No. 121124

IN THE SUPREME COURT OF ILLINOIS

Better Government Association, Plaintiff-Appellant, **v.** **Illinois High School Association; Consolidated High School District 230,** Defendants-Appellees.	On appeal from the Appellate Court of Illinois, First District, No. 15-1356 There on appeal from the Circuit Court of Cook County, Illinois, Chancery Division, No. 2014 CH 12091 Hon. Mary L. Mikva, Presiding

BRIEF OF DEFENDANT-APPELLEE CONSOLIDATED HIGH SCHOOL DISTRICT NO. 230

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. ISSUES PRESENTED FOR REVIEW

As to the allegations against District 230, the issues presented for review are the following:

1. Does Section 7(2) of the Illinois *Freedom of Information Act* ("FOIA") require District 230 to attempt to obtain the IHSA's records from the IHSA? Namely, are all of the following criteria met in this case:

   a. Do the IHSA documents requested here qualify as "public records" of District 230?

   b. Does the IHSA perform a governmental function?

   c. If the IHSA performs a governmental function, is it "on behalf of" District 230?

   d. If the IHSA performs a governmental function on behalf of District 230, are the documents requested here "directly related" to that governmental function?

2. If the IHSA is itself subject to FOIA, does District 230 have any obligation under FOIA to obtain and produce IHSA records that are of no direct relevance to District 230, where a FOIA requester could obtain the records via a FOIA request submitted directly to the IHSA?

II. STATUTES INVOLVED

The following statutory provisions of FOIA are relevant to the allegations pertaining to District 230 in this case:

> 'Public records' means all records * * * pertaining to the transaction of public business, regardless of

> physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

5 ILCS 140/2(c).

> Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act. * * *

5 ILCS 140/3(a).

> A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

5 ILCS 140/7(2).

III. STATEMENT OF FACTS

The Illinois High School Association ("IHSA") is a membership organization consisting of more than 800 public and private high schools in Illinois (C00154 ¶ 4). The IHSA performs a number of roles, all related to organizing and regulating the conduct of interscholastic competitions between high schools. (C00005-06 ¶¶ 9, 13-25). Consolidated High School District 230 ("District 230") is a three-high-school district, and its high schools are members of the IHSA. In 2014, the Better Government Association ("BGA"), a government watchdog organization (C00004 ¶ 5), submitted a FOIA request to the IHSA for the following:

> 1. Any and all IHSA contracts for accounting, legal, sponsorship and public relations/crisis communications services for the 2012-13 and

> 2013-14 fiscal years. This should include, but not be limited to, the IHSA's contracts with Home Team Marketing and Striegel Knobloch & Co.
>
> 2. Any and all IHSA sponsorship contracts/ agreements covering the 2012-13 and 2013-14 fiscal years. This should include, but not be limited to, contracts/agreements with Nike, Gatorade and Country Financial.
>
> 3. Any and all licensed vendor applications...for companies licensed in the 2013-14 fiscal year.

(C00008 ¶ 39; C00149). The IHSA denied the request on the grounds that it is not subject to FOIA—*i.e.*, that it is not a "public body." (C00008 ¶ 40; C00090).

The BGA then submitted a FOIA request to District 230, requesting the same IHSA documents. (C00009 ¶ 41; C00092). District 230 denied the request on the grounds that it did not have any of the requested records and that it was not obligated to obtain them from the IHSA under Section 7(2), FOIA's outsourcing rule. (C00009 ¶¶ 44, 46; C00098).

The BGA challenged both denials by filing a lawsuit in Cook County Circuit Court. (C00003-11). The IHSA filed a motion to dismiss under Section 2-619 of the Illinois *Code of Civil Procedure* (C00134-275), and District 230 filed a motion to dismiss under Section 2-615 (C00116-131). Judge Mikva granted the IHSA's and District 230's respective motions to dismiss, with prejudice. (C00336-337). The appellate court affirmed the trial court's dismissal of the BGA's complaint. (A-175).

IV. STANDARD OF REVIEW

This Court's review of a trial court's 2-615 dismissal is de novo. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147-48 (2002). The Court can sustain the decision of

the lower courts on any basis, regardless of the lower courts' rationale. *People v. Johnson*, 208 Ill. 2d 118, 128 (2003).

V. ARGUMENT

The BGA and its amici portray this case as being about the danger to the public citizenry of decreased transparency due to privatization, but that is not what this case is about. Privatization describes the shift of a function from public or government control or ownership to private control or ownership. Black's Law Dictionary 1316 (9th ed. 2009). But in this case, there is no privatization. The governmental entity here, a school district, isn't alleged ever to have performed any functions resembling those of the IHSA and isn't alleged to have handed over its traditional or statutory duties or responsibilities to a private entity. Rather, the school district is using the services of a private organization that performs a service not provided by any individual governmental entity.

The primary public policy issue in this case is not whether privatization will lead to diminished transparency. Rather, the public policy issues are whether every private entity that works with public schools or other public bodies will find its every record and communication now subject to FOIA and whether public bodies will have to serve as the conduits to facilitate such inquiries.

What is lost in the BGA's public policy argument is the fact that the legislature already balanced these competing interests and already developed the litmus test. It is found in Section 7(2) of FOIA—FOIA's outsourcing provision. The language is plain, and the multiple factors are apparent. But instead of arguing how the factors apply, the BGA invokes law journal after law journal in arguing how

privatization will be the downfall of transparency and lead to private police forces that are outside the scope of public scrutiny. These arguments are better made in the legislative process. No one—least of all District 230—is advocating that public bodies should be entitled to simply delegate their core functions to a private company for the purpose of avoiding transparency. Fortunately, that is ***not*** the test the legislature has created.

A. The legal test in Section 7(2) of FOIA governs whether District 230 is obligated to obtain and disclose IHSA documents.

The general statutory framework of FOIA is that "public bodies" have to disclose their "public records" upon request, unless the records are exempt under the law. While the IHSA's issue is whether it is a "public body" subject to FOIA, there is no question that District 230 is a public body and is subject to FOIA. The question for District 230, then, is whether any provisions of FOIA compel District 230 to obtain the IHSA's business records from the IHSA and produce them to the BGA.

FOIA Section 7(2) addresses a public body's obligation to obtain and produce public records that are in a third party's possession. It sets forth the proper test to be applied in this case:

> A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.

5 ILCS 140/7(2). Section 7(2) uses the defined term, "public record," which means:

> all records * * * pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or

> having been or being used by, received by, in the possession of, or under the control of any public body.

5 ILCS 140/2(c). FOIA's outsourcing rule has yet to be interpreted by this Court. On its face, the rule requires five elements to be met before a public body has any obligation to obtain or produce a record from a government contractor under FOIA:

(1) the record must qualify as a **"public record"** as defined by FOIA—i.e., it must (a) pertain to the transaction of public business and (b) have been prepared by or for or been used by, received by, in the possession of, or under the control of a public body;

(2) the contractor must perform a **"governmental function"**;

(3) the governmental function must be performed **"on behalf of"** the public body;

(4) the record must **"directly relate"** to the governmental function being performed on the public body's behalf; and

(5) the record must **not be otherwise exempt**.

The BGA's statement of the issues as to District 230 and its characterization of the Section 7(2) test are misleading for a few reasons. First, in its statement of the issues presented as to District 230, the BGA does not even mention Section 7(2) and suggests that the only issue is whether the IHSA performs a governmental function. (BGA Br. 1). Second, the BGA ignores a statutorily defined term, "public record" (BGA Br. 18 ("A *record* that 'directly relates…'") (emphasis added)), which would negate an important limitation on the records a public body must obtain and produce. Third, the BGA quotes Section 7(2) as applying when an entity has contracted to perform a governmental function "on behalf of *a* public body" (BGA

Br. 18 (emphasis added)), even though the statute takes a more individualized approach and requires the governmental function to be performed on behalf of *the* public body—i.e., the one to which the FOIA request was made.

If any one of the five elements is not established, Section 7(2) does not apply, and the BGA cannot prevail against District 230. In this case, only the first four elements are at issue as to District 230.

B. Applying Section 7(2) to this case, District 230 met its obligation under FOIA.

If District 230 had the IHSA contracts and vendor applications requested by the BGA in its possession or control, this would have been a simple FOIA request. District 230 either would have produced the documents or would have asserted an exemption in denying the BGA's FOIA request.

But District 230 didn't have the documents, and it didn't have an obligation to get them from the IHSA for four reasons. First, the requested documents were not "public records" of District 230. Second, the IHSA was not performing a "governmental function." Third, even if the IHSA *was* performing a governmental function, it was not doing so "on behalf of" District 230. And fourth, the IHSA contracts and vendor applications were not "directly related" to any function being performed on District 230's behalf. We address each of them in turn.

1. The IHSA contracts and vendor applications requested by the BGA were not District 230's "public records."

FOIA's outsourcing provision reads, in relevant part, "A *public record* that is not in the possession of a public body but is in the possession of [certain government contractors in specific situations] shall be considered a public record of

the public body." 5 ILCS 140/7(2) (emphasis added). Under its plain language, the outsourcing provision literally applies only if the requested record is a "public record." In this case, the IHSA contracts and vendor applications were not "public records" of District 230, so District 230 had no obligation to obtain them from the IHSA or disclose them to the BGA.

a. "Public record" is a defined term under FOIA and cannot be ignored.

The primary object in construing a statute is to ascertain and give effect to the intent of the legislature, the surest and most reliable indicator of which is the statutory language itself, given its plain and ordinary meaning. *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶ 24; *People v. Chenoweth*, 2015 IL 116898, ¶ 21. Further, when a statute defines the very terms it uses, those terms *must* be construed according to the definitions contained in the statute. *People v. Chenoweth*, 2015 IL 116898, ¶ 21 (emphasis added); *State Farm Mutual Automobile Insurance Co. v. University Underwriters Group,* 182 Ill. 2d 240, 244 (1998). Those definitions furnish "official and authoritative evidence of legislative intent and meaning and should be given controlling effect." *Beecher Medical Center, Inc. v. Turnock*, 207 Ill. App. 3d 751, 754 (1st Dist. 1990).

A court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. *Chenoweth*, 2015 IL 116898, ¶ 21. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Id.*; *Board of Education of Springfield School District No. 186*, 2017 IL 120343, ¶ 25. A court may consider the reason for the law, the problems sought to be remedied, the purposes to

be achieved, and the consequences of construing the statute one way or another. *Id.* Also, a court presumes the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice. *Id.*

Particularly in the FOIA context, courts have declined to ignore explicit statutory language. *See, e.g., City of Champaign v. Madigan*, 2013 IL App (4th) 120662 (analyzing whether private communications between individual city council members met the statutory requirements that a requested record be a "public record" of a "public body"); *Quinn v. Stone*, 211 Ill. App. 3d 809 (1st Dist. 1991) (analyzing under the prior FOIA statute whether an individual alderman qualifies as a "public body").

In light of these standards, if the statutory definition can be given a reasonable meaning within the statute, it must be interpreted in that manner.

b. The requirement that the documents at issue qualify as "public records" has legitimate meaning in the context of FOIA, especially Section 7(2).

The fact that access is given only to "public records" is a meaningful limitation on the scope of the outsourcing rule. It means that even if all the other conditions of Section 7(2) are met, FOIA requesters still do not have *carte blanche* access to contractors' records. Were Section 7(2) to apply to all government contractor records—regardless of whether they meet the statutory definition of being a "public record"—it would mean the legislature has required governmental contractors to disclose *more* records than public bodies are required to disclose. That cannot have been what the legislature intended, particularly in light of its legislative declaration that FOIA "is not intended to cause an unwarranted invasion of personal privacy." 5 ILCS 140/1.

Instead, even assuming the other criteria are met, FOIA requesters only have access to contractors' records that (1) "pertain to the transaction of public business" and (2) were "prepared by or for, or [were or are] being used by, received by, in the possession of, or under the control of" a public body. 5 ILCS 140/2(c). Put differently, the outsourcing rule does not change *what* records public bodies are obligated to disclose to requesters; the obligation still only applies to "public records." Rather, the rule clarifies *where and under what circumstances* public bodies have to look beyond records in their own possession in responding to FOIA requests. This is key to understanding the entire framework of Section 7(2).

The BGA argued previously in this case that applying Section 7(2) only to "public records" is unnecessary, because public bodies already have a separate obligation under Section 3(a) of FOIA to disclose "public records." 5 ILCS 140/3(a) ("Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act…"). The BGA's theory is, if Section 3(a) already required disclosure of all "public records," Section 7(2) must be interpreted to apply more broadly, or else it is duplicative. In fact, the opposite is true. Section 7(2) is a limitation on the general rule.

The first half-sentence of Section 3(a) requires public bodies to disclose all public records upon request. But the legislature recognized that the disclosure obligation has limits, and so Section 3(a) specifically defers to Sections 7 and 8.5 of FOIA, including Section 7(2). Thus, it is possible to read Section 3(a) and Section 7(2) consistently with one another and to give meaning to both. If a public record is not in the public body's possession but is in a contractor's possession, we look to

Section 7(2) for the rule. Otherwise, we analyze the situation under Section 3(a). Either way, and of critical importance to this case, FOIA only requires disclosure of "public records." FOIA *never* requires public bodies or their subcontractors to disclose records that do not meet that threshold definition.[1]

The "public record" reference in Section 7(2) has meaning and can be read consistently with the rest of FOIA. It should be read and interpreted accordingly, not ignored. If, as the BGA has argued previously in this case, the legislature's use of a defined term simply is a result of poor draftsmanship, the BGA can advocate for a legislative clarification. In the meantime, it is not the Court's job to rewrite the law or District 230's obligation to guess the legislature's intent.

c. *The IHSA documents in this case were not "public records" of District 230.*

To be public records of District 230, the IHSA contracts and vendor applications must have (a) pertained to the transaction of public business and (b) been prepared by or for District 230 or been used by, received by, in the possession of, or under the control of District 230. 5 ILCS 140/2(c); *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 30. They were neither.

i. *The IHSA documents do not "pertain to the transaction of public business."*

The 2010 FOIA amendment that added Section 7(2) also added to the definition of public records the phrase, "pertaining to the transaction of public business." (P.A. 96-0542). The concept of "public business" necessarily implies a

[1] Indeed, even where FOIA talks about "records" instead of "public records," such as in the section on a presumption of transparency, it only contemplates records "*in the custody or possession* of the public body." 5 ILCS 140/1.2 (emphasis added).

relationship to governmental action. As this Court noted in the tort immunity context, "'Public business' is *the business of government*[,] and a local public entity must either be owned by or operated and controlled by a local governmental unit." *O'Toole v. Chicago Zoological Society*, 2015 IL 118254, ¶ 19 (quoting *Carroll v. Paddock*, 199 Ill. 2d 16 (2002); *see also Brugger v. Joseph Academy, Inc.*, 202 Ill. 2d 435 (2002)) (emphasis added). This Court further clarified that "public business" requires a showing that the activity "'benefits the entire community without limitation' and is 'tightly enmeshed with government either through direct governmental ownership or operational control by a unit of local government.'" *Id.*, ¶ 21.

The point is this: "public business" does *not* refer to any activity that "belongs to the people at large" or relates to "community interests" or "benefits the general public," as the BGA suggests. (BGA Br. 18-19). If the test were that simple, then every museum, theater, concert hall, shopping mall, airport, a wide swath of 501(c)(3) charitable organizations—and even Disney World—would be considered to conduct "public business." That is not the test. There must be a governmental connection.

In this case, that link is missing. District 230 does not own the IHSA or have operational control over the IHSA. The BGA's complaint referenced a number of arguments made by the IHSA in a prior lawsuit, in which the IHSA claimed it was conducting "public business." However, as the appellate court recognized, those were merely legal arguments made by the IHSA, not evidentiary admissions providing factual evidence that IHSA is controlled by its member schools, much less by a school *district. Better Government Ass'n v. Illinois High School Ass'n*, 2016 IL App (1st) 151356, ¶ 34. Admittedly, some individual public school employees are IHSA

board members. But that is not enough to show a connection to government. The BGA cannot demonstrate that public school districts, which are governed by local boards of education, not individual employees, own or operate and control the IHSA, particularly in its day-to-day affairs.

The IHSA contracts and vendor applications requested by the BGA do not pertain to the transaction of public business. Rather, they are the records of a private entity pertaining to the transaction of its own business. They therefore are not public records of District 230, and FOIA's outsourcing provision does not apply.

ii. The IHSA documents were not, and were not alleged to have been, prepared by or for District 230 or been used by, received by, in the possession of, or under the control of District 230.

Regardless of the level of governmental involvement, the second prong of the public-record analysis is not met. The IHSA documents requested were not prepared by or for, used by, received by, in the possession of, or under the control of any public body—in this case, District 230. In analyzing this requirement, the case law is clear that a "public body" under FOIA refers to the entire body itself, not an individual member or employee of that body. *See City of Champaign v. Madigan*, 2013 IL App (4th) 120662 (concluding that individual city council members are not a "public body" under FOIA); *Quinn v. Stone*, 211 Ill. App. 3d 809 (1st Dist. 1991) (concluding that an individual alderman is not a "public body" under FOIA).

In this case, there is no allegation by the BGA that the IHSA contracts and vendor applications were prepared by or for District 230 (or any other public body, for that matter), received by District 230, in District 230's possession, or under District 230's control. While one of District 230's employees sits on the IHSA's board, neither he nor District 230 is alleged to have the requested records. Even if

the District 230 employee saw these records—a point that has not been alleged and that District 230 does not admit but assumes arguendo—District 230, as a public body, never did.

This is fatal to the BGA's case, regardless of whether the IHSA was transacting "public business" or performing a "governmental function." Since the requested documents did not meet the statutory definition of being a "public record" of District 230, the outsourcing rule was not triggered. District 230 therefore had no obligation to attempt to obtain the records from the IHSA.

2. The IHSA does not perform a "governmental function."

The second critical element of FOIA's outsourcing rule is that a contracting entity is performing a "governmental function." 5 ILCS 140/7(2). The mere existence of this requirement means not *every* governmental contractor is affected by Section 7(2); it only applies to those contractors performing a governmental function. That is not the case here.

Although this Court has been distinguishing whether various activities are "governmental functions" for more than 100 years, *see, e.g., City of Chicago v. Chicago League Ball Club*, 196 Ill. 54 (1902), there is no definitive bright-line test. In describing the governmental/proprietary function distinction,[2] this Court said, "If [a] duty or act involves the general public benefit, rather than a corporate or business undertaking for the municipality's corporate benefit, then the function is governmental whether the duty be directly imposed on the municipality or is

[2] The governmental/proprietary distinction has been supplanted in the context of immunity by the *Local Governmental and Governmental Employees Tort Immunity Act. In re Chicago Flood Litigation*, 176 Ill. 2d 179, 191 (1997); *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 379 (1997). The Court's definition nevertheless informs the discussion in the FOIA context.

voluntarily assumed." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 191 (1997). Illinois courts also have looked to Black's Law Dictionary for guidance and defined a governmental function as "[a] government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public." *Demos v. Pappas*, 2011 IL App (1st) 100829, ¶ 25 (quoting Black's Law Dictionary 704 (7th ed. 1999)). Both definitions reflect three elements of a governmental function: (1) it must involve conduct performed or delegated by a governmental entity; (2) it must fall, either explicitly or implicitly, within a function prescribed by a constitution, law, or regulation; and (3) it has to be carried out for the general public's benefit. Even if we were to assume the third factor is met here, the first two are not.

a. The IHSA's function does not involve conduct by a governmental entity or conduct a governmental entity would perform, but for its subcontracting of the function.

As the trial court and the appellate court in this case recognized, the same function may or may not be considered a governmental function depending on who is doing the act. Take education,[3] for example. It can be a governmental function, as in the case of a public school district, or not, as in the case of a private, parochial school. In this case, the function the IHSA performs—developing, supervising, and promoting certain interscholastic competitions among its member schools—is not alleged to have been performed by District 230 or other public school districts historically.

[3] The BGA asserts that the IHSA's function is "education." (BGA Br. 23-24). The IHSA's role is *related* to education because its members are all high schools. But it is not providing education, a point that is discussed in more detail below.

This makes sense, as individual public school districts do not have the means or jurisdiction to organize such a statewide effort. The trial court and appellate court correctly realized that a public body *could* exist to perform the same function as the IHSA, but it doesn't. The concept of external, private organizations providing a framework for interscholastic events is common in Illinois. We see it in sports at the elementary and middle school level (Illinois Elementary School Association ("IESA")), the high school level (IHSA, Illinois Drill Team Association, Amateur Hockey Association Illinois), and the college level (National Collegiate Athletic Association ("NCAA")). We also see it in non-athletic contexts, such as mock trial (Illinois State Bar Association), theater (Illinois High School Theatre Festival), music (Illinois Music Education Association), math (ICTM High School Math Contest, MathCounts), and science and engineering (Worldwide Youth in Science and Engineering), to name just a few.

These functions are not "governmental," however, unless they are conducted by a governmental entity or would be, but for the government entity's subcontracting of its function. Otherwise, every external organization that works with public schools—from mentoring organizations like Big Brothers Big Sisters to private companies hosting student interns to private colleges placing student teachers—would risk its private mission being considered a governmental function. The same would be true for private organizations that support other types of public bodies.

The Illinois Press Association and the Illinois Broadcasters Association implicitly acknowledge District 230's point here. Their amici brief decries that "[t]he very purpose of FOIA will be absolutely undercut by a ruling that a public body (or

bodies) can establish a separate, private entity, and assign to that entity specific duties to be conducted by that private body." (IPA/IBA Amici Br. 6-7). It then goes on to list four examples of governmental entities ceding their former function to a private actor. (Id. 7). Those cases might or might not present a harder question for the Court, but the Court can tackle that question another day, as that is not what is happening in this case. Here, there are no allegations that District 230 ceded or subcontracted to the IHSA a function it or any other governmental entity formerly undertook, so the IHSA's function is not governmental.

b. Nothing in the law requires a governmental entity to organize interscholastic competition for extracurricular activities.

The IHSA's function also does not fall, either explicitly or implicitly, within a function prescribed by a constitution, law, or regulation to a governmental entity. In Illinois, extensive legal requirements for public schools can be found in the Illinois Constitution (Ill. Const. 1970, art. X, § 1), the Illinois *School Code* (105 ILCS 5/1-1, *et seq.*), and regulations of the Illinois State Board of Education (Ill. Admin. Code tit. 23). Legislative requirements for education are comprehensive and extensive; the *School Code* currently exceeds 800 pages. Under the legislative scheme, high schools are required to provide driver's education (105 ILCS 5/27-24.2); character/citizenship education (105 ILCS 5/27-12); language arts, writing, mathematics, science, social studies, music, art, foreign language, and vocational education (105 ILCS 5/27-22(e)); physical education (105 ILCS 5/27-6); health class (105 ILCS 110/3); instruction on "American patriotism and the principles of representative government" (105 ILCS 5/27-3); instruction on Internet safety (105 ILCS 5/27-13.3); instruction, study, and discussion of effective methods by which

pupils may recognize the danger of and avoid abduction (105 ILCS 5/27-13.2); and instruction on preventing use of steroids (105 ILCS 5/27-23.3), to name a few.

Glaringly absent is any requirement that high schools provide extracurricular activities, let alone organize interscholastic competitions for those activities. Students are neither required nor entitled to participate in such interscholastic competitions. *Jordan v. O'Fallon Township High School District No. 203 Board of Education*, 302 Ill. App. 3d 1070, 1076 (5th Dist. 1999); *Clements v. Board of Education of Decatur Public School District No. 61*, 133 Ill. App. 3d 531, 533 (4th Dist. 1985); *Better Government Ass'n v. Illinois High School Ass'n*, 2016 IL App (1st) 151356, ¶ 26. And even if providing extracurricular activities for students were considered a governmental function (*see, e.g., Repede ex rel. Repede v. Community. Unit School District No. 300,* 335 Ill. App. 3d 140, 143 (2d Dist. 2002) (finding a cheerleading squad to be a "governmental activity")), that still does not make the larger, statewide function of the IHSA a governmental function. That public schools decide to participate in IHSA events and be subject to IHSA rules does not transmute the IHSA's function into one that public schools are required to perform.

The IHSA also argues that its function is non-governmental, and District 230 adopts those arguments by reference. The IHSA does not perform the nebulous function of "education" just because it affects one aspect of the operation of high schools. Rather, it is acting as an umbrella membership organization to provide a framework and enable a competitive uniformity among all public *and private* high schools that wish to participate. That function is not governmental in nature, as it does not involve conduct performed or ceded by a governmental entity and does not fall, either explicitly or implicitly, within a function prescribed to a governmental

entity by a constitution, law, or regulation. FOIA's outsourcing rule therefore is not triggered.

3. Even if the IHSA were performing a governmental function, it is not doing so "on behalf of" District 230.

To trigger FOIA's outsourcing rule, the contracting entity must do more than perform a role that could be considered a governmental function. Based on the explicit language of Section 7(2), the governmental function has to be performed "on behalf of the public body." 5 ILCS 140/7(2). "On behalf of" means "as agent [or] representative of." Garner's Dictionary of Legal Usage 106 (3d ed. 2011). In other words, the contractor must stand in the place of the public body and perform a governmental function *that the public body otherwise would perform itself.*

Thus, it is not enough to analyze whether a governmental function is being performed. If the contractor's function is not one the public body would otherwise perform, the outsourcing rule does not apply. That is partially why, for example, even though "education" is a traditional governmental function, private schools are not subject to FOIA. They are not providing education *on behalf of* a public body.

In this case, the IHSA's function is not one that any Illinois high school or school district would or could perform. Presumably that's why the IHSA was first formed. Imagine, for example, if District 230 or one of its individual high schools tried to develop, monitor, and implement a statewide system of interscholastic competition that applied to any public or private high school that wished to join. The logistics of District 230 undertaking such an effort would be challenging, and the expenses enormous. Moreover, it would be unrealistic to expect high schools from

around the state, some of which might compete against District 230 schools, to voluntarily submit to the rulemaking authority of District 230.

That is why the current system is more logical. A neutral, independent organization sets the rules of competition for all member schools. That is the model at every level of interscholastic competition, from the IESA to the IHSA to the NCAA.

These entities provide a function that is uniquely independent and that realistically could not be performed by a single school or school district. It is incorrect to say the IHSA is acting "as an agent or a representative of" District 230, when District 230's high schools are but three of the hundreds of represented members of the IHSA and are being treated the same as any other member. The IHSA is therefore not performing a governmental function *on behalf of* District 230, and the FOIA outsourcing rule does not apply.

4. The IHSA records requested by the BGA were not "directly related" to a governmental function performed on District 230's behalf.

Even if all the prior criteria were met, for Section 7(2) to apply, the requested records must "directly relate[] to the governmental function" being performed on the public body's behalf. 5 ILCS 140/7(2). It's a tailored approach that opens to public inspection only a targeted subset of contractors' records. But the criterion begs an important question: what is the *scope* of the function at issue? The broader the scope of the function, the more of the private contractor's records that "directly relate" and are subject to FOIA, and vice versa. Here, the BGA attempts to define the scope of the IHSA's function too broadly.

a. The BGA's application of the "directly relates" test is untenable.

District 230 does not believe the IHSA is performing a governmental function on its behalf. But even assuming it is, the BGA claims the governmental function the IHSA performs is "education." (BGA Br. 23-24). Framing the function this way suits the BGA, allowing it to argue that *everything* the IHSA does is related to education and is therefore a governmental function, and that *all* records of the IHSA are "directly related" to this governmental function. (C00284, 286).

The BGA's expansive interpretation should be rejected. Applying the BGA's approach, one could say that every private bus company record related to "transportation" would be subject to FOIA, as would every architect record related to "construction" and every janitorial contractor record related to "cleaning services." These categorizations are too broad. Take the architect example, for instance. Architects routinely enter into professional services contracts with schools—and other public bodies—to assess and design buildings and building repairs. But if the function they perform is characterized as "construction" instead of "assessment of life safety issues" or "design of new high school" or something similarly tailored, then almost every record of that architecture firm would be subject to FOIA, including its private business records and the records of all its other clients.

Requiring public entities to provide access to the business records of private entities that are not directly related to provision of a governmental function would result in the public entities becoming default conduits for private parties' access to each other's records in business disputes and competition. For example, FOIA requesters could attempt to gain access to claims and actuarial information from private insurance companies that insure public bodies. And potential bidders on

government contracts could attempt to use FOIA to their competitive advantage and gain access to the private business records, including records related to profit margins, volume of work, etc., of the contractor holding the current government contract. Opening the door of Section 7(2) too widely would co-opt the services of public bodies for private purposes (*i.e.*, private business disputes and competition) in violation of the Illinois Constitution, Ill. Const. 1970, art. VIII, § 1(a), and further subvert the appropriate channels for legal discovery otherwise available to private parties in their disputes.

The problem with overly-broad categorizations of a function is compounded if, as the BGA advocates, the Court ignores Section 7(2)'s individualized approach. Section 7(2) applies to records directly related to "*the* governmental function," but the context is clear that "the governmental function" is the one that is specific to the public body that received the FOIA request. Without individualizing the function at issue, public bodies all around the state, upon receiving a FOIA request, could be stuck having to track down and produce records that have no bearing on their public body or work that a contractor had performed on their behalf.

For example, in the *Hood v. IHSA* case cited by the BGA, a basketball coach at a private high school in Rockford was alleged to have violated IHSA's recruiting rules and was barred from coaching at any IHSA member school for a year. *Hood v. IHSA*, 359 Ill. App. 3d 1065, 1066-67 (2^{d} Dist. 2005). There was an initial letter from the IHSA finding the coach guilty of the recruiting violations, though the allegations at some later point were found to be untrue. *Id.* at 1067. Under the BGA's interpretation of the outsourcing rule, an individual could make a FOIA request of District 230, in Orland Park, for a copy of the letter to the private school, in

Rockford, regarding Coach Hood. But the Hood investigation and violation letter were not related—let alone *directly* related—to anything the IHSA was doing on District 230's behalf. District 230 therefore should have no obligation to attempt to obtain such a letter from the IHSA.

The issue of a properly defined function is important to entities other than the IHSA, including members of the amicus Illinois Press Association ("IPA"). For example, school districts are statutorily required to post dozens of public notices in local newspapers, and they routinely contract with newspaper publishers—from the major metropolitan dailies to downstate rural weeklies—to publish those public notices. Under the BGA's interpretation, this would be considered a governmental function that the newspaper publishers perform on public bodies' behalf, and Section 7(2) should apply to their external business records. And if the "directly related" test casts as wide a net as the BGA suggests, then every internal communication, contract, and document of the publisher that relates to its publication process, or at least its process of publishing public notices, would be subject to disclosure via a FOIA request made to any public body that publishes through that newspaper.

Or suppose an educational consultant were considered to perform a governmental function on behalf of a local school district in a particular case.[4] Records about the consultant's work with *other* school districts, his marketing efforts, or his contract with his accountant do not directly relate to his function on behalf of

[4] District 230 does not concede that any of the organizations or individuals listed in this paragraph performs a governmental function on any public body's behalf. It is merely assuming that point for purposes of argument, so as to focus on the issue of whether the organization's or individual's records are directly related to their function.

the local district, and the local district should not be obligated to obtain and produce those records to a FOIA requester. Similarly, even if the Illinois Association of School Boards ("IASB"), a membership organization offering various resources and professional development opportunities to school boards, were considered to perform a governmental function on behalf of a local school district in a particular case, records about the IASB's work with *other* school districts or about its statewide initiatives do not directly relate to its function on behalf of the local district. The same analysis applies to professional services providers who work with school districts, such as architects, engineers, auditors, or attorneys; district-appointed hearing officers; the PTA; textbook providers like Houghton Mifflin; educational technology companies like PowerSchool and Infinite Campus; and the Illinois Municipal League, to name just a few.

If the BGA's approach of defining the function as broadly as possible is applied, Section 7(2) will be unworkable and illogical for public bodies, not to mention unnecessarily intrusive to the private organizations that work with and support public institutions.

b. When applied reasonably, the "directly related" test is logical and favors District 230's position.

In applying the "directly related" test, a reasonable and practical approach is to consider whether the requested records would be subject to FOIA *if the public body had not contracted out the governmental function.* Those records, plus any bid and contract documents with the contractor that established the relationship, are subject to FOIA under Section 7(2).

For example, suppose a municipality subcontracted its custodial services to a private agency. If the municipality had continued to perform its own custodial services, a FOIA requester could request information about the types of cleaning products used in municipal buildings, cleaning logs, etc. That same information, plus any bid and contract documents between the municipality and the custodial-services company, should be available from the subcontracted custodial-services company via Section 7(2).

The same test works logically where a city contracts with an engineer for city sidewalk and curb repairs. If the city had employed an engineer to perform the repairs, her work logs, communications with suppliers, invoices for materials, etc., would all be subject to FOIA. The same information, plus any bid and contract documents, also would be available from the contracted engineer via Section 7(2).

In each of these scenarios, there is a logical connection between the public body and the records requested from its contractor. But here, the BGA is looking for the IHSA's accounting contracts, legal contracts, sponsorship contracts, public relations/crisis communications services agreements, and licensed vendor applications. Some of those records—contracts between the IHSA and its attorneys or accountants, for example—bear *no* relationship to the IHSA's function in regulating interscholastic competition. And none of those records are *directly related* to any governmental function, let alone one the IHSA performs on behalf of District 230. District 230 therefore had no obligation to attempt to obtain the records from the IHSA.

C. Alternatively, regardless of whether Section 7(2) applies, if the IHSA *is* subject to FOIA, District 230 should not be obligated to obtain records the BGA could obtain directly from the IHSA.

Finally, and in the alternative, if this Court were to conclude that the IHSA *is* itself a public body subject to FOIA, the onus to produce the records in this case should fall solely on the IHSA. District 230 does not have the records requested by the BGA, and regardless of the outsourcing rule in FOIA, District 230 should not be obligated to request and gather the records of another entity that already is subject to FOIA.

Requiring Public Body B to obtain records from Public Body A in response to a FOIA request would impose an unnecessary burden on Public Body B without furthering any public interest. Further, it would usurp the authority of Public Body A to determine whether FOIA exemptions would be invoked. In such a situation, if Public Body A denies a FOIA request for the records, the requester already has a means of challenging the denial, either through an appeal to the Attorney General's office or a FOIA lawsuit in court. There is no need to involve and expend the resources of Public Body B.

FOIA is not designed and should not be interpreted to require one public body to obtain records from another public body. If the Court determines that the IHSA is a public body and subject to FOIA, then the dismissal of the claim against District 230 should be affirmed. District 230 should not be compelled to act as a conduit for access to records that could be obtained directly from the IHSA.

D. District 230's Section 2-615 motion was proper, as the Court is not required to construe as true unsupported conclusions of law.

When ruling on a Section 2-615 motion to dismiss, although a court must accept as true all well-pleaded facts and reasonable inferences, a court cannot accept as true mere conclusions unsupported by specific facts. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. The BGA did not allege facts supporting the elements required under Section 7(2). Instead, it provided conclusory statements that the IHSA "performs a governmental function on behalf of public high schools, including District 230" and that the requested records were "non-exempt public records." (C00010 ¶¶ 53-54). As argued above, the facts do not support the BGA's legal conclusions, and the Court need not consider these conclusions as true. District 230 therefore properly moved to dismiss under Section 2-615.

VI. CONCLUSION

Despite the arguments of the BGA, this case is not about a public body handing off one of its functions to a private entity so as to avoid transparency, and it is not the start of the slippery slope the BGA and its amici warn against. Indeed, this Court need not even address how Section 7(2) would apply in a true privatization or subcontracting case, as those are not the facts before it.

From District 230's perspective, the Court need only apply the test established by the legislature and determine whether the IHSA contracts and vendor applications were public records of District 230, whether the IHSA was performing a governmental function, whether any such function was being performed on District 230's behalf, and whether the specific records were directly related to any such

function. If *any* of the Court's answers is no, Section 7(2) does not apply, and District 230 must prevail. Alternatively, if the IHSA is directly subject to FOIA, then District 230 should have no further obligation to obtain the IHSA documents.

District 230 is caught in the middle. It is not trying to protect or hide anything from the BGA, but it does not believe its obligations under FOIA extend so far as to require it to serve as a conduit for IHSA documents that have no connection or relevance to District 230. Unable to allege the necessary elements to state a valid claim under Section 7(2), the BGA's claim is legally insufficient, and the trial court's dismissal of the claim against District 230 should be affirmed.

Respectfully submitted,

CONSOLIDATED HIGH SCHOOL DISTRICT NO. 230

Date: January 27, 2017

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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 containing 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 28 pages.

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CERTIFICATE OF SERVICE

I, Jeffrey C. Goelitz, an attorney, certify that a true and correct copy of the foregoing **Brief of Defendant-Appellee Consolidated High School District No. 230** was electronically filed with the Illinois Supreme Court and is served upon all counsel of record via email, as indicated below, on January 27, 2017 to the following:

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No. 121124

IN THE SUPREME COURT OF ILLINOIS

Better Government Association, Plaintiff-Appellant, **v.** **Illinois High School Association; Consolidated High School District 230,** Defendants-Appellees.	On appeal from the Appellate Court of Illinois, First District, No. 15-1356 There on appeal from the Circuit Court of Cook County, Illinois, Chancery Division, No. 2014 CH 12091 Hon. Mary L. Mikva, Presiding

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