No. 122949

IN THE
SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF CHICAGO LAW DEPARTMENT,
CITY OF CHICAGO MAYOR'S OFFICE,
CHICAGO POLICE DEPARTMENT,
OFFICE OF THE SPECIAL PROSECUTOR,

Defendants-Appellees.

On Appeal From The Appellate Court of Illinois, First District,
Nos. 1-16-1376, 1-16-1892, 1-16-2071 (cons.),
There Heard On Appeal From the Circuit Court of Cook County, Chancery Division, Illinois, No. 15 CH 4183, the Hon. Mary L. Mikva, Judge Presiding, and the Circuit Court of Cook County, County Department, Criminal Division, No. 2011 Misc. 46, the Hon. Michael P. Toomin, Judge Presiding

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BRIEF OF DEFENDANT-APPELLEE CITY OF CHICAGO

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NATURE OF THE CASE

In January 2015, the Better Government Association ("BGA") served FOIA requests on the City of Chicago, seeking materials exchanged between the City and the Office of the Special Prosecutor in the course of the grand jury investigation of the death of David Koschman. Koschman died following an altercation with Richard Vanecko, a nephew of former Mayor Richard M. Daley. The City denied the FOIA request on the basis that protective orders entered by the criminal court presiding over the grand jury proceeding barred disclosure of the materials. BGA filed suit under FOIA, and the circuit court entered judgment on the pleadings for BGA, denied the City's motion for judgment on the pleadings, and ordered the City to produce the documents. Before entry of judgment for BGA, the City asked the criminal court to modify its protective orders so that it could make the disclosures, but that court refused, citing a continuing interest in the confidentiality of grand jury proceedings. The City appealed the decisions of both courts. The appellate court held that FOIA did not require disclosure, reversed the order granting judgment on the pleadings for BGA, and granted the City's motion for judgment on the pleadings. In addition, it affirmed the criminal court's refusal to modify its protective orders.

BGA filed a petition for leave to appeal, which this court allowed. All questions concerning the BGA's FOIA claim against the City are raised on the pleadings.

ISSUE PRESENTED

Whether the City properly denied BGA's FOIA requests because protective orders issued in a grand jury proceeding barred disclosure of the requested materials.

STATUTES INVOLVED

Section 11(d) of the Illinois Freedom of Information Act, 5 ILCS 140/11(d), in pertinent part:

> The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access.

Section 7(1)(a) of the Illinois Freedom of Information Act, 5 ILCS 140/7(1)(a):

> [T]he following shall be exempt from inspection and copying:
>
> (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

STATEMENT OF FACTS

On April 24, 2004, Koschman was involved in an altercation with Vanecko and suffered injuries that ultimately caused his death. C. 319-23. Between 2004 and 2011, law enforcement authorities investigated the incident, but no charges were filed. C. 323-413.

The Grand Jury Proceedings

In April 2012, on the petition of Koschman's relatives, Judge Toomin of

the Criminal Division of the Circuit Court of Cook County appointed a special prosecutor "to investigate whether criminal charges should be brought against any person in connection with the homicide of David Koschman in the spring of 2004 and whether, from 2004 to [April 2012], employees of the Chicago Police Department and the Cook County State's Attorney Office acted intentionally to suppress and conceal evidence, furnish false evidence, and generally impede the investigation into Mr. Koschman's death." C. 287. On May 22, 2012, Judge Toomin ordered that a special grand jury be empaneled pursuant to the Jury Act, 705 ILCS 305/19, and the grand jury secrecy provisions of the Criminal Code, 725 ILCS 5/112-6, and that the grand jury sessions convene at the OSP offices at Winston & Strawn, LLP, rather than at the courthouse. C. 290-91. The order explained that this arrangement was necessary "due to the nature and scope of the subject matter of this investigation" and "considerations of confidentiality." C. 290.

Before the grand jury was empaneled, OSP requested the entry of a protective order to ensure the confidentiality of the grand jury proceedings. OSP stated that the protective order was necessary "to carry out [the Special Prosecutor's] duties, and in the interests of justice." C. 683. As Judge Toomin subsequently explained, "The protective order was implemented as a means to protect the sanctity of the investigation of the [OSP] and the work of the special grand jury." C. 728.

On June 14, 2012, Judge Toomin entered an order prohibiting "[a]ny

individuals or entities who received Grand Jury materials from [OSP]" in connection with the Koschman investigation "from further disseminating that material or information contained therein." C. 294-95. The order defined "Grand Jury materials" to include "subpoenas, target letters, and other correspondence related to the service of a Grand Jury subpoena, sent by the Office of the Special Prosecutor to any individual or entity in connection with this investigation." C. 294. The order further directed that "[a]ll papers, documents, and transcripts containing or revealing Grand Jury materials" shall be sealed. C. 295. The protective order itself was also sealed. C. 683-84.

In September 2013, after a 17-month grand jury investigation, OSP filed under seal a 162-page report detailing the evidence the special grand jury gathered, and recommending involuntary manslaughter charges against Vanecko and no criminal charges against any of the law enforcement personnel involved in the investigations. C. 305-471. On January 31, 2014, Vanecko pled guilty to involuntary manslaughter and was sentenced. C. 637. Following Vanecko's sentence, on February 3, 2014, Judge Toomin unsealed OSP's report, C. 636-38, which was publicly released the next day.

The Sun-Times' FOIA Request

On February 6, 2014, the Chicago Sun-Times sent FOIA requests to the City for copies of (1) all subpoenas the City received from OSP in connection with the grand jury investigation, and (2) all documents and records the City provided to OSP in response to those subpoenas. C. 643. The City denied the

FOIA request based on the June 14, 2012 protective order. C. 660-63. The Sun-Times appealed the denial to the Illinois Public Access Counselor ("PAC"). C. 646, C. 665-66.

Pursuant to section 9.5(c) of FOIA, the PAC requested that the City "furnish this office with a copy of the [June 14, 2012] protective order." C. 668. Since that order was still under seal, the City moved to lift the seal "for the limited purpose of allowing the PAC, as well as any reviewing courts on appeal, to view the protective order." C. 675. Judge Toomin unsealed the protective order, but in doing so, ordered that "[t]he [June 14, 2012] order shall . . . remain operative as to its nature, purpose, and provisions," and that "all materials subject to the protective order are and shall remain under seal." C. 684.

The PAC addressed the matter in a non-binding opinion. C. 708-16. On June 4, 2014, the PAC issued a letter stating that "the City and CPD possessed a proper basis to withhold records within the scope of the protective order issued by Judge Toomin on June 14, 2012, even if those records would otherwise be subject to disclosure under FOIA." C. 710. Specifically, the PAC agreed that "[t]he protective order expressly prohibits the disclosure of subpoenas that any individual or entity received from the special prosecutor," and thus that the City properly denied the Sun-Times' FOIA request for copies of grand jury subpoenas. C. 712. At the same time, the PAC acknowledged that whether the protective order covered the records the City

provided to the OSP was "not clear," C. 710, and was "an issue that the City may ultimately seek to have the court resolve." C. 715. The PAC stated that the plain language of the June 14, 2012 protective order did not "appear to cover copies of records which the City and CPD provided to the special prosecutor" in response to the grand jury subpoenas. C. 712. The PAC concluded 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 [June 14, 2012] protective order." C. 715.

On June 18, 2014, the City filed a motion before Judge Toomin "to clarify [the] protective order of June 14, 2012." C. 651-55. The City explained that the documents it produced in response to the grand jury subpoenas "reveal what the subpoenas requested, thereby revealing the substance of the subpoenas issued by the Special Prosecutor." C. 654. Thus, they appeared to fall within the category of documents that the June 14, 2012 protective order placed under seal. Id.

On June 25, 2014, Judge Toomin issued an order clarifying that, when "sought for their own sake," the relevant documents in the possession of the City remain publicly available, but what the City could not do under the earlier protective order is "to identify or characterize any of those documents as materials provided to [OSP]" in response to the grand jury subpoenas. C. 728. The court explained: "[the Sun-Times] cannot make an end-run around the terms and purposes of the [June 14, 2012] order by drafting [its] FOIA

request in a manner calculated to reveal what took place before the Special Grand Jury." C. 728-29. Judge Toomin therefore barred the City from "the identification and characterization of documents disseminated to [OSP] in furtherance of its investigation into the death of David Koschman." C. 729. Neither party appealed Judge Toomin's order.

BGA's FOIA Lawsuit

On January 23, 2015, BGA submitted FOIA requests to the City that were substantially similar to the Sun-Times' earlier FOIA requests. BGA requested: (1) "any and all subpoenas issued to the Chicago Police Department ["CPD"], the Law Department and the Mayor's Office in regards to the Vanecko/Koschman investigation/special prosecution," (2) "all emails and other communications between special prosecutor Dan Webb's office and CPD, the Law Department and the Mayor's Office in regards to the same investigation/special prosecution," and (3) indexes of records that the City provided to OSP. SR 20-22.

On February 6, 2015, the City denied BGA's requests pursuant to section 7(1)(a) of FOIA, which exempts from disclosure "information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." SR 23-24 (citing 5 ILCS 140/7(1)(a)). The City stated that disclosure was barred by Judge Toomin's June 14, 2012 and June 25, 2014 protective orders. Id. The City also informed BGA that "no log, list or index was compiled regarding documents produced" to OSP. SR 24.

On March 12, 2015, BGA filed a FOIA lawsuit in the Circuit Court of Cook County. SR 9-15. Counts II, III, and IV claimed that the City's Law Department, the Mayor's Office, and CPD violated FOIA by failing to release the records BGA requested. SR 13-14. Count I was against OSP, from which BGA had also requested documents pursuant to FOIA regarding the grand jury investigation. SR 13. The case was assigned to Judge Mikva. SR 116.

OSP asked Judge Mikva to transfer the FOIA lawsuit to Judge Toomin under General Order No. 1.3, which allows for transfers of matters filed in the wrong division or "[f]or the convenience of parties and witnesses and for the more efficient disposition of litigation." SR 153-56. OSP observed that the documents BGA requested were subject to Judge Toomin's protective orders, and argued that Judge Mikva "should not be put in the position of having to review the rationality of a brethren court's orders." SR 156. Judge Mikva denied the motion, ruling that "the Chancery Division may certainly interpret [section 112-6 of the Code of Criminal Procedure] just like it would any other State or federal law in its consideration of FOIA claims," SR 372 ¶2, and that a mere "hypothetical possibility" that her FOIA ruling might conflict with the non-disclosure obligations imposed by the criminal court did not require a transfer, SR 373 ¶¶5-6.

On May 8, 2015, the City moved to dismiss BGA's FOIA claims on the ground that the records were exempt from disclosure under section 7(1)(a) of FOIA. SR 119-20 ¶ 4. The City argued that Judge Toomin's protective order and

later clarification of that order, which relied on the grand jury secrecy provisions of the Code of Criminal Procedure, 725 ILCS 5/112-6, were "State law," and that the City could not disregard the protective orders without risking contempt. SR 128-31. The City also argued for dismissal based on GTE Sylvania v. Consumers Union, 445 U.S. 375 (1980), in which the United States Supreme Court held that a federal agency does not violate the federal FOIA by withholding documents pursuant to a court order. SR 129-30.

On December 17, 2015, Judge Mikva issued an order denying the City's motion to dismiss. SR 748-49, SR 752-56. Judge Mikva disagreed with Judge Toomin's construction of section 112-6 of the Criminal Code, ruling that the Act "does not extend to protecting persons who provide information to the Grand Jury, unless such person is a State's Attorney or government personnel as provided in section (c)(1) of the Grand Jury Act [sic]. . . ." SR 753 ¶11. In support of her interpretation, Judge Mikva relied on Better Government Association v. Blagojevich, 386 Ill. App. 3d 808 (4th Dist. 2008), in which the court, applying the Federal Rules of Criminal Procedure, ordered the former governor to release federal grand jury subpoenas in response to a FOIA request. SR 753 ¶ 12 (citing Blagojevich, 386 Ill. App.3d at 814-15), SR 756 ¶ 20. Because, in Judge Mikva's view, Judge Toomin had erroneously interpreted section 112-6 of the Criminal Code when he prohibited disclosure of the records, the City could not rely on Judge Toomin's protective orders as "State law" that barred disclosure of the records within the meaning of section

7(1)(a). SR 755-56 ¶ 20. But Judge Mikva acknowledged that the City should not be put "in a position where it would be forced to disobey another court order to comply with this one." SR 756 ¶ 21. To that end, Judge Mikva suggested that BGA intervene before Judge Toomin to seek modification of his protective orders. Id.

BGA did not do so. The City then filed its own motion before Judge Toomin to modify the protective orders in light of Judge Mikva's FOIA ruling, C. 1151-60, pointing out "the risk that complying with the Protective Orders would expose [the City] to a FOIA violation," C. 1159 ¶ 40. The City asked that Judge Toomin "reassess whether the changed circumstances, including the risks Judge Mikva's order imposes on the City, the completion of the OSP's investigation and the conclusion of the prosecution of Richard Vanecko, justify continuation of the Protective Orders as they relate to the subpoenas and correspondence" requested by BGA. C. 1159 ¶ 41.

On April 13, 2016, Judge Toomin issued a memorandum opinion and order refusing to release the City from its non-disclosure obligations under the June 14, 2012 and June 25, 2014 protective orders. C. 1538-58. Judge Toomin stated that secrecy is "fundamental" to the functioning of the grand jury system, C. 1547, and that, while "some of the reasons for secrecy are removed after indictment, others are not," such as the need "to assure freedom of deliberation of future grand juries and the participation of future witnesses, as well as to provide these assurances to those who appeared in a pending

matter," C. 1548. Judge Toomin also disagreed with Judge Mikva that his protective orders were inconsistent with Blagojevich, stating that while the Federal Rules of Criminal Procedure "imposed no secrecy obligation upon any person other than certain designated individuals that did not include the Governor," "the hallmark of [the Illinois] grand jury statute is a blanket prohibition of disclosure of grand jury matters, other than the deliberations and vote of any grand juror, followed by an enumeration of those to whom disclosures may be made, 725 ILCS 5/112-6(c)(1)&(2)." C. 1556 (discussing Fed. R. Crim. P. 6(e)). Accordingly, Judge Toomin ruled that "the protective orders implemented by this Court to uphold the salutary protections of grand jury secrecy shall continue to enjoin the City from releasing the materials as sought" by BGA. C. 1557.

The City then returned to Judge Mikva on a motion for reconsideration. SR 791-802. On June 3, 2016, after a hearing, Judge Mikva denied the motion. SR 1255. Judge Mikva ruled that section 7(1)(a) of FOIA did not apply here because it did not explicitly reference "court orders" as State law that barred disclosure of the records. SR 1264. Judge Mikva instructed the parties to file cross-motions for judgment on the pleadings. SR 1277, SR 1281-82.

On July 12, 2016, Judge Mikva entered an order granting the BGA's motion for judgment on the pleadings, denying the City's motion for judgment on the pleadings, and ordering the City "to release to [BGA] the subpoenas and emails requested in the Freedom of Information Act requests directed to

the City Defendants that are attached to the Complaint in this action," subject to other FOIA exemptions. SR 1769-70. Judge Mikva also found pursuant to Ill. Sup. Ct. R. 304(a) that there was "no just reason for delaying appeal of the order granting [BGA's] motion for judgment on the pleadings," id. ¶5, and stayed enforcement pending appeal, id. ¶4.

The City appealed from Judge Mikva's order directing it to produce materials in response to the BGA's FOIA request, SR 1785-86, and from Judge Toomin's April 13, 2016 order refusing to modify his protective orders, C. 1559. BGA appealed from Judge Mikva's order dismissing its FOIA claims against OSP. The appellate court consolidated the appeals.

The Appellate Court's Decision

The appellate court ruled that Judge Toomin did not abuse his discretion when he refused to modify his protective orders in response to the City's request. In re Appointment of Special Prosecutor, 2017 IL App (1st) 161376, ¶ 39. The court explained that "[t]he justification for grand jury secrecy is well established," id. at ¶ 37, and includes ensuring "[c]andid, complete, and trustworthy testimony" of witnesses who know that their "testimony and material . . . is secret and *will be kept secret*," id. ¶ 39 (emphasis in original). The court observed that, "[i]n recognition of these interests, section 112-6 of the Code expressly mandates secrecy regarding 'matters occurring before the Grand Jury.'" Id. ¶ 38 (citing 725 ILCS 5/112-6(c)(1)). The court emphasized that, under Ill. Sup. Ct. R. 201(c)(1), circuit

courts may enter protective orders "as justice requires," id. at ¶ 32, and that Judge Toomin acted within his discretion by finding that "the need for particularized secrecy still existed with respect to certain aspects of the grand jury's investigation," id. ¶ 39, even after the investigation was complete and Vanecko was prosecuted and sentenced.

The appellate court reversed Judge Mikva's order granting BGA's motion for judgment on the pleadings, and granted the City's motion for judgment on the pleadings. In re Appointment of Special Prosecutor, 2017 IL App (1st) 161376, ¶ 53. The court explained that Illinois FOIA, like its federal counterpart, "only allows a court to order a public agency to produce documents when the agency has 'improperly' withheld them." Id. ¶ 45 (citing 5 ILCS 140/11 and 5 U.S.C. § 552(a)(4)(B)). The court further held that, "[b]ecause the Illinois FOIA was modeled on the federal Freedom of Information Act, Illinois courts look to case law regarding the federal FOIA when interpreting the Illinois FOIA," id. ¶ 44, and that in GTE Sylvania, the United States Supreme Court held that materials are not "improperly withheld" within the meaning of federal FOIA when an injunctive order prohibits their disclosure, id. ¶ 43 (citing GTE Sylvania, 445 U.S. at 384-87). Relying on GTE Sylvania, the appellate court held that "'respect for judicial process' requires that a lawful court order must take precedence over the disclosure requirements of FOIA and that a public body refusing to disclose documents because a court order commands it to do so does not always

withhold those documents "'improperly.'" Id. ¶ 46. The court saw "no reason, nor any textual distinction in the Illinois FOIA, why the rule articulated in GTE Sylvania should not apply with equal force here." Id.

The appellate court also rejected BGA's reliance on Carbondale Convention Center, Inc. v. City of Carbondale, 245 Ill. App. 3d 474 (1993), and Watkins v. McCarthy, 2012 IL App (1st) 100632, which stood "for the general proposition that an agency cannot – through its own participation, action, collusion, or acquiescence – help obtain a court order and then claim that the order prevents it from releasing otherwise disclosable records." In re Appointment of Special Prosecutor, 2017 IL App (1st) 161376, ¶¶ 47-49. These cases were inapplicable because here, the protective order was based on a court's "due consideration of the need for confidentiality" in a grand jury proceeding, and "was not issued at the behest of the City." Id. ¶ 52.

ARGUMENT

A court order enjoined the City from disclosing the materials BGA requested under FOIA. Because the City was not permitted to make the disclosures, it properly denied BGA's FOIA requests. The appellate court therefore correctly granted the City judgment on the pleadings. This court reviews the grant or denial of a motion for judgment on the pleadings de novo. Gillen v. State Farm Mutual Automobile Insurance Co., 215 Ill. 2d 381 (2005). Under that standard, the appellate court's judgment should be affirmed.

I. THE CITY DID NOT "IMPROPERLY WITHHOLD" THE MATERIALS BGA SOUGHT PURSUANT TO FOIA.

In GTE Sylvania, the United States Supreme Court ruled that a public body does not violate federal FOIA by withholding requested materials pursuant to a valid non-disclosure order. 445 U.S. at 386-87. That is because federal FOIA authorizes courts to order production only of public records that have been "improperly withheld," and records withheld pursuant to a court order barring disclosure are not improperly withheld. Id. As the appellate court recognized here, Illinois FOIA contains the same language the Supreme Court relied on in GTE Sylvania, and "Illinois courts look to case law regarding the federal FOIA when interpreting the Illinois FOIA." In re Appointment of Special Prosecutor, 2017 IL App (1st) 161376, ¶ 44. Thus, the result under Illinois FOIA should be the same.

A. There Is A Close Parallel Between The Provisions Of Illinois FOIA At Issue Here And Federal FOIA.

Section 11(d) of Illinois FOIA provides, in relevant part:

> The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access.

5 ILCS 140/11(d).[1] This statutory language is nearly identical to the

[1] This provision has remained the same for more than 30 years since its adoption in 1983, even though other sections of the Illinois FOIA went through numerous amendments. See Ill. Rev. Stat. 1985, ch. 166 para. 211(d). The same is true of the corresponding provision in federal FOIA. See Pub. L. 89-487, 80 Stat. 251 (1966).

corresponding provision of federal FOIA, which provides, in relevant part:

> On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(4)(B).

Illinois courts have repeatedly held that because Illinois FOIA was patterned after federal FOIA, case law construing the federal statute is useful in interpreting the Illinois statute. Korner v. Madigan, 2016 IL App (1st) 153366, ¶ 10 ("The Illinois General Assembly patterned the Illinois FOIA after the federal FOIA, and Illinois courts use case law construing the federal FOIA for guidance in interpreting the Illinois FOIA"); accord Hites v. Waubonsee Community College, 2016 IL App (2d) 150836, ¶ 60; State Journal-Register v. University of Illinois Springfield, 2013 IL App (4th) 120881, ¶ 21; see, e.g., Better Government Association v. Illinois High School Association, 2017 IL 121124, ¶ 30 (citing federal FOIA cases in construing Illinois FOIA); Hamer v. Lentz, 132 Ill. 2d 49, 58 (1989) (same).

This approach hews faithfully to the intent of the General Assembly in enacting Illinois FOIA; legislators expressly stated that federal precedent should guide Illinois courts' interpretation of FOIA. For example, the sponsor of House Bill 234, which became Illinois FOIA, stated:

> . . . throughout the Bill, when there is some close parallel between our language and language in the Federal Freedom of Information Act, it is our intention that case law interpretations under federal FOIA should guide individuals in the courts in Illinois in interpreting the provisions of House Bill 234.

See State of Illinois, 83rd General Assembly, House of Representatives, Transcription Debate, 52nd Legislative Day (May 25, 1983) at 184.

BGA asserts, citing AFSCME v. County of Cook, 136 Ill. 2d 334 (1990), that federal FOIA cases are not persuasive in Illinois, Opening Brief for Plaintiff-Appellant Better Government Association [hereafter "BGA Br."] 17-18, but its reliance on AFSCME is misplaced. In AFSCME, this court declined to follow Dismukes v. Department of Interior, 603 F. Supp. 760 (D.D.C. 1984), in which a federal district court held that a FOIA requestor is not entitled to "specify the format of data he seeks from an agency." Id. at 760. The AFSCME court ruled instead that a public body must make available computer tapes in response to a FOIA request, unless they fall into a FOIA exemption. 136 Ill. 2d at 343. But when AFSCME was decided, there were material textual differences between the pertinent provisions of Illinois and federal FOIA. Id. Illinois FOIA defined "public records" to include "tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics," but this language was not in federal FOIA. Id. at 341 (quoting Ill. Rev. Stat. 1985, ch. 116, par. 202(c)). Thus, this court ruled that the plain language of Illinois FOIA – unlike its federal counterpart – expressly required access to electronic information, including computer tapes. Id. In contrast, here, there are no textual differences between the pertinent provisions of federal and Illinois FOIA. What is more, the AFSCME court made clear that its ruling

was consistent with that of a federal court of appeals, citing Long v. United States Internal Revenue Service, 596 F.2d 362 (9th Cir. 1979), for the proposition that federal FOIA applied to computer tapes. 136 Ill. 2d at 341. AFSCME thus provides no basis to reject the United States Supreme Court's construction of identical statutory language.

B. A Public Body Does Not Violate FOIA When It Withholds Documents That A Court Order Bars From Disclosure.

The appellate court correctly held that the City had not "improperly withheld" the materials BGA requested within the meaning of section 11(d) of Illinois FOIA. In re Appointment of Special Prosecutor, 2017 IL App (1st) 161376, ¶¶ 43-46. Illinois FOIA does not define "improperly withheld," and Illinois courts have not construed that phrase. But in 1980, before the enactment of Illinois FOIA, the United States Supreme Court construed that phrase in GTE Sylvania to uphold the denial of a FOIA request where the records were barred from disclosure by a non-disclosure order. The Supreme Court's rationale is persuasive, consistent with Illinois law, and should be followed here.

In GTE Sylvania, consumer organizations filed FOIA requests with the Consumer Product Safety Commission for information about accidents attributable to the operation of televisions. 445 U.S. at 377. When CPSC notified the manufacturers of its decision to produce the requested records, the manufacturers filed suit to enjoin the disclosure. Id. at 377-78. The

district court granted an injunction, and the Third Circuit affirmed. Id. at 378-79. The FOIA requestors then filed suit to obtain the records. Id. at 379-80.

The Supreme Court ruled that a FOIA requestor may not obtain records under FOIA when the agency holding the records has been enjoined from disclosing them by a federal district court. 445 U.S. at 384. The Court explained that FOIA gave "federal district courts the jurisdiction 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'" Id. (citing 5 U.S.C. § 552(a)(4)(B)). Thus, FOIA required a showing that the agency "(1) improperly (2) withheld (3) agency records." Id. Although the statute did not define the word "improperly," the Court observed that the legislative history made clear that Congress sought "to curb . . . apparently unbridled discretion" of agency officials in denying requests for documents without an adequate basis. Id. at 385. The Court emphasized that "[t]he present case involves a distinctly different context" because "CPSC has not released the documents sought here solely because of the orders issued by the [f]ederal [d]istrict [c]ourt":

> At all times since the filing of the complaint in the instant action, the agency has been subject to a temporary restraining order or a preliminary or permanent injunction barring disclosure. There simply has been no discretion for the agency to exercise.

Id. at 386.

The Court also relied on "the established doctrine that 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." 445 U.S. at 386. There was "no doubt" the district court had jurisdiction to issue the injunctions, and although there was "of course" disagreement among the parties about whether the district court erred in entering them, no party claimed those orders had "only a frivolous pretense to validity," id. at 386-87, so the court "intimat[ed] no view on that issue," id. at n.10. Thus, CPSC was required to obey the injunctions "out of 'respect for judicial process.'" Id. at 387 (quoting Walker v. City of Birmingham, 388 U. S. 307, 321 (1967)). As the Court explained, "[t]o construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the [FOIA] would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." Id. at 387. The Supreme Court later reaffirmed this holding in Department of Justice v. Tax Analysts, 492 U.S. 136 (1989), explaining that because the agency in GTE Sylvania was subject to a pre-existing injunction barring release of the records, it had no discretion to produce them in response to a FOIA request. Id. at 155.

The federal courts of appeals have repeatedly applied GTE Sylvania in similar circumstances. In Wagar v. Department of Justice, 846 F.2d 1040 (6th Cir. 1988), a newspaper sought access to documents DOJ had obtained from a utilities company in antitrust litigation, in which the district court had issued a non-disclosure order. Id. at 1041. The Sixth Circuit upheld the dismissal of

the newspaper's FOIA complaint, ruling that DOJ "could not be compelled to release the documents" that were subject to the non-disclosure order. Id. The court explained that, like CPSC in GTE Sylvania, DOJ was "withholding the documents from [the FOIA requestor] not as a result of unbridled discretion" but, rather, in compliance with the non-disclosure order. Id. at 1046-47. The court further noted that the FOIA requestor could not attack the validity of the non-disclosure order in the FOIA proceeding, but would have to challenge it before the district court presiding over the antitrust litigation. Id. at 1047.

Likewise, in Alley v. Department of Health and Human Services, 590 F.3d 1195 (11th Cir. 2009), the Eleventh Circuit reversed summary judgment for a FOIA requestor who sought access to Medicare payments data from HHS, which could not make the disclosure because of an injunction. Id. at 1198. The court ruled that "[j]udicial authority to devise remedies and enjoin agencies can only be invoked . . . if the agency" has "improperly withheld" the records, and there is no "improper withholding" where the disclosure is enjoined by court order. Id. at 1203-04. The court added that the merits of the injunctive order were not at issue, stating that in GTE Sylvania, "it did not matter . . . whether the injunction prohibiting disclosure was unsound, unwise, or otherwise in need of being modified or vacated." Id. at 1203. The court continued: "Part and parcel of the GTE Sylvania decision is the principle that an injunction issued by one court against the disclosure of information may not be collaterally attacked in another court in a FOIA

lawsuit seeking disclosure of that information." Id. at 1203. Until the non-disclosure order was reversed, it had to be followed. Id. (citing Celotex Corp. v. Edwards, 514 U.S. 300, 306 (1995)); accord City of Hartford v. Chase, 942 F.2d 130, 135-36 (2d Cir. 1991) (confidentiality order was valid defense to request for records under FOIA); Bangor Publishing Co. v. Town of Buckport, 682 A.2d 227, 229 (Me. 1996) (FOIA lawsuit to obtain documents barred from disclosure by court order amounted to "impermissible collateral attac[k] on a valid protective order").

Like the agencies in GTE Sylvania, Wagar, and Alley, the City did not have discretion to disobey the protective orders that barred disclosure of the records BGA sought. Thus, the City, too, did not "improperly withhold" the requested records. Indeed, because FOIA provides for fee-shifting when the government is found to have improperly withheld documents, see 5 ILCS 140/11(i), to hold otherwise would expose the City to substantial liability for attorney's fees for denying BGA's FOIA requests in compliance with the criminal court's orders. Such a result would be grossly unjust and should be rejected.

C. BGA Offers No Valid Basis For A Different Rule In Illinois.

BGA acknowledges that both federal and Illinois FOIA "include the 'improper withholding' language," but nonetheless claims Illinois FOIA "differs materially from federal FOIA." BGA Br. 18. BGA contends that under Illinois FOIA and the case law construing it, records are "improperly withheld" when they are withheld for any reason not on the list of statutory

exemptions, while this is not so under federal FOIA. Id. at 16-19; see id. at 20 ("'improper withholding' is not a substantive doctrine in Illinois, but merely means 'not exempt'"). BGA misapprehends the law.

In Tax Analysts, a FOIA requestor sought judicial decisions received by the Department of Justice's tax division. 492 U.S. at 139. DOJ denied the request on the ground that the records were "available from their primary sources, the District Courts." Id. at 140-41. The Supreme Court reversed, ruling that a federal agency must produce records in response to a FOIA request unless they fall into one of the enumerated exemptions. Id. at 150-51. The Court explained that the "exemptions are explicitly exclusive," and that "[i]t follows from the exclusive nature of the § 552(b) exemption scheme that agency records which do not fall within one of the exemptions are 'improperly' withheld." Id. at 151; accord Milner v. Department of the Navy, 562 U.S. 562, 565 (2011) (federal FOIA "mandates that an agency disclose records on request, unless they fall within one of nine exemptions" which "must be narrowly construed"). Because there was no FOIA exemption for publicly available materials, the Court ruled the withholding was improper.

In so ruling, the Supreme Court rejected DOJ's argument that this conclusion was inconsistent with GTE Sylvania, which held that documents were not "improperly withheld" without also holding that there was an applicable enumerated exemption. 492 U.S. at 154-55 (citing GTE Sylvania, 445 U.S. at 386). The Court instead reaffirmed GTE Sylvania, explaining that

it "represents a departure from the FOIA's self-contained exemption scheme," but that "this departure was a slight one at best, and was necessary in order to serve a critical goal independent of the FOIA – the enforcement of a court order." 429 U.S. at 155. The Court observed that "GTE Sylvania arose in a distinctly different context than the typical FOIA case, where the agency decides for itself whether to comply with a request for agency records." Id. Because the records in GTE Sylvania were subject to an injunction prohibiting their release, CPSC could not produce them in response to a FOIA request. Id. at 154-55.

Thus, contrary to BGA's assertion, see BGA Br. 16, the Supreme Court has construed federal FOIA on this point the way Illinois courts have construed Illinois FOIA – in general, there must be disclosure unless there is an applicable exemption. Even so, the Court recognized that important public policy reasons required it to read the statute to accommodate situations where a public agency is barred by an injunction from disclosing the records.

For the same reason, BGA's contention that adopting the GTE Sylvania approach would necessitate a "second analysis" in each FOIA case, i.e., whether or not the disclosure would be proper even if no FOIA exemption applies, BGA Br. 17 – is meritless. DOJ made a similar argument in Tax Analysts, and the Supreme Court rejected it:

> We reject the Department's suggestion that GTE Sylvania invites courts in every case to engage in balancing, based on public availability and other factors, to determine whether there has been an unjustified denial of information. The FOIA invests courts neither with the authority nor the tools to make such determinations.

492 U.S. at 155. So too here. Illinois FOIA does not require courts to inquire, in every FOIA case, whether it would be proper or improper for the government to withhold a particular public record, nor is that what the appellate court held. Like GTE Sylvania, this is not a typical FOIA case; the City simply had no discretion to disobey the protective orders by disclosing the records in response to BGA's FOIA requests.

BGA also cites several provisions of Illinois FOIA to argue that the meaning of the phrase "improper withholding" is limited to withholding based on the listed exemptions. BGA Br. 19-21. For instance, BGA cites subsection 9(b), id. at 20, which requires public bodies, in denying a FOIA request, to specify the FOIA exemption on which they are relying and also to index their notices of denial "according to the type of exemption asserted," 5 ILCS 140/9(b). But subsection 9(b), by its plain terms, is limited to situations "when a request for public records is denied on the grounds that the records are exempt under Section 7 of [FOIA]." Id. And without a doubt, when an agency claims a statutory exemption, it must identify the specific exemption it relies upon.

BGA also neglects to mention that the immediately preceding subsection, 9(a), requires public agencies denying a FOIA request to notify the requestor in writing of the denial and "the reasons for the denial." 5 ILCS 140/9(a). That broad language encompasses denials on various grounds other than exemptions, such as that the records requested do not constitute public records, that the public body does not have possession of the records, or, as

here, that there is a pre-existing court order barring the agency from disclosing the records. Indeed, there is a similar section in federal FOIA, 5 U.S.C. § 552(a)(6)(A)(i)(I), and yet in GTE Sylvania the Supreme Court upheld the denial of a FOIA request based on the injunction. In addition, subsection 9(b) of Illinois FOIA also allows the indexing of denials "according to the types of records requested," see 5 ILCS 140/9(b), which includes records subject to a pre-existing non-disclosure order.

BGA's reliance on subsection 11(e) of Illinois FOIA, BGA Br. 20, is also misplaced. Subsection 11(e) provides that, in a FOIA lawsuit, on plaintiff's motion, "the court shall order the public body to provide an index of the records to which access has been denied." 5 ILCS 140/11(e). It also provides that the index "shall include" a description of the withheld document and "a statement of the exemption" on which the public body relies. Id. But the term "include" is commonly understood to introduce a non-exhaustive list of things that may contain other similar, non-enumerated items. See People v. Perry, 224 Ill. 2d 312, 328 (2007). There is simply nothing in the language of subsection 11(e) that precludes a public body from identifying an injunction as another reason for denying a FOIA request.

BGA also argues that, because the phrase "improperly withheld" appears only in the judicial review provision of FOIA, "there is no statutory basis to apply it to a proceeding before the [PAC]," which creates "a dichotomy" that the General Assembly could not have intended. BGA Br. 20

(citing 5 ILCS 140/9.5). This mistakenly assumes that FOIA grants the PAC the same powers of review that it grants to the courts. It does not. For instance, the PAC may not review denials of FOIA requests filed for commercial purposes, 5 ILCS 140/9.5(b), or requests that a public entity denied on the basis that they were voluminous, 5 ILCS 140/9.5(b-5). There are no similar restrictions on the scope of judicial review under FOIA.

More to the point, nothing in FOIA precludes the PAC from considering injunctive orders in determining whether a FOIA violation occurred. FOIA does not prescribe the factors the PAC may consider in making its determinations, which reflects the General Assembly's intent to vest the PAC with broad discretion. The co-sponsor of Senate Bill 189, which added the PAC provision to FOIA, explained that the drafters sought "to give [PAC] full discretion, not to tie their hands, and it's an acknowledgment that we just don't know what might happen." State of Illinois, 96th General Assembly, House of Representatives Transcription Debate, 62nd Legislative Day, 5/27/2009, Tr. at 106. And indeed, the PAC did consider Judge Toomin's protective order in determining whether the City properly denied the Sun-Times' FOIA requests in 2014. C. 710. The PAC requested that the City produce the protective order, reviewed it, and determined that "the City and the CPD possessed a proper basis to withhold records within the scope of [that] protective order . . . even if those records would otherwise be subject to disclosure under FOIA." Id.

Next, BGA claims that recognizing court orders as proper bases for denying FOIA requests would enable public bodies to "evade" section 2.20 of FOIA, which makes "all settlement and severance agreements entered into by or on behalf of a public body" public records subject to disclosure. BGA Br. 21 (citing 5 ILCS 140/2.20). BGA speculates that public bodies would "evade this directive by asking the court" to prohibit disclosure of their settlement agreements with third parties. Id.; see Brief of Amicus Curiae Reporters Committee for Freedom of the Press [hereafter "Amicus Br."] 4 (warning against "agreements between state and local governments and technology companies that include provisions concerning public records requests"). The scenarios BGA describes have nothing to do with this case, which does not involve either a settlement or a severance agreement or an agreement of any kind by the City. Rather, Judge Toomin's order was issued at the request of OSP, to effectuate the secrecy provisions of section 112-6. There is therefore no basis for concern that a ruling upholding the City's denial of the FOIA requests would somehow allow public bodies to enter into contracts that expressly evade FOIA's provisions. BGA's related insinuation that courts will rubber-stamp non-disclosure agreements in violation of section 2.20 of FOIA, BGA Br. 22, is similarly unfounded. Even BGA acknowledges elsewhere that "one would expect" that "the judges of this state" would follow the law and precedent. Id. at 23.[2]

[2] BGA asserts that Illinois FOIA "is backed, in part" by a constitutional

D. The Merits Of Judge Toomin's Protective Orders Are Irrelevant To Determining Whether The City Violated FOIA By Obeying Them.

BGA also argues at length that Judge Toomin's statutory construction was erroneous, claiming that section 112-6 does not extend secrecy obligations to recipients of grand jury subpoenas. BGA Br. 26-29, 42-43. This argument misses the mark – whether Judge Toomin's statutory construction is erroneous does not bear on the City's obligation to comply with his orders.[3]

As we explain above, the Supreme Court held in GTE Sylvania that "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." 445 U.S. at 386. This is true so long as the issuing judge had jurisdiction over the parties and the subject matter, and the order is not "only a frivolous pretense to validity." Id. And this court has similarly ruled that "[a]n injunction remains in full force and effect . . . until it has been vacated or modified by the court which granted it or until the order or decree awarding it has been set aside on appeal. Unless it has been

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provision making "reports and records of the obligation, receipt and use of public funds" subject to public inspection and copying. Ill. Const. art. VIII § 1 (c); see also 5 ILCS 140/2.5 (codifying the same provision). This provision has nothing to do with the grand jury materials the BGA seeks and therefore does nothing to advance BGA's position.

[3] In fact, any challenge to Judge Toomin's protective orders is forfeited. BGA never intervened in the criminal case to challenge them, and the orders were never appealed. Moreover, the two-page response BGA filed before Judge Toomin in connection with the City's motion to modify the protective orders, C. 1503-04, did not raise the arguments BGA advances now.

overturned or modified by orderly processes of review, an injunction must be obeyed, even if it is erroneous." People v. Nance, 189 Ill. 2d 142, 145 (2000); accord United Mine Workers Union Hospital v. United Mine Workers, 52 Ill. 2d 496, 501 (1972); People ex rel. Illinois State Dental Society v. Norris, 79 Ill. App. 3d 890, 895 (1st Dist. 1979).

Judge Toomin plainly had jurisdiction to enter protective orders in the grand jury proceeding over which he presided. See Ill. Sup. Ct. Rule 201(c)(1) (vesting court with authority to "make a protective order as justice requires"). Moreover, this court has explained that courts have inherent authority to enter protective orders and, indeed, that state statutes purporting to limit that authority violate the separation of powers doctrine and are unconstitutional. See Best v. Taylor Machine, 179 Ill. 2d 367, 438-45 (1997) (invalidating statute purporting to restrict court's inherent authority to control discovery of plaintiffs' medical information and records in personal injury suits). Although BGA disagrees with Judge Toomin's interpretation of section 112-6, it has never claimed that the protective orders were patently frivolous, and any such argument would plainly be meritless. Among other things, Judge Toomin analyzed the statutory language of section 112-6 of the Criminal Code and drew on Illinois precedent regarding the grand jury secrecy provisions and the legislative history and intent behind the secrecy provisions of the grand juries. C. 294-95, C. 725-29, C. 1538-58. Whether Judge Toomin was right or wrong, his orders were not frivolous.

BGA also suggests that if a court order is erroneous, the party bound by it would not be held in contempt for violating it. BGA Br. 22-23. That is not the law, and the cases BGA cites are distinguishable. In In re Marriage of Kneitz, 341 Ill. App. 3d 299 (2d Dist. 2003), a Louisiana court entered a visitation order that conflicted with a visitation order entered in Illinois. But the Louisiana court had no subject matter jurisdiction over the custody dispute, and in that circumstance, the court held that the party did not have to comply with the order that was "clearly void for lack of subject matter jurisdiction." Id. at 307. That is consistent with the cases we cite above, which hold that a party must comply with a court order so long as it was entered by a court with jurisdiction, even if the order turns out to be erroneous. In Abbott v. Abbott, 129 Ill. App. 2d 96 (4th Dist. 1970), a court reversed a finding of contempt based on a party's failure to deliver custody of a child to the other parent because the custody issue remained undecided, and there was "no written order providing for temporary custody." Id. at 99. Here, Judge Toomin clearly had jurisdiction to issue the protective orders, and he issued orders specifically barring the City from disclosing the very materials that BGA sought.[4]

[4] BGA includes a perfunctory argument that "case law on gag orders is also applicable," BGA Br. 28, but even BGA does not claim that the protective orders here are "gag orders." Regardless, the case it cites, In re A Minor, 127 Ill. 2d 247 (1989), is irrelevant. That was a direct attack by a newspaper on a court order barring the newspaper from publishing a minor's identifying information. See id. at 251-54. This court ruled that a prior restraint on

In any event, BGA's argument that the protective orders were erroneous under section 112-6 of the Criminal Code, BGA Br. 27, is not correct. BGA relies on BGA v. Blagojevich, 386 Ill. App. 3d 808 (4th Dist. 2008), BGA Br. 17, 27-28, but it misapprehends that case. Blagojevich involved federal grand jury subpoenas and thus applied Rule 6(e)(2) of the Federal Rules of Criminal Procedure. 386 Ill. App. 3d at 813-14. As Judge Toomin explained, there are significant textual differences between Rule 6(e)(2) and the secrecy provisions of section 112-6. C. 1556. Rule 6(e)(2) contains an exhaustive list of persons who are subject to grand jury secrecy obligations and provides that "[n]o obligation of secrecy may be imposed on any person" not on that list. Fed. R. Crim. P. 6(e)(2). In contrast, section 112-6 of the Criminal Code contains neither an exhaustive list of persons subject to non-disclosure obligations, nor a prohibition on imposing non-disclosure obligations on others. 725 ILCS 5/112-6. Thus, nothing in the Grand Jury Act prohibited Judge Toomin from entering the orders.

II. THE REQUESTED RECORDS ARE EXEMPT UNDER SECTION 7(a)(1) OF FOIA.

Alternatively, the City properly denied BGA's FOIA requests because the materials BGA requested fall within the FOIA exemption for "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a).

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speech has a heavy presumption of invalidity. Id. at 265. Nothing in In re A Minor suggests that it would apply in the context of the present case.

A. Judge Toomin's Orders Constitute "State Law" For Purposes Of Section 7(1)(a) Of FOIA.

It is undisputed that section 112-6 of the Criminal Code, governing the secrecy of grand jury proceedings, constitutes "State law" for purposes of section 7(1)(a) of FOIA. Taliani v. Herrmann, 2011 IL App (3d) 090138, ¶13 (an inmate's FOIA request for grand jury transcripts properly denied under section 112-6). Judge Toomin's protective orders likewise constitute "State law" for purposes of section 7(1)(a) because they construe and give effect to the grand jury secrecy provisions in section 112-6. As Judge Mikva recognized, Judge Toomin's protective orders were "simply an interpretation of the statute. . . . It doesn't purport to be anything else. This is how I read the Grand Jury Secrecy Act." SR 682. See also SR 681 ("his order is his interpretation of the Grand Jury Secrecy Act"); SR 685 ("this order doesn't do anything other than interpret the grand jury statute. It's Judge Toomin's interpretation of the statute").[5]

Section 112-6 restricts public disclosure of "matters occurring before the grand jury," but it does not define what constitutes such matters. 725 ILCS 5/112-6. The statute thus leaves it to the courts to determine whether documents in a given case constitute a "matter occurring before the grand jury." Judge Toomin's protective orders did precisely that. In particular, he

[5] See also SR 708 ("We have his opinion, his second opinion, which cites case law and says this is how I read the statute and why . . . ."); SR 727 ("I view this as an interpretation of the grand jury secrecy statute, which I do think can provide some protection from FOIA disclosure . . . .").

relied on Board of Education v. Verisario, 143 Ill. App. 3d 1000 (2d Dist. 1986), which construed section 112-6, to determine whether the City's correspondence with OSP constituted a "matter occurring before the grand jury." C. 727. Verisario held that "section 112-6(b) was designed to protect from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process." 143 Ill. App. 3d at 1007. Accordingly, "if a document is sought for its own sake, for its intrinsic value in the furtherance of a lawful investigation, rather than to learn what took place before the grand jury, and if the disclosure will not seriously compromise the secrecy of the grand jury investigation, disclosure is not prohibited." Id. at 1008.

Applying this reasoning, Judge Toomin found that FOIA requests that are "tied by [their] very terms to the subpoenas" issued by OSP "seek to learn what took place before the Special Grand Jury." C. 727. This is so because, rather than requesting "all the documents related to the death of David Koschman and subsequent investigations," such requests seek only those documents that the City produced to OSP in the course of the grand jury investigation. C. 728. Accordingly, Judge Toomin ruled that, because the documents the City produced to OSP revealed the scope and strategy of the grand jury investigation, they "impliedly became subject to the statutory provisions governing grand jury materials." C. 727. He therefore prohibited the City from "identify[ing] or characteriz[ing] any of those documents as

materials provided to the [OSP]." C. 728.

Judge Toomin also explained that section 112-6 reveals a legislative intent to prohibit, rather than facilitate, public access to grand jury records. C. 1555. He ruled that because section 112-6 of the Criminal Code – entitled "Secrecy of proceedings" – was designed to restrict, rather than promote, public access to "matters occurring before the grand jury," it prohibited disclosures under FOIA. C. 1555-56.

As judicial decisions construing and giving effect to the statutory provisions of section 112-6, Judge Toomin's orders are as much "State law" for purposes of the FOIA exemption as section 112-6 itself. The result BGA proposes would be absurd – section 112-6 barring disclosure of "matters occurring before the grand jury" would be State law, but a judicial decision that gives effect to that phrase in a particular case would not be. Thus, contrary to BGA's argument, Judge Toomin did not "create [a] new FOIA exemptio[n]." BGA Br. 7; see id. at 17-19. He simply entered orders to maintain the secrecy of a grand jury investigation, consistent with section 112-6.

Indeed, nothing in the plain language of section 7(1)(a) limits "State law" to statutes. FOIA does not define the term "state law," and in interpreting undefined statutory terms, courts look to their "plain, ordinary meaning." Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 504 (2000). The plain and ordinary meaning of the term "State law" is

not limited to statutes. Indeed, it is customary to treat judicial construction of state statutes as state law. See Village of Vernon Hills v. Heelan, 2015 IL 118170, ¶ 19 ("after this court has construed a statute, that construction becomes, in effect, a part of the statute"); People v. Caballero, 228 Ill. 2d 79, 90 (2008) ("consistent judicial interpretation of section 110-14 is considered a part of the statute until the legislature amends it contrary to that interpretation"). To be sure, unlike decisions of reviewing courts, Judge Toomin's orders are not precedential; but for the City and others subject to the protective orders, they are still binding. They should therefore be regarded every bit as much as state law as section 112-6 itself. Court orders have the force and effect of law until they are modified, vacated, or overturned on appeal. E.g., People v. Rodriquez, 169 Ill. App. 3d 131, 138 (2d Dist. 1988) (parties must obey court orders until the orders are vacated or modified).

Additionally, Black's Law Dictionary defines the term "law," when it appears without an article preceding it, as in section 7(1)(a), to include both "decisions of courts of justice, as well as acts of the legislature":

> "Law," without an article, properly implies a science or system of principles or rules of human conduct, answering to the Latin 'jus;' as when it is spoken of as a subject of study and practice. In this sense, it includes the decisions of courts of justice, as well as acts of the legislature. The judgment of a competent court, until reversed or otherwise superseded, is law, as much as any statute. . . .

http://thelawdictionary.org/letter/l/page/13/ (emphasis added). Here, section 7(1)(a) uses the term "State law," not "a State law." Using the term "law" without an article demonstrates an intent to include law derived from judicial

precedent, such as the law of contempt, and statutes enacted by the General Assembly. Orders issued by courts are therefore "State law" within the ordinary understanding of that term, and the City was required to obey the protective order covering it.

B. The City Did Not Procure The Protective Order.

BGA also asserts that the City could not justify its denial of the FOIA requests based on Judge Toomin's protective orders because the City was allegedly "instrumental in procuring" them. BGA Br. 40. BGA's claim is baseless. Indeed, BGA is inconsistent in this argument, at times scaling it back and arguing only that protective orders should not be used by anyone who "was involved in" or "had any hand in procuring" them. Id. at 25-26, 40, 42. Even BGA's amicus acknowledges that "OSP – not the City – had sought the protective order," Amicus Br. 3, although it still claims that the City cannot use the order as long as "another public agency or a third party" procured it "for the express purpose of evading FOIA," id. at 4. These arguments have nothing to do with the facts of this case.

Both BGA and its amicus rely primarily on Carbondale Convention Center, Inc. v. City of Carbondale, 245 Ill. App. 3d 474 (5th Dist. 1993). In Carbondale, a FOIA requestor sought disclosure of a settlement agreement that Carbondale reached in a breach of contract action with a private company. Id. at 475-76. Less than two weeks later, at the request of the parties, the circuit court entered a dismissal order making confidential the

terms of their settlement agreement. Id. at 475. Carbondale then denied the FOIA request based on the dismissal order. Id. at 476. The appellate court ruled that Carbondale could not use the agreed dismissal order to deny a FOIA request under section 7(1)(a) because the order resulted from the city's own "efforts to prevent disclosure of the agreement." Id. at 477.

That bears no resemblance to this case. The initial protective order was entered on June 14, 2012 – before the special grand jury was empaneled – at the request of OSP, with no involvement by the City. The City was not part of that proceeding. In requesting the non-disclosure order, OSP explained that it was necessary "in order to carry out [the Special Prosecutor's] duties, and in the interests of justice." C. 683. As Judge Toomin subsequently explained, "The protective order was implemented as a means to protect the sanctity of the investigation of [OSP] and the work of the special grand jury." C. 728.[6]

BGA nonetheless claims that the City was involved in "procuring" the protective orders by moving to unseal the June 14, 2012 protective order and then moving to clarify that order, which resulted in the issuance of the June 25, 2014 protective order. BGA Br. 40-42. BGA's characterization is misleading.

[6] The concern for secrecy was so significant that the court authorized the grand jury to meet at the OSP's offices instead of the courthouse: "due to the nature and scope of the subject matter of this investigation, considerations of confidentiality require that all sessions of said Special Grand Jury shall be convened and heard at the law offices of Winston & Strawn, LLP." C. 290.

The City moved to lift the seal from the June 14, 2012 protective order so that it could comply with the PAC's request for a copy of that order as part of its review of the City's denial of the Sun-Times' FOIA request in 2014. C. 668 (PAC request). Contrary to BGA's contention, it was not an option for the City to "simply" ignore the request. BGA Br. 41. Section 9.5(c) of FOIA directs that, "Within 7 business days after receipt of the request for review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the [PAC]." 5 ILCS 140/9.5(c). If the public body does not cooperate, the Attorney General may "issue a subpoena" for the requested documents. Id.

Upon review of the June 14, 2012 order, the PAC recognized that "whether the specific records requested by [the Sun-Times] are all protected by the order . . . is not clear," C. 710, and that "the City may ultimately seek to have the court resolve" that issue, C. 715. In these circumstances, it was necessary for the City to seek clarification from Judge Toomin about the scope of the protective order. If anything, this demonstrates respect for the judicial process and the need to avoid the risk of contempt. Indeed, Judge Mikva rejected BGA's suggestion that the City was complicit in procuring the protective orders, finding that this was not supported by the record. SR 1265, SR 1274 ("I don't think there's a record of that kind of complicity here"; "I don't think that the City brought about this protection or did something improper to bring about this protection").

BGA insinuates that the City acted improperly when it sought

clarification of the June 14, 2012 order, claiming that the City "knew" based on Watkins v. McCarthy, 2012 IL App (1st) 100632, that it could not deny the Sun-Times' FOIA requests because the June 14, 2012 order did not expressly prohibit dissemination of documents under FOIA. BGA Br. 41. This is far-fetched. The agreed order discussed in Watkins, "by its terms, applied to the exchange of confidential discovery by the parties," and not only "did not specifically prohibit" FOIA disclosures to third parties, but contained a provision – which BGA omits to mention – that allowed the parties "to make an application to release documents that may have been considered confidential under the protective order." 2012 IL App (1st) 100632, ¶ 43. Beyond that, the court in Watkins held that section 7(1)(a) did not apply because the case in which the protective order had been entered had been dismissed with prejudice and the protective order no longer bound the parties. Id. Watkins did not involve a grand jury proceeding or a protective order entered to give effect to the secrecy provisions of section 112-6. It therefore said nothing about the legal effect of a protective order like Judge Toomin's.

BGA also suggests that, upon receiving the Sun-Times' FOIA request, the City should have "ask[ed] the criminal court to vacate [its June 14, 2012] order." BGA Br. 41. But 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 production of the documents requested. If anything, the burden of clearing

such an obstacle is on the party seeking disclosure. After all, FOIA requires that a public body respond promptly to a FOIA request (within, at most, 10 business days), and when a public body denies a request based on an exemption, it is the requestor who must take action to challenge that decision. See 5 ILCS 140/9.5(a), (f). Judge Mikva even advised BGA to intervene in the case in front of Judge Toomin, and it did not do so.

In short, there is no basis in the record for BGA's contention that the City participated in procuring the protective orders.

C. If The Court Orders Disclosure, It Should Modify Judge Toomin's Order To Allow Compliance.

The City remains bound by its obligation to obey Judge Toomin's protective orders and risks contempt if it does not obey. Thus, if this court rules for BGA on the FOIA claim and concludes that the City could not properly deny BGA's FOIA requests on the basis of the protective orders, it should reverse Judge Toomin's 2016 order refusing to modify his protective orders to the extent that this order prevents the City from complying with the FOIA request.

BGA argues in passing that Judge Toomin erroneously refused to modify the protective orders in 2016, after Judge Mikva ruled against the City in the FOIA case. BGA Br. 43. BGA's arguments on this point are irrelevant to the determination whether the City properly denied BGA's FOIA requests in 2015, when the protective orders were in full force. Instead, the question concerning the protective orders is whether at the time the City denied the FOIA requests on the basis of extant protective orders, the City's denial was

proper under FOIA. If this court now determines that the protective orders should be modified to allow the release of the materials BGA seeks, the appropriate next step after modification would be for BGA to submit a new FOIA request to which the City may respond without risk of contempt. But to be clear, that would not entitle BGA to prevail on its FOIA claim at issue here because the City did not violate FOIA in 2015 when it denied BGA's requests.[7]

CONCLUSION

For the foregoing reasons, the judgment of the appellate court entering judgment on the pleadings in favor of the City and against BGA on the BGA's FOIA claims should be affirmed.

Respectfully submitted,

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[7] In turn, this disposition would mean that BGA did not "prevail" in the FOIA case. 5 ILCS 140/11(i). As a result, the City would not be liable for attorney's fees in that case.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the 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 10,924 words.

/s Irina Dmitrieva
Irina Dmitrieva, Attorney

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 July 24, 2018.

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