L.R.2d 1059, § 3 (rule "firmly established" that court cannot punish for contempt where order was "rendered without jurisdiction over the subject matter or the parties or without power or authority to render the particular decree or order"); *see also Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (no contempt "where the injunction was transparently invalid").

Illinois judges have no such authority under our FOIA law. *See* BGA Br. at 16-17; *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994) (court must consider and presumptively allow for FOIA disclosure); *Ford v. City of Huntsville*, 242 F.3d 235, 242 (5th Cir. 2001); *Davis v. E. Baton Rouge Par. Sch. Bd.*, 78 F.3d 920, 930-31 (5th Cir. 1996); *Doe v. White*, No. 00 C 0928, 2001 WL 649536, at *1 (N.D. Ill. June 8, 2001). The City had not merely a ***right*** to release information with which the criminal court erroneously interfered, but a statutory ***obligation*** to do so. Had the General Assembly intended to give the Circuit Court greater transparency authority than its own, it would have expressly said so. *See* Tex. Gov't Code Ann. § 552.107 (exemption where "a court by order has prohibited disclosure of the information").[4]

[4] Somewhat relatedly, the City relies, in passing, on *Best v. Taylor Machine Works*. City Br. at 31. *Best* did not involve protective orders in conflict with the legislature's power to regulate access to public records, but legislative encroachments into the discovery process for which the judiciary unquestionably possesses greater authority. *See id.*

The City also overlooks the different histories of federal and Illinois FOIA interpretative case law. When this Court interprets a statute that the General Assembly otherwise amends later, the General Assembly has acquiesced to the interpretation. *People v. Way*, 2017 IL 120023, ¶ 27. This Court has held, since at least 1990, as a first principle, that in response to a proper request, all public records must be released unless a specific exemption applies. *See* BGA Br. at 16-17. The General Assembly has amended the statute many times since but has never amended it to allow for withholding public records on judicially created grounds ***not*** set forth in the statutory exemptions. *GTE Sylvania* notes no such federal interpretive history.

There are also important differences in the purposes of the Illinois and federal FOIA statutes that cannot be reconciled with the City's interpretation. *GTE Sylvania* is based upon federal legislative history explaining that the statute was intended to "curb agency discretion" that had been problematic. 445 U.S. at 385-86. The Court reasoned that there is no discretion to curb when a court orders secrecy. *Id.* Our own statute reflects no such concern, but rather, seeks to ensure "access [that] is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest." 5 ILCS 140/1. Thus, the question in Illinois is simply whether the public is entitled to the record, and individual judges lack the authority to interfere with that entitlement other than through the enforcement of specifically enumerated FOIA exemptions. So in this Illinois case, the "concerns underlying the [Illinois] Freedom of Information Act," *see GTE Sylvania*, 445 U.S. at 386, remain very

much applicable when an individual judge attempts to make records secret that our statute says must be released.

Not surprisingly, therefore, the Court in *GTE Sylvania* was not required to address the crucial initial question that is central here: whether individual judges have the authority to prohibit disclosures required under FOIA in the first place. If that answer is no—and that is the only answer supported by the text of our statute and our case law holding that it is exclusively the province of the General Assembly to create bases for withholding public records—then any concerns about the need to follow erroneous court orders are moot. And no party, nor the Appellate Court, has ever offered a good reason to grant Circuit Court judges that extraordinary power.

Finally, as the City's brief explains, *GTE Sylvania* was not really based on the text of the federal FOIA statute anyway. City Br. at 22-28. Indeed, the City concedes that the Supreme Court later held that exemptions ***are*** exclusive, but that *GTE Sylvania* "represents a departure" for "public policy reasons" thought to be necessary "to accommodate situations" where a judge has ordered non-statutory secrecy. City Br. at 23-24 (quoting *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 154-55 (1989)). This Court has consistently declined to modify Illinois statutes to "accommodate" such policy considerations. *E.g., Manago By & Through Pritchett v. Cty. of Cook*, 2017 IL 121078, ¶ 13. The General Assembly knew of this Court's treatment of the very same issue under FOIA's sister statute, the Open Meetings Act, when it passed FOIA a few years later:

> Thus, whether, as the defendants argue, the instant means chosen by the General Assembly to eliminate secrecy in government and permit the free flow of information to the public might restrict the ability of public officials, either as minority blocs or majority groups, to support or oppose legislation, is not within our power to alter. The Act, by its express terms, does sacrifice the ability of public officials to act and deliberate privately

> to what the General Assembly obviously perceives to be the more important governmental interest of opening the processes of government to public scrutiny. Such a legislative judgment is peculiarly within the domain of the General Assembly. While there appear to be obvious problems of enforcement inherent in the Act, that consideration does not render the Act invalid. Nor may it affect our scrutiny of it.

People ex rel. Difanis v. Barr, 83 Ill. 2d 191, 201-02 (1980); *see also id.* at 199 ("This clearly enunciated public policy [of transparency under OMA] would be poorly served were we to carve out exceptions other than those expressly stated in the Act."). That principle, not one derived from distinguishable federal precedent, governs the issue here.

B. Court Orders Are Not "State Law"

The City also argues that judges make "state law" though their individual secrecy orders, creating exemptions under Section 7(1)(a), which applies when "state law" "specifically prohibit[s]" disclosure. 5 ILCS 140/7(1)(a). Neither the Circuit Court nor the Appellate Court accepted this flawed argument.

The first part of the City's argument attempts to bootstrap into an exemption that the City has never asserted and therefore has waived: that the grand jury secrecy provisions ***themselves*** impose secrecy on grand jury subpoena recipients. City Br. at 33-35. But the contention also lacks merit. Under the statute's plain text, secrecy is imposed only on "the State's Attorney" and "such government personnel as are deemed necessary by the State's Attorney in the performance of such State's Attorney's duty to enforce State criminal law." 725 ILCS 112-6(b), (c).[5] This does not "specifically prohibit" grand jury subpoena recipients from disclosing anything. *See also Better Gov't*

[5] The City's claim that the grand jury statute "leaves it to the courts to determine whether documents in a given case constitute a matter occurring before the grand jury," City Br. at 33, is both incorrect (because all exemptions must be narrowly construed) and irrelevant (because there is no prohibition against disclosing them anyway except as to state's attorneys and other entities that do not include the City).

Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 815-16 (2008) ("There is nothing new or novel about . . . public officials receiving federal grand jury subpoenas. Federal grand juries have been issuing subpoenas for over 200 years. Yet . . . Congress has not seen fit to specifically restrict the behavior of subpoena recipients. . . . [W]e decline to follow those federal cases that have expanded that rule by judicially amending it.").

Further, the City's interpretation conflicts with the criminal court's decision to release the OSP's 162-page report identifying each witness who testified before the grand jury and countless other details. If it were true that the grand jury secrecy provisions "prohibit" the release of these details—which is precisely what the City must prove—then the criminal court and the OSP violated that same state law by releasing the report. The only explanation for that release, therefore, because it was not "preliminary to or in connection with a judicial proceeding," is that it was authorized by the "when a law so directs" clause in the grand jury statute, and therefore not specifically prohibited. *See* 725 ILCS 112-6(c)(3). Then so too for the records BGA requested.

The rest of the City's argument turns on the meaning of "state law." This can be dismissed by the plain text of Section 7(1)(a), which does not include "court orders." 5 ILCS 140/7(1)(a); *compare* Tex. Gov't Code Ann. § 552.107. That alone suffices, but the very next exemption applies to "[p]rivate information, unless disclosure is required by another provision of this Act, a State or federal law or a court order." 5 ILCS 140/7(1)(b). Thus, court orders are not within the scope of "state law" under Section 7(1)(a).

Rather than this plain language, the City relies on one definition of "law" in a free online legal dictionary as allegedly providing "the plain, ordinary meaning" of the statutory provision. City Br. at 36-37. There are multiple problems with this:

First, the City's definition does not include court orders in its philosophical explication of the meaning of "law," but only the "judgment" of a court. The Law Dictionary,[6] *Law*, *available at* https://thelawdictionary.org/letter/l/page/12/ (last accessed Aug. 29, 2018).[7] Second, the City relies on the definition of "law," not the definition of "state law" from its own source: "Legislature passed and signed into law by the governor in one of the 50 US states." The Law Dictionary, *State Law*, *available at* https://thelawdictionary.org/letter/s/page/111/ (last accessed Aug. 29, 2018).

Third, the Black's Law Dictionary definition of "law" is as follows:

> 1. The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system <respect and obey the law>. 2. The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them <the law of the land>. 3. The set of rules or principles dealing with a specific area of a legal system <copyright law>. 4. The judicial and administrative process; legal action and proceedings <when settlement negotiations failed, they submitted their dispute to the law>. 5. A statute <Congress passed a law>. 6. Common law <law but not equity>. 7. The legal profession <she spent her entire career in law>.

Black's Law Dictionary, *Law* (10th ed. 2014). None of these include individual trial court orders, and the narrowest, and therefore the most appropriate under FOIA's narrow construction rule, but also in light of the General Assembly's separate treatment of "court orders" and "state law" in Section 7(1)(b), is a "statute."

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[6] It is unclear what this source is. It claims that it "features Black's Law Dictionary," but as discussed below, the Black's definition of "law" is different. The Law Dictionary, Home Page, *available at* https://thelawdictionary.org/ (last accessed Aug. 30, 2018).

[7] Similarly, the City's case law about judicial interpretation of a statute involves this Court's decisions, not a Circuit Court protective order. *See* City Br. at 35-36.

And fourth, the Black's definition of "state law" is similarly unavailing to the City: "A body of law in a particular state consisting of the state's constitution, statutes, regulations, and common law." Black's Law Dictionary, *State Law* (10th ed. 2014). An individual secrecy order is not precedential or "common law," and judicial common-law creation of FOIA exemptions conflicts with decades of FOIA and OMA precedent and cannot be what the General Assembly intended by "state law" (or "improperly withheld"). *See* BGA Br. at 16-17 (collecting FOIA cases); *Barr*, 83 Ill. 2d at 199 (declining to create OMA exceptions judicially, decided shortly before passage of FOIA).

It is also relevant that the General Assembly listed "regulations" separately from "state law." 5 ILCS 140/7(1)(a) ("Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."). This demonstrates that the General Assembly intended something narrower than any definition that includes regulations. And had the General Assembly intended to include court decisions "implementing" state statutes, as the City claims here with regard to the grand jury statute, it would have used the same "implementing" convention as for regulations.

Finally, there are significant problems with the City's position. "If one were to carry [such an] argument to the extreme, all information regarding the affairs of government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure." *Carbondale Convention Center, Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 479 (1993) (Lewis, J. concurring). An order that qualifies as "state law" could likely be overturned only on Constitutional grounds on appeal. *Id.* "If we were to follow the city's reasoning, the legislature would have to make a specific exclusion of court orders every time it used the words 'State

law'; otherwise the courts could rewrite the legislation anyway the courts deemed best." *Id*.; *see also* SR755 (chancery court noting possibility of "abuse").

Court orders are not "state law," and Section 7(1)(a) does not authorize individual Circuit Court judges to interfere with a public body's statutory disclosure obligations or the public's statutory right to non-exempt records.

C. The City Engaged in Efforts to Block Release of the Records

The City does not dispute, as a legal matter, that if it engaged in "efforts to prevent disclosure of the [records]," it cannot use the order to block release. *See* City Br. at 38. The City engaged in exactly such efforts, so it cannot rely on the order even if it qualified as state law or grounds for a "proper" withholding.

The City suggests it was required by the PAC's decision to seek clarification of the original order. City Br. at 39. But as BGA explained in its opening brief, and which the City concedes, the PAC determined that "the City and CPD must either provide the responsive documents to [the Sun-Times], or alternatively, return to the court to seek clarification of the limits of the protective order[.]" C653. In the words of the criminal court, the City "declined the PAC's invitation to disclose the subject materials," sought a further order from the criminal court, C1541, argued that the PAC's interpretation was "illogical," and asked the criminal court to "conclusively state" that records may not be produced, C654-55. These are not the acts of an innocent bystander; they are "efforts to prevent disclosure." City Br. at 38 (quoting *Carbondale*, 245 Ill. App. 3d at 477).

The City also argues that "there is no authority for the proposition that a government that receives a FOIA request must take the extraordinary step of unilaterally initiating legal action to remove a court-imposed obstacle to the production of the documents requested." City Br. at 40. There is exactly such authority:

> The General Assembly recognizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records . . . is a primary duty of public bodies to the people of this State, and this Act should be construed to this end, fiscal obligations notwithstanding.
>
> It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible[.]

5 ILCS 140/1. Thus, the City's effort to shift the costs of its "primary duty" onto the requesting public, City Br. at 40-41, seemingly without the benefit of FOIA's attorney fee provision, is antithetical to the purpose of the statute. Tellingly, the significant resources the City spent in its efforts before the criminal court and the PAC to prevent release of records could have been used instead to fulfill its "primary duty" of disclosure.

D. The Order Should Be Vacated

Finally, even if the Court were to grant the Circuit Court the power to erase the public's statutory rights to public records, and even if the Court found that the City engaged in no efforts to prevent disclosure of the records, the order here should be vacated. Because the order purports to prevent the City from disclosing information, it implicates the same First Amendment restrictions as a gag order, and the City fails to justify it under those standards. *See* BGA Br. at 28-29. Nor is there a textual basis in the grand jury statute to impose secrecy on a subpoena recipient, as discussed above. But more simply, any purported justification for the secrecy order equally applies to the OSP's report, which identifies all of the grand jury witnesses and more, as BGA has long argued.

II. THE COURT SHOULD NOT ALLOW PROSECUTORS' ACTIONS TO BE SECRET SIMPLY BECAUSE THEY EMPANELED A GRAND JURY

A. "Matters Occurring Before the Grand Jury" Does Not Apply

1. OSP Offers No Supporting Case Law

OSP does not dispute that the plain language of the phrase "matters occurring before the grand jury" supports only BGA's interpretation. It does not dispute the case law establishing that the grand jury and prosecutor are independent, and it offers no evidence that the withheld records reveal anything about the grand jury or its activities. Instead, all of OSP's eggs are in a single basket: its claim that grand jury case law has broadly interpreted the phrase to include all information about a prosecutor's investigation where a grand jury has been empaneled, without any further showing. OSP's case law fails to establish that claim, and squarely supports BGA's interpretation.

The first case on which OSP relies is *Board of Education v. Verisario*, 143 Ill. App. 3d 1000 (1986). It holds that the statute makes secret "only the essence of what takes place in the grand jury room." *Id.* at 1007; *see also* BGA Br. at 31-32. In fact, it distinguished information presented to the grand jury and information that was not:

> The Board also argues that the documents were not matters occurring before the grand jury because the documents were never disclosed to the grand jury. The record, however, shows that the trial court did not hear evidence on, or decide, this question of fact. We cannot, therefore, decide if disclosure was justified on this basis.

Verisario, 143 Ill. App. 3d at 1007 n.1. This is far from "flowery language fixated on the literal grand jury room," OSP Br. at 16, goes to the heart of the issue on the merits, and confirms that even under grand jury law, OSP must support its claims with evidence. *See also Senate of the Com. of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 583 (D.C. Cir. 1987) ("The district judge stated that 'the release of grand jury exhibits will reveal

much about the scope and focus of the grand jury's investigation,' but he did not indicate the record support for that statement. . . .We hold only that the defendants have not yet supplied the information a court must have in order to intelligently make that judgment.") (Ginsburg, J.). And while *Verisario* sought to "protect the identity of witnesses and the strategy or direction of the investigation," OSP Br. at 15, that is for the grand jury's witnesses and investigation, not the independent activities of the prosecutor.

Next OSP cites *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51 (1978). The case involved efforts to obtain testimony from grand jurors about the prosecutor's examination of witness before the grand jury, which is of no help to OSP. *Id.* at 56; *see* BGA Br. at 32. It contains the same "flowery language fixated on the literal grand jury room," stating that "the secrets of the grand jury room shall not be revealed," quoting all the way back to a decision of this Court in 1893. *Id*. at 56, *quoting Gitchell v. People*, 146 Ill. 175, 183 (1893)). Apparently this fixation that OSP finds so objectionable runs deep, but it proves that the grand jury statute is concerned only with secrecy about the grand jury.

From there, OSP turns to federal cases, starting with *In re Special Grand Jury 89-2*, 450 F.3d 1159 (10th Cir. 2006). That case involved efforts by grand jurors to release "testimony or discussion before the grand jury" about environmental crimes at the Rocky Flats Nuclear Weapons Plant. *Id.* at 1162, 1177. While OSP grabs onto the word "broadly" in the decision, OSP Br. at 14-15, it omits the remainder of the passage, which fully supports BGA's position by focusing on the grand jury: "We have broadly interpreted Rule 6(e) to encompass 'what took place in the grand jury room,' [citation], or 'what is said or . . . takes place in the grand jury room.'" *In re Special Grand Jury 89-2*, 450 F.3d at 1176.

OSP's next case is *In the Matter of Eyecare Physicians of America*, 100 F.3d 514 (7th Cir. 1996), a case in which the special prosecutor in this case, in his private capacity, represented a company seeking disclosure of a sealed search warrant application and affidavit that referenced "grand jury testimony and subpoenas," as well as material that was sealed for unrelated reasons. *Id.* at 516. OSP says the case stands for the proposition that "matters occurring before the grand jury includes testimony or materials that could identify those cooperating with or targeted by the ***government's inquiry***." OSP Br. at 15 (emphasis added). It holds no such thing.

The *Eyecare Physicians* motion was brought pursuant to a claimed "due process right to review the affidavit under the Fourth Amendment" and Federal Rule of Criminal Procedure 41(g). 100 F.3d at 516, 517. Discussion of the grand jury was peripheral to those issues, and there was no dispute that materials were "matters occurring before the grand jury," but only whether Eyecare Physicians proved a "particularized need" for them, which it supported only with "bald assertions." *Id.* at 516, 518-19. While the opinion used the phrase "government's investigation," it did so only in a distinct closing passage about "additional consequences" from disclosure unrelated to the grand jury. *Id.* at 519. It surely did not erase the distinction between the grand jury and the "government." *See* C1546 (grand jury "belongs to no branch of institutional Government" (quotation and citation omitted)); *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (grand jury is "an investigative body acting independently of either prosecuting attorney or judge").

OSP's next offering is *Securities & Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980). It is unclear why OSP relies on a "forty-year-old

[D.C.] Circuit opinion." *See* OSP Br. at 13. But the case is irrelevant. Dresser sought protection from an SEC subpoena, claiming that responding to the subpoena would somehow reveal "many or all of the Dresser documents that have already been subpoenaed by the grand jury." *Dresser*, 628 F.2d at 1382. The D.C. Circuit rejected that argument for reasons that do not matter and did not address the issue presented here.

That leaves only *In re Grand Jury Investigation*, 610 F.2d 202 (5th Cir. 1980)—another "forty-year-old" decision. The case involved a motion for sanctions against federal prosecutors for disclosing to the press matters occurring before the grand jury. *Id.* at 207. The materials "discussed the actions of the grand jury and the scope of its inquiry," and the case held, like many others, that the secrecy provisions apply only to information that "may tend to reveal what transpired before the grand jury." *Id*. at 207, 216. This included the following examples, among others:

- "that the grand jury would hear testimony . . . about [the target's] relationship with a New York bank from which he had obtained a large personal loan" and that "the bank officers were the first of a series of witnesses who would be called before the grand jury"
- "the contents of documents presented to the grand jury"
- the "particular banks" and "sale of securities" the grand jury examined
- "that the grand jurors were attempting to determine whether [the target] had knowingly misapplied bank funds and whether he had made false statements on applications for loans for his relatives"

Id. at 207 n.1, 209 n.2; *see also* 211 n.3, 216 n.4. And when discussing more generally the kinds of activities that are secret, the court included only ones that would actually take place before the grand jury: "a witness's testimony"; "statements which reveal the identity of persons who will be called to testify"; and statements "which report when the grand jury will return an indictment." *Id.* at 216-17.

In addition, the case, like *Verisario*, expressly confirms that "matters occurring before the grand jury" does not include the independent conduct of the prosecutor:

> A discussion of actions taken by government attorneys or officials, *e.g.*, a recommendation by the Justice Department attorneys to department officials that an indictment be sought against an individual does not reveal any information about matters occurring before the grand jury.

Id. at 217; *see also id.* at 217 n.5 (further examples). It bears reminder that the request here did not ask for records disclosing the identity of witnesses who appeared before the grand jury (which are disclosed in the 162-page report anyway), but of people interviewed by the OSP, as well as communications with Daley family members, former Corporation Counsel Mara Georges, or their attorneys, which would reveal how the OSP interacted with them but nothing about the grand jury. SR16. But, of course, BGA need not prove that these are not grand jury materials because OSP bears the burden of proof, by clear and convincing evidence, and offers none.

That is the extent of the law cited for OSP's argument that its "broad" interpretation is "grounded in over thirty years of Illinois law, and decades more of federal precedent." OSP Br. at 14. No case supports that sweeping and conclusory assertion, many are irrelevant, and several expressly support BGA's interpretation.

2. The Narrow Construction Rule Need Not Even Be Applied

While OSP attempts to distinguish FOIA's many narrow-construction decisions, that doctrine and its application to derivative exemptions under Section 7(1)(a) are on the most solid of footing. *See* BGA Br. at 29-31. But regardless, OSP's sole contention—still the only basket holding its eggs—is that "BGA is employing the narrow construction principle to ***depart*** from a statute's accepted meaning when that statute is invoked as a Section 7(1)(a) exemption." OSP Br. at 18 (emphasis in original). As discussed above,

OSP's "accepted meaning" is only of its own creation, and its own cases show that the "accepted meaning" excludes the independent actions of prosecutors, as BGA argues. Thus, even apart from the narrow construction rule and the plain meaning of the statutory terms, OSP has failed to meet its burden. But if the Court finds the provision unclear, which it should not, the narrow construction rule prevails.

3. OSP's Approach Is Impractical and Harms Accountability

As with the City's argument discussed above, the Court should decline OSP's invitation to resolve this case on policy grounds. But if the Court is so inclined, they favor transparency, not broad secrecy.

Imagine for a moment the case of an officer-involved shooting in the City of Chicago.[8] The shooting officer claims that a young man was "lunging" at the officer with a knife. There is no dash cam or body cam video and the on-scene officers said they saw nothing or supported the shooting officer's story. Neither the police department nor the oversight agency appointed by the Mayor conducts a very thorough investigation, but due to public pressure, the state's attorney has no choice but to commit to investigating the officer. He immediately empanels a grand jury.

Now imagine the state's attorney discovers there is surveillance video that the police never collected showing that the man with the knife was retreating and not "lunging." But he never presents the video to the grand jury, and so the grand jury does

[8] For background, which is modified here to illustrate BGA's point, see Police Accountability Task Force, Recommendations for Reform (April 2016), at 2-4, *available at* https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf (last accessed Sept. 4, 2018).

not indict.[9] Under BGA's version of the statute, FOIA would require the state's attorney to release the video. Under OSP's, the public would never know the truth or learn of the state's attorney's conduct, and the grand jury would not even know it existed. If such a video falls within the "ample prosecutorial records" allegedly still subject to FOIA under OSP's interpretation of the law, it is surely unclear how. OSP Br. at 22.

BGA understands and respects the reasons for ***grand jury*** secrecy. That is not what is at issue. The Court instead must decide the extent to which prosecutors are shielded from public scrutiny into their own actions whenever they elect to empanel a grand jury. Indeed, OSP's (flawed) explanation of how prosecutors allegedly "will be incentivized to, or certainly easily could" defeat transparency under BGA's interpretation of the law demonstrates BGA's point, as do the anti-transparency arguments made by state's attorneys in *Nelson*. OSP Br. at 23. Nothing in BGA's interpretation will compromise the secrecy of the independent grand jury, and FOIA exemptions already protect things like the identities of witnesses that, unlike here through the actions of the OSP and the criminal court, have not been released. *See* OSP Br. at 22. Policy favors transparency and accountability of prosecutors, not expansive secrecy.

B. "When Another Law So Directs" Applies to FOIA

BGA addressed this argument in detail in its opening brief, and OSP offers little more than invectives in response. *See* OSP Br. at 24 (BGA's argument is "a jumble of self-interested statutory machinations"). OSP's reliance on the general-versus-specific

[9] *See* R. Simmons, The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose, 65 Clev. St. L. Rev. 519, 527 (discussing use of grand jury as political cover for prosecutor's decision not to indict in Tamir Rice case); *see also* OSP Br. at 21 (agreeing with BGA that prosecutors are not required to present all relevant evidence to grand jury). BGA need not, and does not, accuse OSP of this kind of egregious conduct, but the Court's decision here will have far reaching consequences.

doctrine, as well as its repeal-by-implication argument, OSP Br. at 12, might make sense if the grand jury statute simply said the records could not be released without exception. But instead, it expressly allows for disclosure when a law, like FOIA, so directs, and far from "only a general presumption that nonexempt public records must be disclosed," *id.*, FOIA expressly directs that they "shall" be disclosed. 5 ILCS 140/3(a). Therefore, unless a record is exempt under FOIA, the "when a law so directs" clause in the grand jury statute applies, and nothing "specifically prohibits" disclosure. But, the Court need not likely reach this question because OSP failed to prove, by clear and convincing evidence, that the records it withheld are "matters occurring before the grand jury."

C. OSP Has Not Appealed the Ruling on Billing Records

Finally, OSP has not appealed the Appellate Court's ruling that OSP failed to prove that its billing records are exempt from disclosure. That issue, along with related relief BGA sought under Section 11 as a prevailing party, should be resolved on remand regardless of the outcome of BGA's appeal.

III. CONCLUSION

OSP is correct that this case is about more than just BGA's FOIA requests. OSP Br. at 10. It is about the continued vitality of important FOIA doctrines and the ability of the public to fulfill its statutory duty of monitoring the government at a time when it is needed more than ever. The Court should reverse the Appellate Court and affirm those principles.

RESPECTFULLY SUBMITTED,

/s/ Matthew V. Topic

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CERTIFICATION 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 20 pages.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements set forth in this instrument are true and correct and that the foregoing brief was electronically filed with the Illinois Supreme Court using the Odyssey eFileIL system and was served by emailing a PDF copy to the persons named below at the email addresses indicated, on September 5, 2018.

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