No. 124552

In the
Supreme Court of Illinois

BRUCE RUSHTON AND THE ILLINOIS TIMES,

Plaintiffs-Appellees,

v.

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

Defendant-Appellee,

and

WEXFORD HEALTH SOURCES, INC.,

Intervenor-Appellant.

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

BRIEF OF INTERVENOR-APPELLANT WEXFORD HEALTH SOURCES, INC.

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ORAL ARGUMENT REQUESTED

E-FILED
6/26/2019 10:03 PM
Carolyn Taft Grosboll
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Page(s)

I. INTRODUCTION

Plaintiffs brought this FOIA action seeking access to a confidential settlement agreement (the "Confidential Franco Settlement Agreement") that resolved a lawsuit between private parties: the estate of Alfonso Franco, a deceased former IDOC inmate, and Wexford Health Sources, Inc. ("Wexford"), a private company that contracts with the Illinois Department of Corrections ("IDOC") to provide healthcare services to IDOC inmates. Although IDOC was not party to that lawsuit and did not possess a copy of the Confidential Franco Settlement Agreement, Plaintiffs sought disclosure of the document directly from IDOC pursuant to the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.* ("FOIA"). Until this FOIA dispute, neither IDOC nor any other governmental agency had any connection to the Confidential Franco Settlement Agreement.

This appeal asks whether a settlement agreement between private parties is subject to disclosure under FOIA. Wexford respectfully submits that it is not, because the settlement agreement is a purely private document in the sole possession of a private party, having no bearing on any governmental function. For these reasons, the agreement does not satisfy FOIA's requirement for the disclosure of public settlement agreements found in Section 2.20 of the statute. Nor is this document subject to disclosure under the more general terms of FOIA Section 7(2), which allows for disclosure of documents in the possession of private parties contracting to perform a governmental function ***only*** when those records "directly relate" to the

governmental function. For these reasons, the Appellate Court of Illinois, Fourth Judicial District erred in finding that Section 7(2) of FOIA provides for the disclosure of the Confidential Franco Settlement Agreement. As the Circuit Court correctly held, no applicable provision of FOIA requires the disclosure of the Confidential Franco Settlement Agreement.

The judgment at issue in this appeal is the Circuit Court's grant of Summary Judgment in favor of Wexford, which was reversed by the Fourth District. The Circuit Court below considered, *in camera*, an unredacted copy of the subject settlement agreement as well as an index describing: (1) the reason for withholding the same and (2) the nature and basis of the redactions applied to the version previously provided to IDOC in an effort to resolve this FOIA dispute without litigation. The same was provided to the Fourth District for its independent review.

II. ISSUE PRESENTED FOR REVIEW

Whether FOIA requires disclosure of a confidential settlement agreement between Wexford and another private party, where the document has no bearing on Wexford's performance of a governmental function.

III. JURISDICTION

Illinois Supreme Court Rule 315 confers appellate jurisdiction on this Court. On January 8, 2019, the Appellate Court of Illinois, Fourth Judicial District, reversed and remanded the Circuit Court of Sangamon County's grant of Summary Judgment in favor of Wexford, which held that the Confidential Franco Settlement Agreement was not subject to public disclosure pursuant to FOIA. A 001-09. Wexford filed a timely petition for leave to appeal with this Court on February 13, 2019, within 35 days of the entry of the Fourth District's Order. This Court granted review on May 22, 2019.

IV. STATUTES INVOLVED

> "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials 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).

> Settlement and severance agreements. All settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted.

5 ILCS 140/2.20.

> 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).

V. STANDARD OF REVIEW

The *de novo* standard of review applies to this review of a grant of summary judgment. *See Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 404 (2009); *Uphoff v. Grosskopf*, 2013 IL App (4th) 130422, ¶ 11. In the FOIA context, this Court has held that the scope of disclosure is a question of law to be reviewed *de novo. Better Gov't Ass'n v. Office of the Special Prosecutor (In re Appointment of Special Prosecutor)*, 2019 IL 122949, ¶ 22.

VI. STATEMENT OF FACTS

Pursuant to its contract with the State of Illinois, Wexford provides medical, dental, vision, pharmaceutical, and mental health services to inmates at specified State correctional centers. Wexford, a private company, also carries out business with a variety of other partners throughout the country. Wexford works cooperatively with IDOC to fulfill the agency's obligations under the FOIA statute and produce documents responsive to FOIA requests when the law requires. As a business with confidential and competitively sensitive information, Wexford also asserts its right to maintain the confidentiality of its business records when such records are not subject to disclosure under FOIA or any other applicable laws.

In 2014, the estate of Alfonso Franco ("Franco"), a former IDOC inmate, filed suit against Wexford and certain Wexford personnel on behalf of deceased former IDOC inmate Alfonso Franco. The lawsuit did not name IDOC or any IDOC personnel as a party, and IDOC was not involved in any aspect of the litigation. *See* C 513.Wexford made an independent business decision to settle the lawsuit. Wexford memorialized that decision in the Confidential Franco Settlement Agreement. C 501, SEC C 4-18; C 18-19. IDOC was not involved in Wexford's decision to settle that lawsuit: IDOC did not participate in settlement discussions, review draft agreements, provide funding, receive updates, or have any input in the settlement of the litigation. *See* C 14-17.

The Confidential Franco Settlement Agreement does not discuss or otherwise relate to any aspect of Wexford's provision of medical care. It simply

memorializes Wexford's decision to settle a legal claim. The document not only lacks any discussion, analysis, or assessment of Mr. Franco's health or Wexford's treatment thereof, it also affirmatively and explicitly confirms the parties' understanding that the Agreement is neither evidence of any violation of, or non-compliance with, any statute, duty, or law, nor the admission of wrong-doing or liability of any party. *Id.* at § 6.

A. Plaintiff's FOIA Request and Discussions With IDOC and Wexford.

On August 25, 2015, Plaintiff Bruce Rushton, a journalist employed by Plaintiff *Illinois Times*, made a FOIA request to IDOC "for a set of records relating to claims and/or lawsuits filed in connection with the death of Alfonso Franco, a former inmate." C 8; C 12. IDOC possessed no documents responsive to this request. Then, as now, the Confidential Franco Settlement Agreement belonged to Wexford and was in Wexford's sole possession (other than the copy in the Franco Estate's possession). IDOC did not have a copy of the document because IDOC was not a party to, nor did it play any role in, the formation of the Agreement. *See* C 14-17.

On September 8, 2015, IDOC informed Mr. Rushton that it did not maintain or possess documents responsive to the FOIA request. C 14-17. After several additional exchanges between IDOC and Rushton, on September 28, 2015, IDOC contacted Wexford to request that it provide IDOC with a copy of the Confidential Franco Settlement Agreement. C 13; C 15. Responding the same day, Wexford declined to provide the Franco Settlement Agreement to IDOC, citing the confidential nature of the document. *Id.* Over the next several

months, Wexford, IDOC, and Mr. Rushton had extensive back-and-forth discussions regarding whether the Confidential Franco Settlement Agreement was properly subject to disclosure under FOIA. C 14-17.

Ultimately, and only in the interest of cooperation with its longtime business partner, Wexford provided IDOC with a redacted version of the Confidential Franco Settlement Agreement on December 7, 2015. C 18-19. Along with the redacted document, Wexford included a two-page memorandum reiterating Wexford's position that the FOIA statute did not require disclosure of this confidential document. *Id.* As explained therein, Wexford provided the redacted Confidential Franco Settlement Agreement to IDOC "because it is committed to maintaining its valued and long-standing partnership with IDOC," and because Wexford was confident that once IDOC personnel reviewed the document, they would "determine that it is only a document memorializing Wexford's independent business decision to settle a legal claim filed by an individual IDOC inmate." C 18. Wexford and IDOC continued their discussion regarding the applicability of FOIA to the document throughout December 2015 and January 2016.

Wexford did not hear anything further from IDOC or Mr. Rushton until June of 2016, when discussions resumed regarding the Confidential Franco Settlement Agreement. C 87-88. Wexford readily agreed to provide Mr. Rushton the memorandum that Wexford had provided to IDOC in October 2015 regarding the issue, but it maintained its continued objection to the

production of the redacted Confidential Franco Settlement Agreement for the reasons it had previously articulated. *See id.* In June 2016, IDOC provided Mr. Rushton with the correspondence between IDOC and Wexford, as well as the memorandum Wexford had previously provided to IDOC. *See* C 88. IDOC did not, however, produce the redacted Confidential Franco Settlement Agreement to Mr. Rushton.

After hearing again from Mr. Rushton, on August 25, 2016, IDOC renewed its request for an unredacted copy of the Confidential Franco Settlement Agreement for its independent review. C21-22. IDOC stated that "once received, [IDOC] will determine if there are applicable FOIA exceptions. If there are no applicable exceptions, it is [IDOC's] position that these agreements must be tendered to Mr. Rushton." *Id.* Finally, IDOC warned Wexford that "[i]n the event that we do not receive these documents, we will tender the heavily redacted settlement agreement along with an explanation that we have been unable to obtain responsive documents from Wexford." *Id.*

Wexford objected to IDOC's stated intention to provide the redacted Confidential Franco Settlement Agreement to Mr. Rushton, and on September 26, 2016, it filed suit seeking to prevent IDOC from unnecessarily producing the redacted document. *See* Complaint, *Wexford* v. *IDOC,* 2016-MR-852, at ¶¶ 16-18 (Cir. Ct. Sangamon County, filed Sept. 16, 2016); C 81-94. After that case was dismissed on procedural grounds unrelated to the merits, *see* C 571-72,

but before Wexford's time to appeal had run, IDOC provided the redacted document to Mr. Rushton. *See* C 518. Wexford never consented to this release.

B. The Current Lawsuit.

On April 7, 2017, Plaintiffs filed a FOIA action against IDOC, seeking production of the unredacted Confidential Franco Settlement Agreement, as well as attorneys' fees, costs, civil penalties, and other relief. C 10 at ¶ 14. At IDOC's request, Wexford filed a Motion to Intervene C 4, which the Circuit Court granted on July 20, 2017. *Id.* Pursuant to court order, Wexford filed, under seal, a copy of the unredacted Settlement Agreement and an Index setting out the basis for withholding and redacting the same. C 5.

Both Plaintiffs and Wexford filed motions for summary judgement. At the February 16, 2018 hearing on those motions, Judge Otwell heard oral argument from both sides, noting for the record that he had reviewed both the Index and unredacted Settlement Agreement prior to that hearing. A 015. IDOC declined to take a position in the dispute, informing the court that "the AG's Office defers to Wexford and Plaintiff. It's their fight, and we'll follow the Court's order." A 043. Following lengthy oral argument and detailed questioning by Judge Otwell, the court concluded that the Confidential Franco Settlement Agreement constituted "a business decision that is not directly related to the provision of medical services pursuant to the contract between Wexford and IDOC." A 048-49.

On February 26, 2018, the Circuit Court granted Wexford's Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment.

C 6, A 010-11. That order was memorialized in both a docket entry on motion hearing (C 6) and in a subsequent agreed written Order on Cross-Motions for Summary Judgment, which incorporated the reasoning set forth as stated on the record. A 010-11. In that Order, the Circuit Court held that "5 ILCS 140/7(2) does not authorize disclosure of the settlement agreement because the business decision to settle claims does not '***directly*** relate' to the governmental function performed by Wexford." *Id.* (emphasis in original). The court further held that "5 ILCS 140/2.20 does not authorize disclosure of the settlement agreement because Wexford is not a public body." *Id.*

Plaintiffs appealed to the Fourth District. On January 8, 2019, the Fourth District reversed and remanded the Circuit Court's grant of summary judgment in favor of Wexford. A 001-09. Noting that "FOIA does not define the term 'directly relates,' which appears in section 7(2)," but "declin[ing] to define this term because any definition might prove to be insufficiently flexible in future cases," the Fourth District concluded that "the term 'directly relates' must be liberally construed in light of FOIA's purpose." A007-08. The Fourth District therefore held that "Wexford's settlement agreement directly relates to a governmental function because that settlement agreement involved the settling of a claim arising out of its rendering of medical care." A 008. Wexford timely filed a timely Petition for Leave to Appeal with this Court, which was granted on May 22, 2019.

VII. ARGUMENT

As a general matter, FOIA does not apply to documents held by private citizens. In recent years, however, the Illinois legislature has amended the statute to require, in a narrow set of circumstances, the disclosure of a private entity's records so that governmental entities do not "avoid their disclosure obligations by contractually delegating their responsibility to a private entity." *Better Gov't Ass'n v. Ill. High Sch. Ass'n* ("*IHSA*"), 2017 IL 121124, ¶ 62.

Importantly, the Illinois legislature limited FOIA's reach regarding disclosure of a private entity's records in several key respects. First, the legislature crafted a provision that only calls for the disclosure of settlement agreements entered into "by or on behalf of a public body." 5 ILCS 140/2.20. Critically, the legislature did not provide for disclosure of settlement agreements between private entities.

For documents other than settlement agreements, the legislature required disclosure of private entities' records in certain limited circumstances. Specifically, unlike public entities, whose records are subject to disclosure if they merely "pertain[] to the transaction of public business," private entities performing a governmental function are only required to disclose documents that "directly relate" to that governmental function. 5 ILCS 140/2(c). While Wexford does not believe this limited disclosure obligation reaches private entities' settlement agreements, even if it does, as explained below, the disclosure requirement does not apply in this case.

Through its comprehensive legislative scheme, the Illinois legislature directed that private entities' documents are subject to FOIA in only limited circumstances. This case is about recognizing that none of those limited circumstances contemplated by the legislature apply to Wexford's Confidential Franco Settlement Agreement.

A. Illinois' FOIA Statute Narrowly Cabins Disclosure of Private Records.

In evaluating this appeal and construing the meaning of FOIA, "the cardinal rule, to which all other rules and canons are subordinate, is to ascertain and give effect to the true intent of the legislature." *Nelson v. Kendall Cty.*, 2014 IL 116303, ¶ 23. The "most reliable indicator of legislative intent is the language of the statute." *Better Gov't Ass'n*, 2019 IL 122949, ¶ 23. That statutory language must be "viewed as a whole. Therefore, words and phrases must be construed in light of other relevant statutory provisions and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *Id.*

This Court has also instructed that "the court may [also] 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. Further, a court presumes that the legislature did not intend absurdity, inconvenience, or injustice in enacting legislation." *Id.* That said, this Court has reiterated that "[a] court cannot restrict or enlarge the meaning of an unambiguous statute. The responsibility for the justice or wisdom of legislation rests upon the legislature." *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381,

394-95 (1998). Instead, "[a] court must interpret and apply statutes in the manner in which they are written[,] and as such "[a] court must not rewrite statutes to make them consistent with the court's idea of orderliness and public policy." *Id.*

Here, Illinois' FOIA statute draws critical distinctions between the disclosure obligations of public entities and those of private entities that perform governmental functions. Specifically, FOIA requires disclosure of a ***public entity's*** (1) records that "pertain[] to the transaction of public business," and (2) settlement agreements. For ***private entities***, on the other hand, FOIA (1) reaches only those records that "directly relate" to a governmental function, and (2) does not reach settlement agreements.

Three provisions of the FOIA Statute—***enacted or amended in relevant part by the Illinois legislature at the very same time***—create this framework. First, in Section 2(c), FOIA defines "public records" to mean all records, as broadly described, "***pertaining to the transaction of public business***" that have 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) (emphasis added). Absent a FOIA exemption, if these records are in the possession of a public body, they must be produced in response to a valid FOIA request.

Second, in Section 2.20, the Statute provides that ***settlement agreements*** "entered into ***by or on behalf of a public body*** are public records"

that must be produced, absent a FOIA exemption. 5 ILCS 140/2.20 (emphasis added).

And finally, in Section 7(2), the Statute provides that records that are held exclusively in the ***possession of a private party*** performing a governmental fuction and that "***directly relate[] to the governmental function***" are public records that must be produced, absent a FOIA exemption. 5 ILCS 140/7(2) (emphasis added).

1. Settlement Agreements Entered Into Solely Between Private Entities Are Not Subject to FOIA Disclosure.

In Section 2.20, the Illinois legislature explicitly identified those settlement agreements that are subject to FOIA disclosure. Section 2.20 provides:

> Settlement and severance agreements. All settlement and severance agreements entered into ***by or on behalf of a public body*** are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of this Act may be redacted.

5 ILCS 140/2.20 (emphasis added).

a. Section 2.20 Excludes Settlements Between Private Entities From the Reach of FOIA.

Section 2.20 is the legislature's first and last word on whether settlement agreements are subject to disclosure pursuant to FOIA. Indeed, no other section of FOIA addresses settlement agreements. Importantly, the legislature did not include private entities' settlement agreements within the scope of this provision. Instead, by requiring that a settlement agreement must be entered into "by or on behalf of a public body" to be subject to disclosure, the

legislature unambiguously excluded private agreements from FOIA's reach. Until this case, no reported Illinois court decision has ever applied or even suggested that FOIA reaches settlement agreements of private parties performing a governmental function.

The negative implication canon of construction, "*expressio unius est exclusio alterius*," compels this result. *See, e.g.*, *Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004). As this Court described the canon, "the expression of one thing is the exclusion of another." *Id.* In other words, "[w]here a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." *Id.* This maxim "is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else." *Id. See also People v. Lisa (In re D.W.)*, 214 Ill. 2d 289, 308 (2005). Thus, the omission of private party settlement agreements from Section 2.20, must be read as a deliberate choice that settlement agreements between private parties are not subject to disclosure pursuant to FOIA.

Furthermore, because Section 2.20 addresses the specific context of settlement agreements, this Court need look no further in FOIA for other, more general disclosure provisions that might be read to reach settlement agreements between private parties. Section 2.20 is the exclusive specific statutory basis for disclosure of settlement agreements and it governs in this case—as opposed to the more generalized language of Section 7(2) noted above

and discussed at length below in Argument Part A.2—because "it is a commonplace of statutory construction that when two conflicting statutes [or two provisions within the same statute] cover the same subject, the specific governs the general." *People ex rel. Madigan v. Burge*, 2014 IL 115635, ¶ 31 (internal quotations omitted). *See also Van Dyke v. White*, 2019 IL 121452, ¶ 55 (invoking the general/specific canon to hold that "reliance on [a] 'catch-all' phrase . . . is unnecessary and inappropriate" given a more specific and contradictory statutory provision on the same issue).

b. Legislative History Demonstrates That Section 2.20 Excludes Settlements Between Private Entities From the Reach of FOIA.

FOIA's legislative history confirms that the only settlement agreements subject to disclosure are those entered into by or on behalf of public entities. In Public Act 96-542, the legislature amended FOIA in two significant ways. First, it added Section 2.20 to include disclosure of settlement agreements entered into by or on behalf of public entities, and second, it added Section 7(2) to create a limited disclosure obligation for private entities' records. *See* Pub. Act 96-542 (eff. Jan. 1, 2010) (adding 5 ILCS 140/7(2) and 5 ILCS 140/2.20).

The focus of the legislature in enacting Section 2.20 was clear. As Illinois Senator Harmon explained during the floor debate, the bill was "intended to deal with situations where ***a government*** shields a settlement agreement behind the exemption for insurance-related matters" and to clarify that ***public settlement agreements*** are subject to disclosure, but "may be redacted to

prevent other information that is protected from being disclosed." *See* 96th Ill. Gen. Assem., Senate Proceedings, April 2, 2009, at 239. Moreover, the legislative discussion regarding Public Act 96-542's enactment made ***no mention whatsoever*** of FOIA's potential application to settlements exclusively between private parties. 96th Ill. Gen Assem., House Proceedings, May 27, 2009, at 89-118.

Significantly, six years later, the legislature amended Section 2.20 to include ***public severance agreements***. *See* Pub. Act. 99-478 (eff. June 1, 2016) (amending 5 ILCS 140/2.20). As in 2010, the 2016 floor discussion referenced only public bodies. 99th Ill. Gen. Assem., House Proceedings, April 15, 2015, at 68-71. The legislature made no effort to expand Section 2.20 to require disclosure of settlement agreements between private parties.

c. The Simultaneous Passage of Section 7(2) and Section 2.20 Further Confirms That Section 2.20 Excludes Settlements Between Private Entities From the Reach of FOIA.

The contours of Section 7(2) are discussed below in Argument Part A.2, but for present purposes, it is sufficient to note that on the ***very same day*** the legislature added Section 2.20 to FOIA, the legislature also amended FOIA to include limited disclosure obligations for private entities under Section 7(2). There can be no credible claim, therefore, that the Illinois legislature simply overlooked private entities that perform governmental functions when it drafted and enacted Section 2.20 pertaining to settlement agreements. Indeed, the simultaneous creation and enactment of Section 7(2) and Section 2.20

readily demonstrates that the legislature was fully aware of the role of private entities in performing governmental functions, but chose, as was its prerogative, to limit disclosure obligations exclusively to public entities' settlement agreements.

In sum, the language of Section 2.20, the case law interpreting its reach, and the legislative history of Public Act 96-452 demonstrate that the Illinois legislature intended only those settlement agreements entered into "by or on behalf of public entities" to be subject to FOIA disclosure.

2. Private Records That Do Not "Directly Relate[] to the Governmental Function" Are Not Subject to Disclosure.

As described above, this Court need not consider the contours of Section 7(2), which generally governs the limited disclosure of private records, in light of Section 2.20, which specifically governs settlement agreements. Nevertheless, even if this Court were to reach Section 7(2), the outcome would be the same. The Confidential Franco Settlement Agreement is not subject to disclosure under FOIA because Section 7(2) does not require disclosure of private records that do not directly relate to the governmental function.

Section 7(2) of FOIA addresses the limited disclosure obligations of private parties performing a governmental function. It states:

> 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) (emphasis added).

a. Section 7(2) Applies A Heightened Nexus Standard For Disclosure of Private Records.

In analyzing the scope of Section 7(2), the Court must begin with the plain and ordinary meaning of the text. *See Better Gov't Ass'n*, 2019 IL 122949 ¶ 23. Here the plain meaning of "directly relates" demonstrates that the public may not access all of a third party's records merely because there is some tangential relationship between the document and the governmental function. Instead, a requesting party must show a "direct" relationship. And that relationship must be established ***on a document by document basis***. *See, e.g., id.* at ¶¶ 38-39, 49 (exempting nearly all documents from FOIA disclosure but remanding for *in camera* review and analysis of itemized invoices and billing records).

This Court has explained that it must view the FOIA statute "as a whole" and construe provisions' language "in light of other relevant statutory provisions and not in isolation." *Better Govt's Ass'n,* 2019 IL 122949 ¶ 23. Section 2(c), which focuses on public bodies, provides exactly this "other relevant statutory provision." Pursuant to Section 2(c), in the context of a public entity's documents, FOIA requires a far weaker nexus to public business:

> "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials ***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) (emphasis added).

The clear distinction between the exacting "directly relates" standard for private documents and the more lax "pertain" standard for public documents reflects the legislature's deliberate decision to substantially limit the disclosure obligations of private parties performing governmental functions.

b. Legislative History Further Confirms Section 7(2)'s Heightened Nexus Standard for Disclosure of Private Records.

The legislative history of the "pertains" and "directly relates" language further the differences between these disclosure obligations. In Public Act 96-542—the same Public Act that added Section 2.20, discussed above—the legislature amended FOIA to add these two distinct nexus requirements. Specifically, the following changes were made to Section 2(c), with additions highlighted with capitalized text and deletions noted with strike-through text:

> "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, ELECTRONIC COMMUNICATIONS, recorded information and all other documentary materials ***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, ~~possessed~~ or under the control of any public body.

Pub. Act 96-542 (eff. Jan. 1, 2010) (amending 5 ILCS 140/2(c)) (emphasis added).

In the ***very same*** Public Act, the legislature added Section 7(2), which required that records exclusively held by private entities be disclosed only if they "***directly relate[]*** to the governmental function and [are] not otherwise exempt under this Act." *Id.* (adding 5 ILCS 140/7(2))(emphasis added).

By ***simultaneously creating two different standards*** in the Act, the legislature intended the two sections of FOIA to have differing applications. As the United States Supreme Court noted in *Bates v. United States*, 522 U.S. 23, 29-30 (1997), "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." No less is true with respect to actions by the Illinois legislature.

Relatedly, the legislature's decision to craft these different standards reflects the legislature's longstanding decision to balance the goals of public disclosure in government and fostering successful partnerships with private entities that benefit the people of Illinois. For example, in drafting the FOIA exemption for trade secrets, 150 ILCS 140/7(g), Illinois Representative Currie highlighted and justified the broad definition of "trade secrets" under FOIA. As she explained:

> ***We do define trade secrets broadly in this Bill,*** and we certainly intend that term to be interpreted so as to include business

> strategies and information that, if it were disclosed, might cause harm to the competitive person . . . position of the person in the business community. ***We really do not intend, by this Bill, to have a chilling effect on private parties interest or willingness in doing business with the state. That's what we intend by trade secrets.***

83d Ill. Gen. Assem., House Proceedings, May 25, 1983, at 184 (Statements of Representative Currie) (emphasis added). Like the broad definition of "trade secrets" under FOIA, the clear distinction between the "directly relate" nexus standard for private documents and the "pertain" nexus standard for public documents achieves this balance.

c. Caselaw Likewise Confirms Section 7(2)'s Heightened Nexus Standard for Disclosure of Private Records.

This Court recognized the higher standard for private entities in *IHSA*, rejecting the idea that the performance of governmental functions alone could "transform a private entity into a public body for purposes for the FOIA." 2017 IL 121124 ¶ 55. "To hold otherwise would mean that any private entity that merely provides education services to public schools would risk being transformed into a public body. The General Assembly could not have intended such a result." *Id.* Accordingly, this Court framed the analysis as asking "whether the IHSA has contracted with District 230 to perform a governmental function on its behalf and, ***if so, whether the requested records are directly related to that governmental function***." *Id.* at ¶ 63 (emphasis added).

Similarly, the Second District recognized the distinct standards for private and public entities in *Chicago Tribune v. College of DuPage*, where it stated: "The fact that a private company's acts may be connected with a

governmental function does not create a public body where none existed before." 2017 IL App (2d) 160274, ¶ 53. The court explained that, while the FOIA statute has broad reach in the arena of public bodies' documents, for private parties' documents, "a record must 'directly relate' to the governmental function performed on behalf of a public body." *Id.* at ¶ 53. The court emphasized that the "directly relates" standard "makes clear the legislature's intention that the general public may not access all of a third party's records merely because it has contracted with a public body to perform a governmental function. FOIA is not concerned with private affairs." *Id.*

Finally, a sister State's application of the heightened nexus standard for private entity records under a FOIA-equivalent statute with the same "directly relates" language also provides helpful guidance. Pennsylvania's "Right to Known Law" "authorize[s] access to the records of a third party contractor 'with whom the agency has contracted to perform a governmental function on behalf of the agency,' provided that the requested record 'directly relates to the governmental function.'" *Mid Valley Sch. Dist. v. Warshawer*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 469, 16 (Pa. Commw. Ct 2013). Importantly, in applying ***this nexus standard that tracks the language of Section 7(2)***, Pennsylvania courts have consistently acknowledged and enforced the exacting nature of the required nexus. *Id.* at 35 (holding that records from private contractors may be subject to disclosure "only if the function is governmental in nature, ***and the precise information sought directly relates to performance of that***

governmental function.'") (emphasis added). *See also Allegheny Cty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1038 (Pa. Commw. Ct. 2010) ("Access is further restricted to records that 'directly' relate to carrying out the governmental function, to avoid access that may relate to the contract but do not relate to its performance."); *Allegheny Cty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 346 (Pa. Commw. Ct. 2013) ("Section 506(d) ***prescribes more restricted access precisely because it applies to private entities.*** Section 506(d) does not reach all records in possession of a private contractor that relate to the governmental function; rather, the records reached are only those that relate to performance of that function."); *Buehl v. Office of Open Records*, 6 A.3d 27, 31 (Pa. Commw. Ct. 2010) (Pricing records are not subject to disclosure because they "do not directly relate to providing commissary services to inmates," and therefore what the vendor paid for the items "is beyond the parameters of its contract with IDOC—it does not directly relate to performing or carrying out this governmental function.").

In sum, for records of private entities, Section 7(2) unquestionably requires a heightened nexus between the specific record at issue and the private entity's governmental function.

B. The Confidential Franco Settlement Agreement is Not Subject to Disclosure.

1. The Confidential Franco Settlement Agreement is Not Subject to Disclosure Under Section 2.20 Because it is Not a Settlement Agreement Entered into "By or On Behalf of" a Public Body.

As discussed in Argument Part A.1 *supra*, FOIA's Section 2.20 delineates which settlement agreements are subject to disclosure under FOIA: only those agreements "entered into by or on behalf of a public body" are potentially subject to disclosure. 5 ILCS 140/2.20. There can be no credible claim that the Confidential Franco Settlement Agreement was entered into by or on behalf of a public body. No public body was named as a party in the litigation; no public body (or its representative) reviewed, approved, or contributed to the settlement; and no public body receives any benefit under the settlement agreement.

Accordingly, this private document fails to meet FOIA's requirements for disclosure of a settlement agreement, 5 ILCS 140/2.20. Absent statutory authority under Section 2.20, this settlement agreement is not subject to FOIA.

2. The Confidential Franco Settlement Agreement is Not Subject to Disclosure Under Section 7(2) Because It Does Not "Directly Relate" to a Governmental Function.

Because Section 2.20 specifically governs which settlement agreements potentially fall within the scope of FOIA, Section 7(2)'s more general reference to private entities' records does not encompass settlement agreements. For that reason, Section 7(2) cannot provide a basis for FOIA disclosure of the settlement agreement here.

But even if Section 7(2) were (erroneously, in Wexford's view) determined to potentially apply to settlement agreements, it would not require disclosure of the Confidential Franco Settlement Agreement at issue in this case. Wexford's governmental function, per its contract, is the provision of healthcare to IDOC inmates. To be sure, Mr. Franco's underlying complaint pertained to the healthcare he received as an inmate. Wexford acknowledges that documents such as Mr. Franco's treatment history, prescription records, and similar ***medical*** records would "directly relate" to that governmental function.

It is not so with the Confidential Franco Settlement Agreement. An *in camera* review, as was conducted by the Circuit Court and noted on the record (A 015), confirms that the document lacks any reference to Mr. Franco's medical conditions or the care he received at Wexford. It is entirely devoid of any mention of: (1) any aspect of any medical conditions Mr. Franco ever experienced; (2) any aspect of any healthcare Wexford personnel ever provided to Mr. Franco at any time; or (3) any assessment or analysis of Wexford's provision of healthcare to inmates (*i.e.,* the governmental function). Indeed, the Confidential Franco Settlement Agreement specifically states that the document does not constitute any kind of assessment of or determination regarding the medical care Wexford provided to Mr. Franco. C 501, SEC C3-18 at § 6; C 18-19.

Instead, the Confidential Franco Settlement Agreement focuses exclusively on the resolution of legal proceedings, the discharge of legal claims, execution of release documents, and the legal covenants governing all past, present, and future claims. As the Circuit Court correctly observed, the Confidential Franco Settlement Agreement memorialized a "business decision that is not directly related to the provision of medical services pursuant to the contract between Wexford and IDOC." A 048-49. Wexford's governmental function is simply not addressed in this document. Because of this wide gulf between the contents of the Confidential Franco Settlement Agreement and Wexford's governmental function, this document cannot be said to "directly relate" to the governmental function. It therefore falls outside of Section 7(2).

The Fourth District concluded that the Confidential Franco Settlement Agreement satisfied Section 7(2) "because that settlement agreement involved the settling of a claim arising out of its rendering of medical care." A 008. Respectfully, this conclusion applied Section 7(2) at too high a level of generality. The test must, again, be conducted at the document level. *See Better Gov't Ass'n*, 2019 IL 122949 at ¶¶ 38-39, 49 (exempting nearly all documents but remanding for *in camera* review and analysis of itemized invoices and billing records). Instead, the Fourth District looked only at the general subject matter of the litigation. While the backdrop of the Franco lawsuit was the healthcare Wexford provided to Mr. Franco, the specific

Confidential Franco Settlement Agreement fails to "directly relate" to Wexford's governmental function. A 010-11.

Because this document fails to satisfy the requirement of Section 7(2) that the material "directly relates to the governmental function," the Fourth District erred in concluding that Section 7(2) provides a basis for disclosure.

C. Reversal of the Fourth District Will Restore The Balance The Legislature Struck Between The Goals of Governmental Transparency and Private Partnerships.

As noted above, the Illinois legislature has long recognized the need for a balanced, carefully-crated FOIA statute as applied to the interests of private parties who, through doing business with the State, may come under the purview of certain FOIA obligations. This Court has likewise repeatedly recognized that the FOIA statute is a powerful tool with wide-reaching impact, and that ensuring its proper interpretation and application is of great public importance. *See, e.g., Better Gov't Ass'n*, 2019 IL 122949 (protecting grand jury materials from FOIA disclosure); *Perry v. Dep't of Fin. & Prof'l Regulation*, 2018 IL 122349 (adjudicating retroactivity of statute barring disclosure of certain materials under FOIA); *IHSA*, 2017 IL 121124 (holding that the Illinois High School Association was not a "public body" under FOIA). This careful analysis reflects the statute's deliberate balancing of interests and its implicit acknowledgement of various principles important to the State of Illinois, such as protecting deliberately confidential information (including grand jury information) and the privacy interests of private bodies (such as the IHSA).

Upsetting that careful balance disrupts these principles and violates the legislature's intent.

The Fourth District's broad ruling neither promotes the balance struck by the Legislature nor exercises the caution employed by this Court. And, if it is left to stand, the Fourth Circuit's sweeping view of Section 7(2) will impact far more than just private settlement agreements. Indeed, absent guidance from this Court enforcing the appropriate limits on FOIA's disclosure requirements, a vast array of private companies' documents the legislature never intended to subject to disclosure could be sought and disclosed, simply because the private company in question contracts to perform a governmental function. Such uncalled-for disclosure of private companies' documents is exactly the kind of development that can create the ***"chilling effect on private parties interest or willingness in doing business with the state" that the legislature has long sought to avoid.*** 83d Ill. Gen. Assem., House Proceedings, May 25, 1983, at 184.

Importantly, the impact from such a "chilling effect" in this case is not an abstract or academic matter. Instead, it has the potential to fundamentally impact the expansive public-private partnerships Illinois has relied on for decades to deliver critical services to the people of Illinois. The State purchases over $10 billion worth of products and services each year. *See Sell2Illinois: Make the State of Illinois Your Next Customer*, STATE OF ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, https://tinyurl.com/Sell2Illinois. Each of

the State of Illinois' 934 government agencies relies on the services of private party vendors to at least some extent, whether as a supplier, a contractor, a partner, or a direct service provider. *See* ILLINOIS PURCHASING GROUP, https://tinyurl.com/bidnetdirect. Illinois state and municipal governments turn to private parties to effectively and efficiently provide a wide variety of products and services, including, as described in Wexford's Petition for Leave to Appeal (at 14), services that the government would not be able to provide on its own. Indeed, it is difficult to conceive of an arm of government that does not rely, at least to some extent, on private providers.

Illinois state and municipal leaders have, through their extensive and ongoing engagement in this practice, demonstrated their belief in the benefits of partnering with private entities. And these leaders have good reason to be confident. There is extensive evidence of the value that public-private partnerships bring to governments and the people they serve. In such arrangements, the "[p]rivate sector contractor accepts risks and responsibility for (some or all of) design, construction, financing, maintenance and operations" of a project, while the "[p]ublic sector retains strategic control over service delivery." *2016 Engineering & Construction Conference*, DELOITTE (June 15-17, 2016), https://tinyurl.com/yxc4t5sj. State entities "have [also] used [public-private] partnership agreements successfully to gain access to capital, develop capital assets, provide services more efficiently, or provide large infusions of cash to help fund other organizational priorities." *Public-*

Private Partnerships (P3), GOVERNMENT FINANCE OFFICERS ASSOCIATION (Jan. 2015) https://tinyurl.com/P3GFOA. Moreover, "[a] variety of [government] agencies have explored and even embraced such partnerships as a solution to some of the most intractable and complex problems agencies face." *Public-Private Partnerships: A Legal Primer*, AMERICAN BAR ASSOCIATION, 7, https://tinyurl.com/ABAP3primer.

Illinois' ability to continue to effectuate this model, however, depends on fostering a legislative environment conducive to such partnerships. Critical to this environment is recognition of the value companies place on protecting their private information when doing business with the government. Indeed, companies will make decisions based, in part, on such considerations, as noted in the Amazon headquarters example previously discussed in Wexford's Petition for Leave to Appeal (at 15-16).

It now falls to this Court to protect and effectuate the legislature's dual goals of public disclosure and effective public-private partnership. Otherwise, the State of Illinois and its citizens will suffer the consequences—including governmental bodies distracted and burdened with the task of responding to increased FOIA requests seeking documents in the sole possession of private parties; the use of scarce governmental resources to obtain documents from the private parties who possess them (as FOIA does not authorize requestors to seek those documents directly from private parties), *see* 5 ILCS 140/3(c); and strained working relationships between government entities and their private

partners. All of these consequences will negatively impact governmental bodies' ability to serve the people of Illinois.

VIII. CONCLUSION

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

Respectfully submitted,

Dated: June 26, 2019

By: /s/ *Andrew R. DeVooght*

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 7,429 words.

/s/ *Andrew R. DeVooght*

No. 124552

In the

Supreme Court of Illinois

BRUCE RUSHTON AND THE ILLINOIS TIMES,

Plaintiffs-Appellees,

v.

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

Defendant-Appellee,

and

WEXFORD HEALTH SOURCES, INC.,

Intervenor-Appellant.

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

APPENDIX TO BRIEF OF INTERVENOR-APPELLANT WEXFORD HEALTH SOURCES, INC.

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ORAL ARGUMENT REQUESTED

APPENDIX
TABLE OF CONTENTS

Page

FILED
January 8, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 180206

NO. 4-18-0206

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

BRUCE RUSHTON and THE ILLINOIS TIMES, Plaintiffs-Appellants, v. THE DEPARTMENT OF CORRECTIONS and JOHN R. BALDWIN, in His Official Capacity as Director of Corrections, Defendants-Appellees (Wexford Health Sources, Inc., a Florida Corporation, Intervenor-Appellee).	)))))))))	Appeal from the Circuit Court of Sangamon County No. 17MR324 The Honorable Brian T. Otwell, Judge Presiding

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.

Presiding Justice Holder White and Justice Knecht concurred in the judgment and opinion.

OPINION

¶ 1 Wexford Health Sources, Inc. (Wexford), provides medical, dental, vision, pharmaceutical, and mental health services to prisoners in the Department of Corrections (Department). In August 2015, Wexford entered into a confidential settlement agreement with the estate of a prisoner who allegedly died from inadequate medical care. Later that month, Bruce Rushton and the Illinois Times (plaintiffs) filed a freedom of information request pursuant to the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)) in which plaintiffs requested a copy from the Department of Wexford's settlement agreement.

¶ 2 In September 2015, the Department requested an unredacted copy of the settlement agreement from Wexford, but Wexford refused this request. In December 2015,

Wexford provided a redacted copy of the settlement agreement to the Department. However, Wexford would not give the Department an unredacted version of the settlement agreement. Ultimately, the Department gave plaintiffs a copy of the redacted settlement agreement.

¶ 3 In April 2017, plaintiffs filed a complaint against the Department requesting the release of the unredacted settlement agreement. Later that month, Wexford intervened in the lawsuit and stated that the Department did not have an unredacted version of the settlement agreement in its possession.

¶ 4 In December 2017, Wexford filed a motion for summary judgment in which it argued that the confidential settlement agreement is not covered by FOIA because it is not a public record that "directly relates" to a governmental function. See 5 ILCS 140/7(2) (West 2016) ("A public record that is *** in the possession of a party [who] *** has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function ***, shall be considered a public record of the public body ***."). Alternatively, Wexford argued that portions of the settlement agreement should be redacted pursuant to FOIA. See *id.* § 7(1). In February 2018, the trial court granted Wexford's motion for summary judgment, concluding that the settlement agreement did not "directly relate" to a governmental function.

¶ 5 Plaintiffs appeal, arguing that the settlement agreement "directly relates" to a governmental function. We agree and reverse and remand for further proceedings.

¶ 6 I. BACKGROUND

¶ 7 A. The FOIA Request

¶ 8 Bruce Rushton is a journalist for the Illinois Times, which is a newspaper based in Springfield, Illinois. In August 2015, pursuant to FOIA, plaintiffs requested that the Department

turn over "[a]ll settlement agreements pertaining to claims and/or lawsuits filed in connection with the death of Alfonso Franco, a former inmate at [the] Taylorville Correctional Center who died from cancer in 2012." Plaintiffs elaborated that "[t]his request includes but is not limited to settlement agreements involving any private entities charged with providing health care to Mr. Franco, including but not limited to Wexford Health Sources."

¶ 9 In relevant part, FOIA provides as follows:

> "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." (Emphasis added.) 5 ILCS 140/7(2) (West 2014).

¶ 10 In September 2015, the Department requested an unredacted copy of the settlement agreement from Wexford, but Wexford refused this request. In December 2015, Wexford provided a redacted copy of the settlement agreement to the Department.

¶ 11 In August 2016, the Department renewed its request for an unredacted copy of the settlement agreement. The Department intended to review the unredacted copy and, if applicable, redact the agreement pursuant to FOIA and provide it to plaintiffs. The Department stated that if Wexford did not give it an unredacted copy, it would provide the redacted copy to plaintiffs. However, Wexford would not give the Department an unredacted version of the settlement agreement. Ultimately, the Department gave plaintiffs a copy of the redacted settlement agreement.

¶ 12 In April 2017, plaintiffs filed a complaint against the Department in which it

requested the release of the unredacted settlement agreement. Later that month, Wexford was given leave to intervene in the lawsuit. Wexford filed an answer in which it noted that the Department did not have an unredacted copy of the settlement agreement.

¶ 13 B. The Motions for Summary Judgment

¶ 14 In December 2017, Wexford filed a motion for summary judgment in which it argued that (1) the confidential settlement agreement is not covered by FOIA because it is not a public record that "directly relates" to a governmental function or, in the alternative, (2) portions of the settlement agreement should be redacted pursuant to FOIA. 5 ILCS 140/7(1), (2) (West 2016).

¶ 15 Later that month, plaintiffs filed a motion for summary judgment in which they argued (1) the settlement agreement "directly relates" to a governmental function, (2) Wexford had waived any redaction argument, and (3) the settlement agreement should not be partially redacted.

¶ 16 C. The Trial Court's Order

¶ 17 In February 2018, the trial court granted Wexford's motion for summary judgment. The court concluded that FOIA did not require the disclosure of the settlement agreement because it did not "directly relate" to a governmental function. *Id.* § 7(2). As a result, the court did not consider whether the settlement agreement should be partially redacted pursuant to FOIA. *Id.* § 7(1).

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Plaintiffs appeal, arguing that the settlement agreement "directly relates" to a governmental function. We agree and reverse and remand for further proceedings.

¶ 21 A. The Applicable Law

¶ 22 Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000. An order granting summary judgment is reviewed *de novo*. *Uphoff v. Grosskopf*, 2013 IL App (4th) 130422, ¶ 11, 2 N.E.3d 498.

¶ 23 FOIA requires that a public body "make available to any person for inspection or copying all public records, except as otherwise provided." 5 ILCS 140/3(a) (West 2016). A public body includes "all legislative, executive, administrative, or advisory bodies of the State." *Id.* § 2(a). A public record is "all records, reports, forms, writings, letters, memoranda, *** and all other documentary materials pertaining to the transaction of public business." *Id.* § 2(c).

¶ 24 FOIA can also require the production of public records that are in the possession of private parties. Section 7(2) of FOIA provides as follows:

> "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." (Emphasis added.) *Id.* § 7(2).

¶ 25 The purpose of FOIA is to open public records "to the light of public scrutiny." (Internal quotation marks omitted.) *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 29, 992 N.E.2d 629. "In furtherance of this policy, FOIA is to be liberally construed

while exemptions are to be read narrowly." *State Journal-Register v. University of Illinois Springfield*, 2013 IL App (4th) 120881, ¶ 21, 994 N.E.2d 705; see also *Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838, ¶ 13, 52 N.E.3d 711.

¶ 26 In *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 62, 89 N.E.3d 376, the supreme court interpreted the purpose of section 7(2) and concluded as follows:

> "The BGA [(Better Government Association)] asserts that in adding section 7(2), it was the General Assembly's intent to respond to the growing concern related to the privatization of government responsibilities and its impact on the right of public information access and transparency. As the BGA points out, when governmental functions are privatized, there is a risk of decreased accountability and transparency. We agree that such an interpretation is consistent with the purpose of the FOIA, which is expressly based on a policy of full, complete disclosure regarding the affairs of government to promote accountability in government and an informed citizenry. 5 ILCS 140/1 (West 2014); *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373, 378-79 (1989). To that end, we agree that section 7(2) ensures that governmental entities must not be permitted to avoid their disclosure obligations by contractually delegating their responsibility to a private entity."

¶ 27 In *Chicago Tribune v. College of Du Page*, 2017 IL App (2d) 160274, ¶ 47, 79 N.E.3d 694, the Chicago Tribune requested that the court define the term " 'governmental function' " as it relates to section 7(2) of FOIA. The Second District declined this request, reasoning as follows:

> "[W]e are hesitant to adopt a sweeping pronouncement of black letter law in this case, because it might prove to be insufficiently flexible to account for the myriad of governmental entities to which FOIA applies, to say nothing of the individualized governmental functions they each perform. Rather, we believe that such analysis must be subject to a fact-specific inquiry ***." *Id.* ¶ 48.

¶ 28 The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *In re Jarquan B.*, 2017 IL 121483, ¶ 22, 102 N.E.3d 182. The best indicator of the legislature's intent is the plain and ordinary meaning of the statute. *In re J.C.*, 2012 IL App (4th) 110861, ¶ 19, 966 N.E.2d 453. When the language of a statute is clear and unambiguous, it should be applied as written without resort to extrinsic aids of construction. *Poris v. Lake Holiday Property Owners Ass'n*, 2013 IL 113907, ¶ 47, 983 N.E.2d 993. "Additionally, in determining the legislative intent of a statute, a court may consider not only the language used, but also the reason and necessity for the law, the evils sought to be remedied, and the purposes to be achieved." *Prazen v. Shoop*, 2013 IL 115035, ¶ 21, 998 N.E.2d 1. Courts should construe words and phrases in light of other relevant provisions. *In re C.P.*, 2018 IL App (4th) 180310, ¶ 18. Statutory interpretation is a question of law reviewed *de novo*. *City of Champaign*, 2013 IL App (4th) 120662, ¶ 28.

¶ 29 B. This Case

¶ 30 We initially note that FOIA does not define the term "directly relates," which appears in section 7(2). See 5 ILCS 140/2, 7(2) (West 2016). However, similar to the Second District in *College of Du Page*, we decline to define this term because any definition might prove to be insufficiently flexible in future cases. *College of Du Page*, 2017 IL App (2d) 160274, ¶ 48. Instead, we conclude that whether a public record "directly relates" to a governmental function is

a fact-specific inquiry. *Id.* Furthermore, the term "directly relates" must be liberally construed in light of FOIA's purpose. *City of Champaign*, 2013 IL App (4th) 120662, ¶ 29; *Peoria Journal Star*, 2016 IL App (3d) 140838, ¶ 13.

¶ 31 In this case, Wexford contracted to provide medical care to prisoners in the Department. In so doing, Wexford, a private party, contracted with the Department, a public body, to perform a governmental function. See *People v. Manning*, 371 Ill. App. 3d 457, 462, 863 N.E.2d 289, 295 (2007) ("[t]he eighth amendment to the federal constitution [citation] requires that prison officials ensure that inmates receive adequate medical care.")

¶ 32 Here, plaintiffs requested "[a]ll settlement agreements pertaining to claims and/or lawsuits filed in connection with the death of Alfonso Franco, a former inmate at [the] Taylorville Correctional Center who died from cancer in 2012." Plaintiffs elaborated that "[t]his request includes *** settlement agreements involving any private entities charged with providing health care to Mr. Franco, including but not limited to Wexford Health Sources." The Department tried to accommodate this request, but Wexford refused to give an unredacted copy of the settlement agreement.

¶ 33 Based on the unique and undisputed facts of this case, we conclude that Wexford's settlement agreement *directly relates* to a governmental function because that settlement agreement involved the settling of a claim arising out of its rendering of medical care. See 5 ILCS 140/7(2) (West 2016); *Manning*, 371 Ill. App. 3d at 462. This conclusion is buttressed by the purpose of section 7(2), which is to address "the growing concern related to the privatization of government responsibilities and its impact on the right of public information access and transparency." *Illinois High School Ass'n*, 2017 IL 121124, ¶ 62. Accordingly, we hold that the trial court erred when it concluded that Wexford's settlement agreement did not

directly relate to a governmental function. See 5 ILCS 140/7(2) (West 2016).

¶ 34 C. Redactions

¶ 35 Because the trial court wrongly concluded that FOIA did not require the disclosure of the settlement agreement, it did not consider whether the settlement agreement should be partially redacted. On remand, the trial court should consider this secondary issue.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the trial court's order and remand for further proceedings.

¶ 38 Reversed and remanded.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

BRUCE RUSHTON and THE ILLINOIS TIMES,

Plaintiffs,

v.

ILLINOIS DEPARTMENT OF CORRECTIONS,

Defendant,

v.

WEXFORD HEALTH SERVICES, INC.,

Intervenor.

Case No. 17-MR-324

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before this Court on the Plaintiff's request for documents pursuant to the Illinois Freedom of Information Act, 5 ILCS 104/1 *et seq.* ("FOIA"). At issue is a settlement agreement entered into between the estate of former Illinois Department of Corrections ("IDOC") inmate Alfonso Franco and Intervenor Wexford Health Services, Inc. ("Wexford"), a private company that contracts with the State of Illinois to provide healthcare services to IDOC inmates. The parties agree that Wexford is a private party with whom IDOC has contracted to perform a governmental function on behalf of a public body.

At issue in this case is whether the settlement agreement is subject to disclosure pursuant to Section 7(2) of FOIA or any other provision of FOIA. The parties have submitted cross-motions for summary determination on that question, and oral argument was heard on both motions on February 16, 2018 at 10:30 a.m.

For the reasons stated on the record at the February 18, 2018 hearing, the Court finds that 5 ILCS 140/7(2) does not authorize disclosure of the settlement agreement because the business

decision to settle claims does not "*directly* relate" to the governmental function performed by Wexford. The Court further finds that 5 ILCS 140/2.20 does not authorize disclosure of the settlement agreement because Wexford is not a public body.

Accordingly, for the reasons stated on the record, which shall be incorporated by reference as part of this Order, Plaintiffs' Motion for Summary Judgment is denied and Intervenor Wexford Health Services, Inc.'s Motion for Summary Judgment is allowed. Exhibit A to Defendant Wexford's Index of Withheld Documents (the settlement agreement) shall remain sealed in the record. This is a final and appealable order with no just cause to delay its enforcement.

Entered 2/26/18, 2018.

Judge Brian T. Otwell, Circuit Judge

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4/24/2018 11:41 AM
Paul Palazzolo
7th Judicial Circuit
Sangamon County, IL
2017MR000324

IN THE CIRCUIT COURT OF THE

SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

BRUCE RUSHTON and THE ILLINOIS TIMES,	)	
Plaintiffs	)	
vs.	)	
ILLINOIS DEPARTMENT OF CORRECTIONS,	)	No. 17-MR-324
Defendant	)	
vs.	)	
WEXFORD HEALTH SERVICES, INC.,	)	
Intervenor	)	

REPORT OF PROCEEDINGS of the Hearing held in the above-entitled cause on February 16, 2018, before THE HONORABLE BRIAN T. OTWELL, Judge presiding.

Pam Woolley, RPR, RMR
Official Court Reporter
Sangamon County Courthouse
Springfield, Illinois
CSR No. 084-002483
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Appearing on behalf of the Plaintiffs

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Appearing on behalf of the Defendant
Illinois Department of Corrections

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Appearing on behalf of Intervener
Wexford Health Services

THE COURT: This is case number 17-MR-324, Rushton vs. Illinois Department of Corrections, Defendant, and Wexford Health Services as Intervenor. Matter comes on for hearing on cross motions for summary judgment by Rushton and Wexford. Counsel, you want to go clockwise from my perspective and introduce yourselves and the parties you represent, please.

MR. DEVOOGHT: Good morning, your Honor, Andrew DeVooght, D-E-V-O-O-G-H-T. I represent Wexford.

THE COURT: Thank you.

MR. RAMAGE: Andy Ramage, your Honor, Wexford.

MS. RUVINSKY: Nina Ruvinsky, R-U-V-I-N-S-K-Y, Wexford.

MR. GRADY: Dylan Grady on behalf of IDOC, your Honor.

THE COURT: All right, thank you.

MR. CRAVEN: Don Craven and John Myers on behalf of Mr. Rushton, who is also present.

THE COURT: Very good. As I indicated,

I'll hear from the Plaintiff on its Motion For Summary Judgment in this matter. I will indicate for the record that I have received the Index and unredacted Settlement Agreement and have reviewed same prior to today's hearing. Those are sealed -- the unredacted copy of the settlement document is sealed in the record and will remain so pending the outcome of this hearing. All right, so I'll hear from the Plaintiff.

MR. CRAVEN: Thank you, your Honor. This is a FOIA request for a Settlement Agreement between the former inmate or inmate's family and Wexford, and we think this is a case that is tailor made for the application of Section 7(2) of the Freedom of Information Act, which was inserted into the Act in 2010 to allow access to public records in the possession of contractors for public bodies when those records are related to the services to be performed by that contractor. In this case, we're dealing with IDOC and its obligations, its very broad obligations under Illinois law and the constitution to provide

health care to the inmates held in the Department. We've quoted the law. We've also quoted the language in the Wexford IDOC contract, establishing again the very broad parameters of the obligations of the State under the law and the obligations of Wexford to IDOC to provide health care to the inmates. In this case, we're asking for a Settlement Agreement which is related not necessarily to the performance of duties by Wexford, but perhaps more properly said, the alleged failure of performance of duties by Wexford. Wexford, a broad variety of Wexford employees were sued by an inmate for failure to perform or failure to provide adequate health care, and that lawsuit was then settled. We had provided the Court with a variety of Attorney General's opinions on the issue of access to settlement agreements and the application of 7(2). We provided the Court with the *College of DuPage* decision related to the proper application of Section 7(2) of FOIA, and we think that under Section 7(2) and the applicable law, this

Settlement Agreement is a public record subject to disclosure, technically under the Act by IDOC, not necessarily by Wexford, but it is a public record subject to disclosure under the Act. Wexford raised no exemptions to disclosure in their pleadings. They have raised some in their Motion For Summary Judgment. They allege that this is private information, that some of the redacted information might be private information as defined in the Act, and, frankly, if there are that kind of information in the Settlement Agreement such as Social Security numbers and that kind of stuff (unintelligible), but as to the other, I think that list of what's private information is in the Act; the Court is well aware of that; it's quoted in the pleadings, and that information may remain redacted. They also make an argument that this is trade secret information because it's not paid. It's paid by Wexford or their insurer, not paid with public funds. Those kinds of arguments frankly we have dealt with for many years,

and the courts and the public access counselor have been rather consistent that settlement agreements by or on behalf of public bodies, even if paid by an insurance company, aren't trade secrets. Clearly in this case and Wexford makes the interesting announcement that any monies that it would pay or its insurance company would pay to inmates or families of inmates at DOC would have no impact on the amount of money paid by DOC, insert taxpayers, in future contracts for services. That's just silly. It's rather elementary that you have to factor in the cost of these sorts of unfortunate circumstances into the cost of doing business with the Department of Corrections. They allege that the names of their employees, the release of the names of their employees would be an invasion of privacy. The names of at least some of the employees are contained in the public record also attached to our Motion For Summary Judgment, and I would also point the Court to the PAC opinion attached to our motion, indicating that a settlement

agreement in a sexual harassment case is a public record, even when paid by an insurance company, and it's a public record including the names of the victims of sexual harassment; those names must be produced. I simply don't see the logic behind a claim that the names of people paid by a public contractor, the release of those names would be an invasion of privacy when the release of the name of a victim of a sexual harassment claim must be released. In short, Judge, we think this is -- this is why 7(2) was inserted into the Act. We would ask the Court to find that it's public record and to order its disclosure. I would note, and I have to say that I'm very sad that Ms. McNaught couldn't be here today because she's left the AG's office, but this would be the first time in many years that in a FOIA case we agree that it's a public record and should be disclosed, and the general counsel for IDOC agreed that this was a record that is subject to the provisions of the IDOC Wexford contract and should likewise be

disclosed. We would ask the Court to agree with us, the Department, and IDOC and order the disclosure of the Settlement Agreement. Thank you.

THE COURT: All right, thank you. I'll hear from Defendant Wexford.

MR. DEVOOGHT: Thank you, your Honor. Your Honor, before I start, if I may approach, I just have a couple --

THE COURT: You may.

MR. DEVOOGHT: -- a couple handouts, statutory, your Honor.

THE COURT: Very good.

MR. DEVOOGHT: Your Honor, we agree, Wexford agrees this case is about whether or not Section 7(2) applies, and I have these very basic pieces of paper here because what I want to do is focus on the actual statute, because we have, with all respect, a sort of broad, sweeping argument about the statute, and there was suggestion that Mr. Rushton's counsel has pointed your Honor to all the applicable law, but it's just not true, and when one looks at the standard, we have 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. That's Wexford. The last part, and it directly relates to the governmental function, and, your Honor, what Mr. Rushton's counsel is going to highlight for your Honor is when you look at the statute, you can understand what directly relate action means by looking at the other provisions of the statute and understand that in this the FOIA context there is a balance that's been struck between when you are dealing with a private party and its documents and a governmental entity and its documents, and even a private party, your Honor, that is providing governmental function, and that section is the actual definition of public record. Your Honor, the second piece of paper in the stack, public records mean, and then they cite all these different types of materials. All other documents or materials 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, and so, your Honor, when you hold these two statutes, these two provisions together, which is the next slide, the language and that directly relates to the governmental function, it means something. It means it is a heightened standard. There's more of a connection, when you're talking about a private party's document, to the actual performance of the governmental function than if you simply have a document that is IDOC, that is a document that IDOC created or a document that was prepared for IDOC, and that matters in this case, and that's not my argument, Judge; that's a recognition of the statute, and frankly the *Tribune* case that Mr. Craven cites, your Honor, the *Tribune* case, which we quote in paragraph 21 of our brief, says, referring to Section 7(2), this requirement makes clear the legislature's intention that

the general public may not access all of a third party's records merely because it is contracted with a public body to perform a governmental function. FOIA is not concerned with private affairs. The fact that a private company's acts may be connected with a governmental function does not create a public body or non exist it, and, your Honor, this document is exactly the case. When you look at other types of documents in this litigation, there's no question Wexford provides health care, that the underlying lawsuit involved health care, but as your Honor knows as well as anyone, this is a document-by-document analysis, and that standard means something when you're talking about a document in IDOC's possession pertaining to the transaction of public business. That's unquestionably a lower standard, and this balance is struck all across the statute. Your Honor, there's a reason for example, the trade secrets exemption, the trade secrets exemption for documents of private parties, the Courts have

said -- again I can't take credit for this argument, but as Mr. Craven is aware, we just had a lawsuit with Judge Schmidt, who we all continue to miss, involving our manuals and our manuals, some of which were involved in providing care, and if those manuals were actually involved in providing care, we didn't say they didn't directly relate to the provision of the governmental function. Wexford wasn't trying to hide it; that's a document that directly related. Similarly in this litigation, a document talking with HIPAA concerns and the like, Judge, it's outside the scope of this, but a doctor's notes and diagnoses, a document regarding care that was given or not given, but your Honor has the document. This is a business decision, and Section 6 specifically denounces the notion that this document somehow -- the Plaintiffs acknowledge that it's somehow an acknowledgment of guilt or that it's any sort of discussion of, assessment of, or critique or acknowledgment of any fault in the medical care, and the

point is that in this case, the argument that Mr. Craven makes at the superficial level sounds good, but there is a balance that the legislature and the courts have drawn, have struck, and it's implicated here. This language directly relates has to mean something more than simply pertaining to the transaction of public business. And, your Honor, all you have to do is look at the cases that Mr. Craven has cited throughout the course of this discussion. They're all cited and discussed in our brief, Judge, so I won't go through everything, but just to give you some examples. And this is the thing, I think the most important take-away, it is a document-by-document analysis. It's not -- I mean the argument is because Wexford provides health care, all their documents and the lawsuit relates to health care, that every document, and that's not -- that's just not the law, and the examples that they rely on, Judge, they involve instances where the documents do directly relate. *City of Martinsville* is the first public access

opinion Mr. Craven has cited. The *City of Martinsville* case, Judge, they were asking for -- they built a sidewalk, and they were asking for the engineering records in that case regarding the materials used, the hours worked, things that directly, clearly directly related to the building of the sidewalk. The second case, *Northstar Lottery,* Judge, *Northstar Lottery* is the case where the Illinois -- the government farmed out a component of running the Illinois Lottery, and there, there were contracts at issue, Judge, and there, the decision was made that those contracts directly related. Well those contracts, Judge, specifically outlined the price, and more importantly the services that the third party was providing, Judge. The document laid out exactly what the governmental function was that they were going to perform. Well that makes sense that that directly relates. So those two examples, and the last example that Mr. Craven cites, your Honor, is the charter school case. As your Honor knows, it's

attached, and I'm sure your Honor has reviewed it, nine or ten of those eleven pages or twelve pages focus on do those two entities, are they one entity or are they separate entities, and because the opinion finds them to be the same entity, says, those documents in your possession are considered those documents in your possession, Judge.

THE COURT: Now that case was a case where, if I recall, and I haven't -- it's been a while since I read it, but that was an issue as to -- that was a public body issue, was it not?

MR. DEVOOGHT: It was, and there is a last paragraph, Judge, and, you know, Mr. Craven is an excellent attorney and enjoyed working with. There's one paragraph at the end that says, assuming, arguendo, Judge, that you are separate entities, it says the documents related to the construction of the charter school directly relate. So there is one paragraph that is arguably -- it's not the dispositive part of the decision; it's arguably dicta, but it's

in there, and I still think it's instructive, because in that case, Judge, Mr. Craven notes that they're charged with the management of the Charter Schools. The Charter Schools didn't exist; they created them. They had to build them, and so these are documents where they literally are physically through brick and mortar building there, with the State funds, which I'll get to in a second, with the State funds that are given to them specifically to build these buildings that they then in turn manage. So I think even then, Judge, it's apples to oranges, and it's really important to me, your Honor, that we are not in here arguing about even other settlement agreements or other documents that may come down the pipe; we are talking about a specific document and whether or not that specific document directly relates. In this case, we believe that when you look at it and if you look at it, this balance struck in the statute that I think respectfully is not highlighted by the Plaintiffs but is highlighted by the *Chicago Tribune* case,

your Honor, that not every document becomes a public document just because you are performing a governmental function, and I'd like to then, Judge, address if I may the argument and the reference to these settlement agreements and this notion that they have been dealing through the years with cases that are analogous to this case. Respectfully that's just not true. It actually highlights another bargain or balance in the statute. The cases that Mr. Craven is citing, every single one, Judge, every one deals with Section 2.20 and this idea of a settlement on behalf of or by a public body, not -- and the statute clearly recognizes and *Chicago Tribune* clearly recognizes that just because you perform a governmental function, you don't become a public body, and it shows -- the legislature is able to write with precision. If Mr. Rushton wants to go lobby the legislature to add a Section 2.21 that says, and also the settlement agreements of third-party vendors who provide a governmental function, he can

do that, but Section 2.20, Judge, specifically says, by or on behalf of a public body, so respectfully, those cases are not applicable, because that provision is not at issue, but to the extent to which counsel is asking your Honor to glean a policy argument from a statute that we argue I think you look at the statute doesn't apply and this argument of public funds, it's similarly different, because in those cases, Judge, those funds, they are either directly allotted for those payments, for those services, or as here we have a private party making a decision and settling a case, and the government and the -- and actually in the decision, Judge, where Section 2.20 is interpreted by the -- where we cited, Judge, in our brief where the Attorney General -- the policy arguments, Mr. Craven says we articulate and how they apply to us, the Attorney General highlights the clear statutory language of Section 2.20, Judge, and the clear statutory language, and that's the last page of my handout, Judge,

Section 2.20, settlements and severance agreements. All settlements and severance agreements entered into by or on behalf of a public body are public record subject to inspection (unintelligible). Judge, when you take 2.20 and you hold it up with 7(2), to suggest that 2.20 paints with such a broad brush that Wexford should be considered a public body or that on behalf of a public body, that that's just not correct, because 7(2) acknowledges, as the *Tribune* case, again I don't mean to -- I very rarely quote a case in an opening brief and a reply brief, but I did it just because I think when you look at the *Tribune* language, which a case Mr. Craven touts, Judge, it explicitly says not every third party becomes a public body, and that's really critical for this case. It's really critical given the specific, explicit language of 2.20. The last thing, Judge, I wanted to mention in terms of policy, and this is important; these cases have no real consequences, and Wexford, you know, this notion that Wexford has not been transparent

or that Wexford's argument relates to not being transparent, transparency, it's just not true. Again with Section 7(2), if there is a document that directly relates to the carrying out of the governmental function, then that document has to be disclosed. There is no argument. That's exactly again, Judge, I mean we prevailed with Judge Schmidt. He read thousands of pages of our manuals. As your Honor knows, that's the type of judge that he was, and he read literally thousands of pages of our manuals, eight or nine manuals, and we gave those to Plaintiffs' counsel under seal, just as we do in any case if a Plaintiff needs those for an underlying litigation, subject to protective order, and having read those, acknowledge yeah, they directly relate, but there's an exemption for those, and I think when you juxtapose the types of documents we're talking about and we recognize the difference in the statute, this particular document, just this document, doesn't directly relate; and the last part, in terms of those public

policy issues, Judge, and I argue public policy only because I firmly believe -- I wrote that memo that is attached that was given to IDOC two or three years ago now where I researched all the fifty states and all I could come up with, as your Honor will see, is the Pennsylvania case that I think cuts in our favor, in terms of precision, the information, the link it has to have when you're talking about directly relate, so that that language means something. It doesn't mean the same thing as simply pertained, but in this case, there are real world consequences, and the most important one isn't about money. Frankly, Mr. Rushton was at a hearing that I was at -- it's all public record -- in January, the *Rasho* case, Judge, and I'm sure you're aware of it. It's the case involving mental health and the provision of mental health, and the biggest issue after you read Mr. Rushton's scathing, you know, review of IDOC and Wexford; it's no secret, his view, but looking, as Judge Mihm will, at the underlying issues, the biggest

issue in that case is staffing. Wexford has hired -- it's all public record -- over five hundred people in the last five years just related to mental health, and we've lost more than 250 of them because of, as your Honor knows, the challenges that correctional medicine presents in terms of unique atmosphere, despite paying way above market, one psychiatrist being paid six hundred thousand dollars to try to get this talent in there, and this lawsuit made public invariably if it leads to more lawsuits, it's yet another reason that we are going to have a hard time retaining staff, and it has a real-world impact, because the very subject of the underlying *Rasho* case relates to staffing and the difficulty in keeping our staff, and when you add something like this, a document that doesn't directly relate, it has a real-world consequence, but more importantly, under the statutes, 7(2) Section 2C and the 2.20, this document does not fall within those provisions, and respectfully, your Honor, we believe that your Honor ruling

that this particular document is not subject to FOIA, it will not result in a lack of transparency for the very arguments we're making, because we are never going to stand before this Court or any Court and argue that a document doesn't directly relate when it does. We are going to hope that there is an exception or an exemption, and if not, we're going to disclose it, which is the last point I want to make, because as your Honor knows, the reason that that legal memo is attached as an exhibit, I wrote it, and when Mr. Rushton came back and asked for documents, I was driving to Springfield and I called then General Counsel, now Judge Hunt, and said, you have got to produce that memo; we don't believe you have to produce the settlement, but you have to produce the memo I wrote because it's in your possession; it was prepared for you. When you look at the statute, that document need only pertain to government business, but it's a different standard in this case, and we would ask your Honor to find that under that standard,

this particular document not be subject to FOIA.

THE COURT: All right, so what about the argument that the settlement record and presumably one of the main things that is of interest and certainly newsworthy would be the amount of the settlement affects future benefits, and if I'm wrongly paraphrasing your argument, Mr. Craven, you can correct me, but the amount of the settlement pertains to any future contracts that Wexford may enter into with DOC because Wexford is going to have to include the amount of insurance premiums that are paid in the future due to past settlements, again correct me if I'm wrong but --

MR. CRAVEN: -- fair summary.

THE COURT: -- and therefore that's a matter of certainly of public interest, but it's a matter that pertains to, to use the language, it's a matter pertaining to the transaction of public business because of the amount of taxpayer money that's going to be required to fund future contracts. Is that a

fair representation of your argument?

MR. CRAVEN: Yes.

THE COURT: Can you respond to that?

MR. DEVOOGHT: Yes, your Honor. In the first instance, I don't think the fact that even if it has that impact, that it means that it directly relates to the performance of the government function, because you are talking about in this instance a document that reflects the settlement of a case with a backdrop being prior medical services provided, and in this instance when you're looking to something directly relate to the performance of that governmental function. It may be that first of all Wexford in terms of talking to IDOC about the litigation, you know, IDOC is aware of the litigation. Second of all, even if it has an impact in terms of the amount of money we have to charge going forward, it still, Judge, when you look at how the statute is balanced, it doesn't mean that that document itself directly relates to the provision of the health care, and I think that that's the

balance that's struck here, because when you look you have a private party versus a government body, and in all those funds cases, Judge, they are specifically with Section 2.20, and if this a concern that Mr. Rushton can persuade the legislature it's of sufficient concern, I think actually the argument highlights why did the government feel the need to have specifically Section 2.20 if that argument on its face brings the document by itself back into the statute. I mean if you think about it, Judge, why did they add Section 2.20. To make clear that a Settlement Agreement, which we all know often says nothing about the underlying subject, they literally added a specific provision, Judge, to bring that type of document under FOIA. Did they do that because they didn't think (unintelligible) fell under this broad language of pertains, which is much broader than directly relates. So I think it's really important to look at when we have this specific provision, 2.20, that specifically addresses that issue, and,

your Honor, it is in that context, your Honor's good question, it's in that context of 2.20, the public access opinion in our brief, where the Attorney General first articulates those policy arguments, but again that's the same opinion where the Attorney General, not us, not Wexford, says, the clear unambiguous language of 2.20 relates to a public body. So if the legislature decides that those same policy arguments should apply to a third party, they can tweak the statute, but as written and as applied and even as argued by the Attorney General, who Mr. Craven is asking you to follow their view here, the Attorney General emphasized that that statute applies to public bodies and that its language is clear, and although those policy arguments in theory may transfer over, the statute only authorizes it with respect to public bodies, and so the fact that you have that specific provision of settlement agreements I think undercuts the notion that one can shoehorn in the settlement agreement

under directly relates.

THE COURT: Let me ask because I'm interested in today's environment, Mr. Craven made reference to the settlement agreements involving sexual harassment and the requirement that those -- that the FOIA provides for disclosure or requires disclosure, and frankly I cannot recall the authority that's being cited in that regard so.

MR. CRAVEN: It's a PAC opinion, your Honor.

MR. DEVOOGHT: First of all, Judge, if that's one of the cases we've cited, I'd go back to two things. One, all of the public cases that I'm aware of that he cites in terms of public, all the settlement agreements he cites, none of them is with a private party. It may be an insurer on behalf of the public body, Judge, first of all, but it is not a private party with (unintelligible). That's number one. Number two, the extent to which -- yeah, the extent to which it involves sexual harassment,

Judge, all those cases that he cites -- this is critical -- involve a public body and public employees. They do not involve private parties, and that really is the dispositive difference, and it may be that Mr. Craven and Mr. Rushton want the statute to be broader than it is, but 2.20 is very specific. It says, by or on behalf of a public body, and the reason that that's so critical and dispositive, if the whole statute didn't have any other distinctions it would draw, that argument might have more traction, but when you look at 7(2) and it talks about the idea of there being third parties that provided governmental function but they're not called public bodies, or you read the *Tribune* case and they talk, Judge, about just because you are a private party performing a governmental function, you don't become a public body, that underscores the same is true; these are public employees, and so I'm not aware of a specific -- again if the legislature wants to have a specific provision about all sexual harassment cases,

whether they're public or private bodies, public employees, private employees, they can do that, but under the existing law and the framework, there is a clear distinction that is drawn, and again this is I think the most important point. It is not a matter of there not being transparency; it is a balance that is struck between, if you're talking directly about a public body or if you're talking about a private party, it's performing a service, and if it's a private party performing a service, there has to be more of that connection, and so, you know, in this case, you think about it, Judge, IDOC wasn't a party to this lawsuit; they weren't a party to this settlement. They didn't even have this document. That goes to that when you look at public record, they never had it; they never asked for it before this; it wasn't something prepared for them; they didn't know anything about it, because it was a private business decision by Wexford, and I think, you know, the reason I keep harping on transparency is because I understand that

someone would say, well if you have these policy arguments that you think underscore why your client is a public body, aren't those important when they apply to a private party. They are, but there's also -- again this isn't my argument, Judge; this is across the statute and across the courts -- a balance that is struck, and more is required when you are talking about a private party.

THE COURT: All right, thank you, Mr. DeVooght. Before I hear your response, Mr. Craven, Mr. Grady, do you have?

MR. GRADY: Your Honor, the AG's Office defers to Wexford and Plaintiff. It's their fight, and we'll follow the Court's order.

THE COURT: All right, thank you. All right, Mr. Craven.

MR. CRAVEN: Counsel said very clearly that not every body becomes a public body just because they have a contract with the State. This is not a public body case.

THE COURT: Right.

MR. CRAVEN: This case is about a contract that IDOC and the Attorney General

say should have been turned over to the Department when they asked for it, and Wexford, in the interest of transparency, refused. If they had complied with the contract as IDOC and the Attorney General set forth in the pleading, if they had complied with the contract, this very clearly falls within the definition of public record, because it was then in the possession of and received by IDOC, and their arguments are gone. Why Section 2.20? And I'll be brief, but I was sort of there, and Section 2.20 was put into the statute in a naive effort to avoid this very argument that somehow the payment of settlement agreements is a trade secret, is a commercial decision. No, it's not. A settlement agreement impacts fundamentally the amount of money paid by taxpayers for services either by public bodies or contractors for public bodies. Many of the cases involving settlement agreements that I made reference to earlier predate 2.20, but we had the argument over and over and over, so 2.20 was inserted into

the statute in an effort to avoid further arguments about the secrecy of settlement agreements, and obviously, given this case and the number of PAC opinions, was an unsuccessful effort to avoid further arguments, but that's why it was inserted. This directly relates to the governmental function of providing adequate health care to inmates in the Department and the cost of providing adequate health care to the inmates in the Department. There is a real-world consequence to hiding settlement agreements. There's a real-world consequence to the cost of injured and now deceased inmates not receiving the adequate health care that IDOC thought they were paying for. This is a document dead center under 7(2), and we would ask that it be released.

THE COURT: All right, thank you. Mr. DeVooght, since you also filed a Motion For Summary Judgment, I suppose it's appropriate to allow you to respond.

MR. DEVOOGHT: Just very briefly and just to the reply. Number one, there's no

case support citation for this notion that 2.20 applies to private parties, first of all. It says what it says; it says public bodies on or behalf, and that's the statute; that's the applicable law. There's no case citation whatsoever by Mr. Craven anywhere in his papers that 2.20 should apply to a private party, number one. Number two, Judge, I only cited *Chicago Tribune* because that was a case, your Honor, the first time we were in court that counsel touted, specifically mentioned that case orally in court, and when one looks at that case, I just think, Judge, that case underscores the real world pragmatic approach the courts have taken. Number three, I didn't address, with all respect, verbally the four points the contract argument. I think if your Honor just reads our provision 4.6, this notion that somehow our contract says that we acknowledge that's a public document, respectfully, but if your Honor will just go back and read Section 4.6 in our contract, that's not what it says. It says, a

document, we are going to be exchanging confidential information throughout the course of their work and providing care; if we provide something to them during the course of providing care and we provide that document to them and we don't say that it's subject to FOIA confidential, then it's public, and we actually did a block quote, which not a huge fan of, but I think it's easiest for your Honor, and the contract is attached as an exhibit. So this notion that -- I mean that would blow up the entire balance if a party is signing on, and Mr. Craven I think understands that it would blow up the entire balance, Judge, if a party is signing on and saying every single document they have becomes -- and that's also rejected in *Tribune*. Finally this notion of funding and the impact, I think it's very important on 2.20 that it's public bodies, and Mr. Craven's argument is not for this Court; it's for the legislature on that provision. So we'd respectfully ask, your Honor, that you find this one particular

document to not be subject to FOIA. Thank you, your Honor.

THE COURT: All right, thank you. Well I mean as far as contract is concerned I suppose if that provision was interpreted as requiring Wexford to provide unredacted settlement records to DOC in performance of the contract, then that would be between DOC and Wexford. Obviously as we all acknowledge, once if DOC had obtained an unredacted copy of the settlement record, then they'd be required to turn it over pursuant to the Freedom of Information Act, but that wasn't done here. You know I'm all about transparency; I'm all about First Amendment rights, but I think that Section 2.20 acts as a -- in a relatively recently enacted provision that acts as a restriction on relatively broader language contained in 7(2). I think that the argument that the amount of the settlement impacts the amount of taxpayer money going forward with respect to any future contracts between Wexford and DOC is a good argument; it's a

good policy argument, but it's speculative for one thing that they are going to enter into any future contracts as opposed to some other vendor, but more importantly, I think that's an indirect result or an indirect consequence of the Settlement Agreement in this matter, which I do find to be a business decision that is not directly related to the provision of medical services pursuant to the contract between Wexford and IDOC. So I will allow the Defendant's Motion For Summary Judgment, deny the Plaintiff's Motion For Summary Judgment. I think it's a close case, and if I'm wrong, I suspect that I'll find out. So does Wexford wish to prepare a written order consistent with my ruling?

MR. DEVOOGHT: We will, your Honor.

THE COURT: All right. I'll look for that, and I'll note the docket with my rulings and set that with Plaintiff and I'll sign that. Anything else then for today?

MR. DEVOOGHT: Not from Wexford.

MR. CRAVEN: Thank you, your Honor.

THE COURT: Thank you, counsel. We're in recess.

(PROCEEDINGS CONCLUDED)

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

I, Pam Woolley, Official Court Reporter for the Seventh Judicial Circuit of Illinois, hereby certify that I reported the proceedings had in the above-entitled cause and the foregoing is a true and accurate transcript of proceedings had.

DATED THIS 2nd day of March, 2018.

Pam Woolley
Pam Woolley, RPR, RMR
CSR No. 084-002483

TABLE OF CONTENTS-RECORD

FEBRUARY 16, 2018 HEARING TRANSCRIPT (filed April 24, 2018) R 19

No. 124552

In the Supreme Court of Illinois	
BRUCE RUSHTON AND THE ILLINOIS TIMES, Plaintiffs-Appellees, v. ILLINOIS DEPARTMENT OF CORRECTIONS, AND JOHN R. BALDWIN, IN HIS CAPACITY AS DIRECTOR OF THE ILLINOIS DEPARTMENT OF CORRECTIONS, Defendant-Appellee, and WEXFORD HEALTH SOURCES, INC., A FLORIDA CORPORATION, Intervenor-Appellant.	No.

NOTICE OF ELECTRONIC FILING

To: ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on June 26, 2019, on behalf of Intervenor-Appellant Wexford Health Sources, Inc., I, Andrew R. DeVooght, an attorney, caused the following:

BRIEF OF INTERVENOR-APPELLANT WEXFORD HEALTH SOURCES, INC.

to be electronically filed with the Clerk for the Supreme Court of Illinois.

Dated: June 26, 2019

Respectfully submitted,

LOEB & LOEB LLP

By: /s/ Andrew R. DeVooght

Andrew R. DeVooght

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Attorneys for Intervenor-Appellant Wexford Health Sources, Inc.

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on June 26, 2019, Brief of Intervenor-Appellant Wexford Health Sources, Inc., with attached Appendix was electronically filed with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

The undersigned further certifies that a copy of the same was served via electronic mail to the parties listed below, on June 5, 2019:

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

/s/ *Andrew R. DeVooght*
Andrew R. DeVooght