No. 121124

IN THE
SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,

Plaintiff-Appellant,

v.

ILLINOIS HIGH SCHOOL ASSOCIATION, CONSOLIDATED HIGH SCHOOL DISTRICT 230,

Defendants-Appellees.

On leave to appeal from the Appellate Court of Illinois, First District, No. 15-1356

There on Appeal from the Circuit Court of Cook County, Chancery Division, No. 14 CH 12091

Honorable Mary Lane Mikva, Judge Presiding

DEFENDANT-APPELLEE ILLINOIS HIGH SCHOOL ASSOCIATION' S BRIEF AND ARGUMENT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ISSUES PRESENTED

I. WHETHER THE APPELLATE COURT PROPERLY CONCLUDED THAT IHSA IS NOT A SUBSIDIARY OF A PUBLIC BODY SUBJECT TO THE FREEDOM OF INFORMATION ACT?

II. WHETHER THE *O'TOOLE V. CHICAGO ZOOLOGICAL SOCIETY* ANALYSIS RELATIVE TO TORT IMMUNITY SIMILARLY DETERMINES WHETHER AN ENTITY IS A SUBSIDIARY PUBLIC BODY UNDER THE FREEDOM OF INFORMATION ACT?

III. WHETHER THE FACTS IN IHSA'S UNREFUTED AFFIDAVIT WERE PROPERLY DEEMED ADMITTED?

IV. WHETHER IHSA'S UNSUCCESSFUL LEGAL ARGUMENTS IN EARLIER LITIGATION ESTOP IT FROM ARGUING IT IS NOT A SUBSIDIARY PUBLIC BODY UNDER THE FREEDOM OF INFORMATION ACT?

NATURE OF THE CASE

This appeal calls on the Court to: (1) confirm the proper analysis to be applied to whether a private entity such as the Illinois High School Association ("IHSA") is a subsidiary of a public body subject to the provisions of the Freedom of Information Act ("FOIA"); and (2) determine whether the IHSA's function of organizing certain interscholastic athletics and activities on behalf of its public and private member schools amounts to performance of a governmental function. The First District applied the three-factor test first enunciated by the Second District in *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism & Drug Dependence,* 64 Ill. App. 3d 94 (2d Dist. 1978) (the "*Rockford* Test"), and later applied in *Hopf v. Topcorp, Inc.*, 170 Ill. App. 3d 85 (1st Dist. 1988) ("*Hopf I*"), and *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887 (1st Dist. 1993) ("*Hopf II*"), to find that the IHSA is not subject to FOIA. This ruling should be affirmed to ensure consistency in the application of FOIA to private entities such as the IHSA.

STANDARD OF REVIEW

IHSA agrees that this Court reviews orders granting motions to dismiss under 735 ILCS 5/2-619 *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Further, statutes are construed in accordance with the plain and ordinary meaning of the statutory language. *People v. Chenoweth*, 2015 IL 116898, ¶ 21. The primary focus of statutory construction is to ascertain and give effect to the legislature's intent. *Id.* To determine legislative intent, this Court may consider not only the language of FOIA, but also the purpose and necessity for the law, the evils sought to be remedied, the goals to be achieved, and the consequences that would result from construing FOIA one way or the other. *Hubble v. Bi-State Dev. Agency of the Illinois-Missouri Metro. Dist.*, 238 Ill. 2d 262, 268 (2010).

JURISDICTION

On April 13, 2015, the circuit court granted the IHSA's 2-619 motion and the 2-615 motion filed by co-defendant Consolidated High School District 230 ("District 230"). On June 24, 2016, the First District issued its opinion affirming the circuit court. BGA filed its petition for leave to appeal on July 29, 2016. This Court granted BGA's petition for leave to appeal on September 28, 2016.

RELEVANT STATUTORY PROVISIONS

> The disclosure provisions of FOIA apply to a "Public body," which is defined as:
> [A]ll legislative, executive, administrative, or advisory bodies of the State, . . . school districts and . . . any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof . . .
> 5 ILCS 140/2(a) (emphasis added).
>
> FOIA further provides:
> 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 this 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).

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STATEMENT OF FACTS

A. Procedural Background And Lower Court Rulings

On July 23, 2014, plaintiff Better Government Association ("BGA") filed a one-count complaint against the Illinois High School Association ("IHSA") and Consolidated High School District 230 ("District 230") alleging that both violated the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.* ("FOIA"). C. 3-98. The complaint arose out of an FOIA request made by BGA to the IHSA on June 5, 2014. C. 8-9. The FOIA request sought all of the IHSA's contracts for accounting, legal, sponsorship and public relations/crisis communications services and all licensed vendor applications for the 2012-2013 and 2013-2014 fiscal years. C. 8; 88. The IHSA responded that it is a non-profit 501(c)(3) charitable organization based in Bloomington, Illinois and not subject to FOIA. C. 8; 90. IHSA relied, in part, on an earlier opinion issued by the Public Access Counselor ("PAC") on September 29, 2010, concluding that the IHSA is not subject to FOIA because it does not fall within the definition of a "public body" under 5 ILCS 140/2(a). C. 277.

On July 2, 2014, BGA issued a request to District 230 for the same records, purportedly under Section 7(2) of FOIA, 5 ILCS 140/7(2). C. 9. On July 15, 2014, District 230 responded that it was not in possession of any responsive documents. C. 9.

The IHSA and District 230 filed separate motions to dismiss BGA's complaint. C. 116-131; 134-277. The IHSA moved to dismiss under section 2-619(a)(9) and argued that it was not a subsidiary of a public body that was subject to FOIA. C. 134-136; 138-152. The IHSA's motion was supported by the Affidavit of Martin Hickman ("Hickman Affidavit"), IHSA's Executive Director at that time, a copy of the IHSA's Constitution and By-laws, and the PAC letter opining that the IHSA was not a public body under

FOIA. C. 154-277. District 230's motion was filed under section 2-615 and argued that the IHSA was not a public body. C. 116-130. District 230 also contended that it did not possess the records sought and the records were not public in any event. *Id.*

On April 13, 2015, following oral argument, the circuit court granted IHSA's and District 230's respective motions to dismiss with prejudice. A. 153-154. The circuit court concluded that under *Rockford*, the IHSA is not a subsidiary of a public body subject to FOIA. Supplemental Record Vol. 3 R. 65:1-3 (hereinafter, "Supp. Rec."). In addition to the fact that the IHSA receives no government funding, the court noted that the IHSA's functions were not necessarily governmental and it was not subject to governmental control. Supp. Rec. Vol. 3 R. 65:6-17. In so ruling, the court determined that all of the facts set forth in the unrebutted Hickman Affidavit were deemed admitted since BGA failed to submit a counter-affidavit, and that the IHSA's unsuccessful legal arguments in *Hood v. IHSA*, 359 Ill. App. 3d 1065 (2d Dist. 2005), relating to the IHSA's claimed entitlement to tort immunity, were not legally binding admissions. *Id.* at 64:13-17. The circuit court further observed that BGA was not entitled to discovery because BGA did not seek any discovery and that discovery was not necessary for the circuit court to decide IHSA's motion. *Id.* at 18:1-13; 20:21-24; 21:1-11; 24:9-16; 29:4-11; 34:16-21; 50:10-17.

The circuit court explained that there are "a number of private organizations that support the public and private schools and it does not make them all governmental actors." Supp. Rec. Vol. 3 R. 65:6-17. The circuit court also observed that the IHSA's organization of interscholastic athletics "is a function that could be done, as I've said now probably five times, by a public entity or it could be done by a private, not-for-profit

association. And [in] this case [it] is being done by a private, not-for-profit association for the benefit of both public schools and private schools . . ." *Id.* at 97:18-24.

The First District affirmed the circuit court's ruling on June 24, 2016. A. 157-175. The First District applied the *Rockford* Test and found that all three factors weighed in favor of finding that the IHSA is not a subsidiary of a public body because: (1) the IHSA has a separate and independent legal existence apart from its member schools (A. 165-166); (2) the IHSA's function of organizing interscholastic sports, while enhancing education, is distinct from education itself, can be performed by private or public entities, and is not inherently governmental (A. 168-170); (3) IHSA is controlled by its Executive Director, administrative staff, and the Board of Directors, not the government, and IHSA does not receive government funding; and (4) since IHSA does not perform governmental functions, its records are likewise not subject to disclosure under FOIA Section 7(2). A. 172. The First District also agreed that IHSA's arguments in *Hood* were not legally binding evidentiary admissions and the facts in IHSA's unrebutted affidavit were properly deemed admitted. A. 170-171.

B. Nature And Operations Of The IHSA

The following facts are taken from the IHSA's publicly available governing documents and the Hickman Affidavit, which facts were deemed admitted by both the circuit court and the First District. Supp. Rec. Vol. 3 R. 64:13-18.

1. The IHSA's Independent Legal Identity and Existence

The IHSA was founded on December 27, 1900. *www.ihsa.org/AbouttheIHSA.aspx.* BGA conceded that the IHSA's formation was separate from government resolution in its appellate brief and oral argument in the First

District. *See* BGA Opening Appellate Brief at p. 24; A. 166. As an unincorporated voluntary association, the IHSA has separate standing to sue and be sued under 735 ILCS 5/2-209.1. A. 165. The IHSA is a recognized 501(c)(3) charitable organization and is listed by the Illinois Attorney General as a registered Charitable Trust in its database. C. 154. The Internal Revenue Service also recognizes the IHSA as a separate legal entity—the IHSA files its own tax returns and has its own Federal Employer Identification Number. C. 154-155. Further, the IHSA withholds payroll taxes and other required deductions, and issues W-2 forms annually to its employees. C. 155. The building that houses the IHSA's offices at 2715 McGraw Drive, Bloomington, Illinois is owned solely in the IHSA's name. *Id.*

Although several Illinois statutes impose responsibilities on the IHSA (*e.g.*, providing materials relating to concussions), none legislate or require the IHSA's continued existence. Further, there are no statutes or other authority in Illinois requiring that schools either join the IHSA or provide interscholastic athletics and activities for their students. A. 166-167.

2. The IHSA's Limited Purpose and Scope

The IHSA is a private voluntary unincorporated association of over 800 private and public high schools located throughout Illinois. C. 154. As stated in Section 1.120 of the IHSA's Constitution, the purpose of the IHSA is to "provide leadership for the development, supervision, and promotion of interscholastic competition and other activities in which its member schools engage." C. 172. There are high schools in Illinois that are not members of the IHSA and the IHSA does not govern all sports and extracurricular activities engaged in by its member schools. C. 171; 161-165; 226-239.

The sports and activities governed by the IHSA are limited to those listed at http://ihsa.org/SportsActivities.aspx. For example, the IHSA does not oversee intramural sports, club sports, sports in non-IHSA events, and many other after school programs that are provided by high schools in the state. *See Id.* at "Activities Column." The IHSA also has no authority over any of its member schools' classroom activities, employment decisions, student discipline, or any other internal school decisions.

3. Lack of Governmental Control and Funding of IHSA

As a non-profit association, the IHSA does not have any owners. *See* 805 ILCS 105/106.05. The business of the Association is conducted by the Board of Directors, which is expressly authorized under the IHSA Constitution to employ an Executive Director and other administrative staff as necessary to conduct the day-to-day business of the IHSA. C. 155;176. The Executive Director has broad authority, including deciding all matters concerning eligibility, protests, By-laws or rules, which can then be appealed to the Board of Directors. C. 177-178. The Executive Director is also responsible for contract negotiation, public relations, and all other matters "necessary to carry on the affairs of the Association." C. 225.

The IHSA's Executive Director and other administrative staff are not government employees, are not paid from government funds, and are not subject to any state regulations regarding public employees. C. 155. Moreover, they are not eligible for any state or local governmental retirement programs or insurance benefits based on their employment with the IHSA. *Id.* They are employees of the IHSA, paid by the IHSA, and provided certain benefits as determined solely by the IHSA. *Id.* The IHSA's administrative staff reports to the Executive Director. *Id.* The IHSA maintains its own

liability insurance policy and the premium for that policy is paid out of the IHSA's own private revenue stream. A. 20.

The IHSA is governed by its independent, elected Board of Directors. Per Section 1.310 of the IHSA's Constitution, the Board of Directors is made up of ten members elected by the general membership. C. 175-176. Each Director of the Board must be a principal of a member school. C. 175. The Constitution provides for the creation of seven Divisions within Illinois. *Id.* One Director is elected from each of the seven Divisions. *Id.* In addition, three Directors are elected from the IHSA's membership at-large. *Id.* Of those three at-large Directors, one Director must be from a private/non-public school, one seat is reserved for under-represented genders, and the third seat is reserved for racial minorities. *Id.*

There is no provision that would prohibit the Board from consisting of a majority of private/non-public school principals. C. 154. Indeed, it is entirely possible that all of the Directors could come from private member schools at any given time. C. 155. Of note, Division 1, which contains all of the City of Chicago schools, is overwhelmingly made up of public schools. *Id.* However, the last two elected Directors from Division 1 have been from private schools. *Id.*

The Directors are not paid a salary for their service on the Board and they are not employees of the IHSA. C. 155. Importantly, it is the individual principal who is elected to the Board, and not the member school. *Id.* Their employers need not authorize any vote or decision made by the Director, and if a Director changes jobs and moves to a different member school, he or she does not lose their seat on the Board and their replacement as principal does not assume their Board position. *Id.* This is true regardless

of whether the Director is moving from a public school to a private school or vice-versa, so long as the new member school is located within the Director's elected legislative Division if they hold a "districted" seat or so long as he or she continues to meet the requirements for their particular "at-large" seat. *Id.* Until the recent expiration of his term, James Quaid was an elected Director who continued to hold his Board position after changing jobs from Marmion High School to Gordon Tech/DePaul College Prep High School. *Id.* Mr. Quaid's Board seat did not pass to the new principal at Marmion High School. *Id.*

Sections 1.700 and 1.900 of the IHSA's Constitution detail the legislative process that is used in creating, amending or repealing provisions of the Constitution and By-laws. C. 180-183. This process includes the division of member schools into twenty-one election Districts, with one principal from each District being elected to the Legislative Commission. C. 180. There are also seven at-large Commission members elected by the general membership, one from each of the seven Divisions, as well as seven athletic administrators elected by the general membership, one from each of the seven Divisions. *Id.* There is no requirement that any particular number of the thirty-five Legislative Commission members be from public schools as opposed to private schools. C. 156. As a result, as with the Board, it is possible that the Legislative Commission could consist entirely of members from private schools, and a member who changes jobs does not lose their Legislative Commission seat. *Id.*

The IHSA's Constitution and By-laws also set forth very specific legislative proposal and voting requirements. C. 182-183. All changes to the Constitution and By-Laws proposed by the Legislative Commission require the approval of a majority of

member schools. *Id.* Each member school is given the opportunity to vote, whether it is a public or private school. C. 156. A member school's input in the association is limited to voting on legislative proposals and the election of Board Members and Legislative Commission representatives.

4. Non-Public Sources of Funding for the IHSA

The IHSA does not receive any government funding, does not charge member schools any membership fees or dues, and does not charge its members any entry fees for events. C. 154. Rather, the IHSA's revenue is generated from the interscholastic events that it organizes and the sponsorships it receives. *Id.* The IHSA's only revenue-generating events are those which are part of its state tournament series contests, including the regional, sectional and finals events. C. 154. While IHSA rules apply to regular season contests, it does not organize or arrange regular season contests and derives no revenue from them.

Schools do not donate their facilities to the IHSA for state tournament series events. Instead, the IHSA contracts with host schools as well as other venues (events are often held at non-high school venues, such as the basketball finals, held at the Peoria Civic Center, and the football finals, held at the University of Illinois and Northern Illinois University), pays for the use of the facilities, and provides a minimum guarantee to the host. C. 328. The host site and the IHSA split any profit in excess of the guarantee. *Id.* For example, the IHSA provided a $2,000.00 guarantee plus 20% of profits after expenses to the host school and reimbursed the host school for the cost of officials for the 2013-14 Boys Basketball Class 4A Regional. *Id.* The IHSA frequently

holds events at private schools and did so a total of 289 times during the 2013-14 season.[1] In wrestling, for example, in 2015, 4 of 16 state tournament series events were hosted at private schools. C. 327.

C. *Hood* And Resulting Legislative Action

In *Hood v. IHSA*, 359 Ill. App. 3d 1065 (2d Dist. 2005), a basketball coach from one of IHSA's member schools sued the IHSA and its Executive Director for negligence and defamation arising from a ruling that plaintiff was guilty of recruiting violations, resulting in a one-year suspension from coaching in any IHSA interscholastic competition. The IHSA argued that since the federal courts deemed IHSA a "state actor" for purposes of federal civil rights laws,[2] the IHSA and its employees should enjoy the same immunities as other governmental actors under The Local Government and Governmental Employees Tort Immunity Act ("Tort Immunity Act"). *Id.* at 1068. The Tort Immunity Act applies to a "local public entity," which also includes "any non-for-profit corporation organized for the purpose of conducting public business" and "public employees." 745 ILCS 10/1-206; 745 ILCS 10/2-201.

The IHSA *lost* this argument as the *Hood* court *declined* to extend the Tort Immunity Act to the IHSA. In other words, the IHSA is *not* part (i.e. not a subsidiary) of a "local public entity" and its Executive Director is *not* a "public employee" under the Tort Immunity Act *as a matter of Illinois law*. The *Hood* court also found it significant

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[1] This figure excludes football and other single contest events which would be hosted by one of the participants. (compiled from www.ihsa.org).

[2] The distinction between considering the IHSA as a "state actor" under federal civil rights law and considering the IHSA as a subsidiary of a "public body" or a "local public entity" under FOIA and the Tort Immunity Act, respectively, is discussed further in Section III below.

that private schools make up a "significant portion" of IHSA's membership and "may play a key role in its decision making." A. 123; 171.

Following *Hood*, the Illinois legislature passed the Interscholastic Association Defamation Act (745 ILCS 54/1, *et seq.*). Instead of amending the Tort Immunity Act to explicitly include the IHSA and similar organizations under the definition of "local public entity," the legislature passed a limited, separate act providing the IHSA with immunity from defamation alone. 745 ILCS 54 *et seq.*

ARGUMENT

I. BGA AND *AMICI* MISSTATE THE FUNDAMENTAL AND DISPOSITIVE ISSUE PRESENTED IN THIS APPEAL

At the outset, it is important to distinguish between what this appeal fundamentally is and is not about. This appeal turns on whether the IHSA—a private voluntary organization of public and private schools across the State formed for the purpose of organizing interscholastic competition—is a subsidiary of a public body subject to FOIA. There is no need for the Court to broadly determine whether education is an inherently governmental function. The circuit court and First District drew no such conclusion and a determination on this issue is not required to assess whether the IHSA is a subsidiary public body for purposes of an FOIA request.

Nor does this appeal involve interpreting or applying FOIA to counter the so-called "privatization" efforts which BGA and *amici* intimate have been undertaken by the legislative and executive branches. As an organization whose existence long predates the 1984 enactment of FOIA, the IHSA's functions do not involve any "transfer [of] decision-making power over service delivery and facility operations to the private sector" with the effect of shielding the government's business from public transparency. BGA

Brief at 20. BGA's vague reference to the dangers of privatization is as inflammatory as it is irrelevant. This new argument, introduced for the first time in this Court, is intended to distract from what is otherwise a pure legal question—determination of what it means to be a subsidiary public body under FOIA. BGA's suggestion that the First District's opinion will encourage municipalities to privatize police forces in order to shield such activities from public scrutiny is unfounded and immaterial to the limited and dispositive question presented here, namely the IHSA's status under FOIA.

BGA's comments overlook that the functions IHSA serves are far removed from law enforcement and other similar traditional governmental services. IHSA has existed for over 100 years and provides a benefit to *both* public and private schools that individual schools could not efficiently or effectively achieve on their own. IHSA organizes statewide tournament competition and furnishes its members with the benefits of a collectively agreed upon framework for interscholastic competition enforced by a neutral, independent association. Whether a school wishes to participate is entirely its own decision. No public business was transferred to IHSA and IHSA was not created as a subterfuge to perform governmental functions under the auspices of a private organization to avoid scrutiny under FOIA. The arguments raised by BGA and *amici* which equate the IHSA's functions with the provision of education and their references to privatization should be viewed for what they are—diversions intended to transform this case into something it is not.

II. THE *ROCKFORD* TEST WAS PROPERLY APPLIED TO DETERMINE WHETHER A PRIVATE ENTITY IS A SUBSIDIARY PUBLIC BODY UNDER FOIA

BGA notably does not contend that the *Rockford* Test *does not* apply to the subsidiary public body inquiry. Indeed, the First District observed that the parties *agreed*

that *Rockford* applied; the dispute centered only on the outcome of that analysis. A. 165. BGA's argument in this Court illustrates that it advocates for a modified version of the *Rockford* Test—one that is malleable and result-oriented. *See* BGA Brief at 16. As explained below, the test as it presently exists is appropriately aligned with the goal of statutory construction and will ensure consistency in the application of Illinois law. By contrast, BGA's approach would introduce instability and lead to absurd results.

A. The *Rockford* Test is Consistent with Principles of Statutory Construction

FOIA applies to a "public body," which is defined as "all legislative, executive, administrative, or advisory bodies of the State, . . . school districts . . . [and] *any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof* . . ." 5 ILCS 140/2(a) (emphasis added). The critical question here is whether the IHSA is a "subsidiary" of a public body, *i.e.* District 230, or its other member schools.

The primary focus of statutory construction is to ascertain and give effect to the legislature's intent.[3] *People v. Chenoweth*, 2015 IL 116898, ¶ 21. The language of the statute is given its "plain and ordinary meaning." *Id.* When a statute defines a term, that definition provides "official and authoritative evidence of legislative intent and meaning and should be given controlling effect." *Beecher Med. Ctr., Inc. v. Turnock*, 207 Ill. App. 3d 751, 754 (1st Dist. 1990).

Well-established rules of statutory construction teach that because FOIA includes examples as to what constitutes a subsidiary of a public body, the Court should look to those examples to inform what is meant by the term "subsidiary." *See LeCompte v.*

[3] The legislative history of the FOIA provisions at issue does not provide any further guidance regarding the legislature's intended meaning of "subsidiary" public bodies.

Zoning Bd. of Appeals for Barrington Hills, 2011 IL App (1st) 100423, ¶ 28 ("[U]nless the boarding of horses is similar to other uses in the definition, the rules of statutory construction prevent us from saying the Village intended for the commercial boarding of horses to be a use included in that list."). The meaning of "subsidiary bodies" should therefore be construed by examining the ordinary meaning of the two examples specifically set forth in FOIA—"committees and subcommittees." A "committee" is defined as "a body of persons delegated to consider, investigate, take action on, or report on some matter." *Definition of Committee*, Merriam-Webster, https://www.merriam-webster.com/dictionary/committee (last visited Jan. 26, 2014). "Subcommittee" is defined as "a subdivision of a committee usually organized for a specific purpose." *Definition of Subcommittee*, Merriam-Webster, https://www.merriam-webster.com/dictionary/subcommittee (last visited Jan. 26, 2014).

The 3-part test enumerated in *Rockford* is consistent with this statutory construct. Although *Rockford* interpreted the Open Meetings Act (5 ILCS 120/1, *et seq.*) instead of FOIA, the language used in both statutes is similar, and Illinois courts consider the same factors under both statutes in evaluating whether an entity is a subsidiary of a public body. *See, e.g., Hopf II*, 256 Ill. App. 3d at 893. Three factors guide an analysis whose end goal is to give effect to legislative intent:

> 1) whether the entity has a legal existence independent of government resolution;
>
> 2) the nature of the functions performed by the entity; and
>
> 3) the degree of government control exerted over the entity.

Id. at 892, citing *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism & Drug Dependence*, 64 Ill. App. 3d 94, 96-97 (2d Dist. 1978).[4]

The Second District in *Rockford* determined that a not-for-profit corporation organized to administer drug and alcohol treatment programs was not a subsidiary public body even though the corporation received 90% of its funding from the government and was "required to comply with numerous government regulations." *Rockford*, 64 Ill. App. 3d at 95. The court found that the organization's "formal legal nature" as a private corporation and the independence of its board of directors and employees were "extremely significant factors." *Id.* at 96.

In *Hopf II*, the First District concluded that two for-profit corporations organized by the City of Evanston and Northwestern University to develop a research park were not subsidiary public bodies despite the fact that Evanston appointed half of the board members and paid for the operating expenses of the corporations. *Hopf II*, 256 Ill. App. 3d at 889-91. As in *Rockford*, the *Hopf II* court found it significant that the entities were separately incorporated. *Id.* at 894. The court further found that Evanston did not control the day-to-day operations of the corporations even though it appointed half of the board members. *Id.*

The analysis in both *Rockford* and *Hopf II* give effect to what the legislature intended when it referred to a "subsidiary" of a public body, which construction was faithful to the purpose the statute at issue in each case was intended to serve. Consistent with *Rockford*, the undisputed facts here demonstrate that the IHSA is not a subsidiary of

[4] While *Rockford* and *Hopf II* did not list public funding as a separate factor, the amount of governmental financial support is relevant to the degree of control exercised by the government over an entity.

its member schools or any other public body. It is formally organized as a separate recognized non-profit voluntary association; performs private functions; does not receive any public funding; has its own independent employees responsible for operations; and is provided oversight by a Board of Directors comprised of school principals (who could all be from private schools), acting in their individual capacities rather than as representatives of the schools where they are employed.

B. The *Rockford* Test is Also Consistent with this Court's Construction of the Tort Immunity Act

The *Rockford* Test is also consistent with the analysis used by this Court in determining whether a private entity enjoys immunity under the Tort Immunity Act as construed by this Court in *O'Toole v. Chicago Zoology Society*, 2015 IL 118254. In *O'Toole*, this Court determined that a non-profit society charged with maintaining a zoo on publicly-owned land "did not conduct public business" and was not a "local public entity" under the Tort Immunity Act. *Id.* at ¶ 30. As with the *Rockford* factors in the FOIA context, this Court emphasized that "the key inquiry in cases like this is whether the not-for-profit corporation seeking tort immunity remains subject to 'operational control by a unit of local government.'" *Id.* at ¶ 23. This Court noted that the society maintained day-to-day control over the zoo and its buildings, had its own employees and pension plan, maintained its own liability insurance, did not rely heavily on public funding, and was governed by an independent board of directors (*Id.* at ¶¶ 23, 25), all factors which are true with respect to the IHSA.

In *Brugger v. Joseph Academy, Inc.*, 202 Ill. 2d 435 (2002), also involving the application of the Tort Immunity Act to a private entity, this Court held that a private not-for-profit school serving special education students pursuant to contracts with local

public school districts did not qualify for immunity because it retained operational autonomy of its day to day functions. This Court also engaged in an analysis identical to the second *Rockford* factor (nature of the functions performed by the private entity) and reiterated that "public business" under the Tort Immunity Act required the private entity to pursue "an activity that benefits the entire community without limitation." *Id.* at 438, quoting *Carroll v. Paddock*, 199 Ill. 2d 16, 25, 26 (2002). This Court further explained that "the phrase 'public business' is also today commonly understood to mean the business of the government." *Brugger*, 202 Ill.2d at 438. Applying the foregoing definition of public business to the nature of the functions performed by the school, this Court rejected the school's argument that it conducted "public business" simply because "the public has an interest in the traditional governmental function of education." *Id.* at 441.

Notably, this Court has previously recognized the nexus between whether a private entity is a "public body" under the Tort Immunity Act and the application of FOIA and the Open Meetings Act to that private entity, observing that being subject to FOIA and the Open Meetings Act provides "an indicia of the requisite control" by the government that would weigh in favor of finding the private entity to be immune. *See Carroll*, 199 Ill. 2d at 26; *Brugger*, 202 Ill. 2d at 444; *O'Toole*, 2015 IL 118254, ¶ 19. This appeal provides the Court with an opportunity to clarify that the converse is also true—the established precedent that the IHSA is *not* a "local public entity" entitled to immunity under the Tort Immunity Act should weigh in favor of finding that there is insufficient governmental control of the IHSA for it to qualify as a subsidiary of a public body subject to FOIA and the Open Meetings Act.

There is a compelling need for consistency in the application of the Tort Immunity Act, FOIA, and the Open Meetings Act to private entities. It is illogical that a private entity could be found to be a subsidiary of a public body subject to FOIA and the Open Meetings Act and yet not enjoy the same protections under the Tort Immunity Act as its public body parent. Indeed, a contrary conclusion would lead to an absurd result—a private entity would not be entitled to tort immunity because it is not a public entity, but yet subject to FOIA because it somehow qualifies as a subsidiary of a public body. *See Hubble v. Bi-State Dev. Agency of the Illinois-Missouri Metro. Dist.*, 238 Ill. 2d 262, 268 (2010) ("[I]n determining legislative intent, a court may properly consider not only the language of the statute, but also the purpose and necessity for the law, the evils sought to be remedied and the goals to be achieved, *and the consequences that would result from construing the statute one way or the other*.") (emphasis added). The *Rockford* Test protects against such an incongruent result.

BGA's attempt to justify the inconsistent application of the Tort Immunity Act and FOIA to private entities misses the mark. BGA's assertion is founded on a misplaced focus on the liberal construction to which the FOIA is generally subject. BGA overlooks that the policy of liberal construction applies to the determination of what public records must be disclosed by a public body or its subsidiary. This analysis is wholly divorced from the threshold consideration at issue here—whether an entity is subject to FOIA in the first instance. Put simply, FOIA should not be "liberally" construed in the manner BGA suggests to supplant the threshold determination of whether a private entity is subject to FOIA under the guise of giving effect to FOIA's purpose. The policy of liberal construction applies to determine what records are to be produced *only after* a

determination is made regarding whether the specific entity is actually subject to its requirements. *See, e.g., ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1196 (Ind. 2016) (explaining that the "liberally construed" directive in Indiana's FOIA law "applies in determining *what records* are subject to disclosure, not *who* is covered by" the law) (emphasis theirs).

III. BGA'S PROPOSED MODIFIED TEST IS FUNDAMENTALLY FLAWED

BGA concedes that the *Rockford* factors are a "good start" for determining whether a private entity is a subsidiary public body under FOIA. BGA Brief at 16. But BGA argues that these factors are "too restrictive and should not be made exclusive," must "remain flexible to account for other situations," and "[o]ther cases may warrant additional considerations that should not be foreclosed." BGA Brief at 16-17. BGA's so-called test is no test at all. In contrast to the well-reasoned basis for the *Rockford* test and the clear guidance and certainty that it provides, BGA urges this Court to adopt an *ad hoc*, ambiguous approach that will not be helpful in providing future direction to private entities, the PAC, or lower courts regarding the application of FOIA and could lead to absurd results.

In addition to proposing an open-ended and result-oriented approach, BGA identifies two new specific factors for the Court to consider: (1) the extent to which a private entity has sought and obtained governmental immunity; and (2) the extent to which a private entity has been found to be a state actor under civil rights laws. BGA Br. 16.

With respect to the first, IHSA agrees that a private entity's entitlement to tort immunity is relevant to the FOIA inquiry because it is subsumed within the *Rockford* analysis concerning the level of day-to-day control exercised by the government over the

private entity. However, whether an entity has "sought" immunity is not relevant, especially when the entity's quest for tort immunity was rejected. Where, as here, a private entity's bid for tort immunity was rejected as a matter of Illinois law, that ruling should prompt a finding that the entity is likewise not subject to FOIA. BGA's reliance on the IHSA's unsuccessful legal arguments in *Hood* and apparent belief that these rejected arguments trump the precedential appellate ruling in that case undermines the fundamental principle of *stare decisis,* which doctrine is vital to the preservation and development of law.

With respect to the second factor proposed by BGA, the Seventh Circuit's determination in *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987), that the IHSA is a "state actor" for purposes of federal civil rights laws is utterly distinct from the question of whether the IHSA is a subsidiary public body under FOIA's enumerated definitions. BGA provides no support for its conclusory argument that the *Griffin* decision should inform this Court's interpretation of FOIA's statutory language. Regardless, this Court is not bound to follow federal decisions "particularly where, as here, we are interpreting an Illinois statute." *People v. Reese*, 2015 IL App (1st) 120654, ¶ 70. BGA cannot circumvent or manipulate a state legislature's intent as expressed by statute by resorting to a federal court's application of federal law.

Sister courts considering this question under analogous facts reject what BGA invites this Court to accept. For instance, the Michigan supreme court in *Breighner v. MHSAA*, 471 Mich. 217 (2004), held that the Michigan High School Athletic

Association[5] was not subject to Michigan's FOIA even though it had previously been ruled a "state actor" for constitutional law purposes. The *Breighner* court explained that "it is possible for MHSAA to be a state actor under § 1983 and the Fourteenth Amendment without being a 'public body' under the FOIA . . . the Legislature was free to define '*public body*' in the FOIA as narrowly or broadly as it wished." *Id.* at 228, n.3 (emphasis theirs). Here, the Legislature's definition of public body does not take into account whether an entity is deemed a state actor under unrelated civil rights laws.

Justice Pincham's dissent in *Hopf I* also does not help BGA formulate an alternative analysis as the IHSA's function of organizing high school sports is not "essential to the public interest" and the IHSA is not engaged in "governing." BGA Brief at 16. Further, it cannot be the case that a private party who contracts with the government to "promote" public purposes transforms that private party into a subsidiary of the government. BGA Brief at 16. This would implicate a broad range of contractual arrangements between the government and private parties and have a chilling effect on such contracts. *See* MPEA and NPI *amici* brief for further discussion regarding the negative repercussions of BGA's proposed far-reaching approach.

IV. IHSA'S FACTS IN SUPPORT OF APPLICATION OF THE THREE *ROCKFORD* FACTORS ARE UNDISPUTED

The IHSA relied on the Hickman Affidavit and IHSA's governing documents in support of its section 2-619 motion establishing that it is not a subsidiary public body under the three applicable *Rockford* factors. The circuit court and First District relied on *Piser v. State Farm Mut. Auto. Ins. Co.*, 405 Ill. App. 3d 341 (1st Dist. 2010), to deem the

[5] The MSHAA is Michigan's counterpart to the IHSA.

facts in the Hickman Affidavit admitted because BGA did not tender a counter-affidavit. Supp. Rec. Vol. 3 R. 64:13-18; A. 15-16. BGA makes several arguments in an attempt to escape the import of its factual admissions, each of which is without merit.

First, BGA argues that it was not required to submit a counter-affidavit because it cited to "other evidence" in its complaint, namely, the IHSA's purported evidentiary admissions in *Hood*. However, the circuit court and First District correctly found that the IHSA's argument in *Hood* that it conducted public business and was controlled and owned by local governmental entities (which is legally wrong as non-profits have no owners) were legal arguments and not evidentiary admissions. Supp. Rec. Vol. 3 R. 41:1-6; 64:19-22; A. 15-16. The First District explained that "[w]hether an entity is controlled or has sufficient public ties to be considered a 'local public entity' under the Tort Immunity Act are legal questions." A. 15.

Similarly, in this matter, IHSA urges this Court to accept its legal arguments that the IHSA has a separate legal existence from the government, does not perform governmental functions, and is not controlled by the government. The facts supporting each of these are set forth in the Hickman Affidavit and the IHSA's governing documents which stand unrebutted. The aforementioned supporting documents establish the following facts: the IHSA is a 501(c)(3) charitable organization (going to the legal argument that IHSA has a separate legal existence); the IHSA engages in the limited function of organizing interscholastic competition (going to the legal argument that IHSA does not perform governmental functions); and the IHSA's day-to-day operations are the responsibilities of its own employees and an independent Board (going to the legal argument that IHSA is not controlled by the government). Since the IHSA's arguments

in *Hood* are not "other evidence" as BGA asserts, BGA could not merely rely on its complaint to defend against the IHSA's 2-619 motion.

Moreover, it would be fundamentally unfair to use the IHSA's statements in *Hood* as admissions given that the IHSA's position was rejected in *Hood* and the court refused to grant the IHSA governmental immunity. It is for this very reason that the doctrine of judicial estoppel does not apply unless a party takes positions in two different cases that are factually inconsistent and the party must have succeeded in the first proceeding and received a benefit. *See Seymour v. Collins*, 2015 IL 118432, ¶ 37; *People v. Caballero*, 206 Ill. 2d 65, 81 (2002) ("The doctrine of judicial estoppel does not apply in the present case because the disputed statements by the State regarding relative culpability and rehabilitative prospects were matters of opinion, not of fact."). Any other rule would significantly impede the ability of litigants, particularly those who are often subject to suit, to advance their legal positions.

Second, BGA argues that IHSA's motion is an answer that did nothing more than claim that BGA's allegations were not true. BGA Brief at 27. But the IHSA did not simply deny BGA's allegations without offering affirmative evidence. The First District correctly found that "IHSA's motion sufficiently alleged that it was not subject to FOIA as demonstrated by the application of the relevant test . . . and as supported by the documents attached to its motion . . ." A. 163. The IHSA's supporting documents amounted to "other affirmative matter" that avoided the legal effect of BGA's claim. *In re Estate of Schlenker*, 209 Ill.2d 456, 461 (2004) (other affirmative matter "negates the cause of action completely").

Third, BGA argues that the Hickman Affidavit only addressed the "separate existence" and "government support" factors of the *Rockford* Test and failed to adequately address BGA's allegations that the IHSA is owned and controlled by local government and performs public business. BGA Brief at 28. This claim is easily refuted.

As previously noted, not-for-profit entities have no owners. *See supra* at p. 25. More importantly, however, BGA waived any objections to the sufficiency of the Hickman Affidavit because BGA did not object or seek to strike the affidavit in the circuit court proceedings. *See Forest Preserve Dist. of Du Page County v. First Nat'l Bank of Franklin Park*, 401 Ill. App. 3d 966, 975 (2d Dist. 2010) ("A reviewing court will not consider arguments not presented to the trial court."). Even if BGA's argument is not considered waived, the Hickman Affidavit sets forth facts regarding how the IHSA's Board and Legislative Committee are elected and the day-to-day running of the IHSA's operations by its own employees. C. 154-156. These facts are relevant to the degree of governmental control factor. Further, the IHSA's Constitution and By-laws provide the undisputed factual basis detailing the limited non-governmental functions the IHSA performs for its member schools.

V. ALL THREE *ROCKFORD* FACTORS SUPPORT THE FINDING THAT THE IHSA IS NOT A SUBSIDIARY PUBLIC BODY

Having established that the proper analysis is the one set out in *Rockford*, the circuit court and First District both correctly concluded that the IHSA is not a subsidiary public body under FOIA.

A. Independent Legal Existence

BGA admitted in its opening brief in the First District that the IHSA was not created by a state statute or any other governmental resolution and "conceded at oral

argument" that the IHSA "has a separate legal existence, independent from its member schools or any other public body." BGA Opening Appellate Brief at 24; A. 166. BGA's present argument that the IHSA does not exist independently from government resolution because public schools "by their own governmental acts, have delegated authority to IHSA" should be rejected as a result. BGA Brief at 26. In addition to taking an inconsistent position before this Court, BGA's argument is demonstrably wrong. Further, whether certain responsibilities have been delegated to IHSA is entirely separate from the question of its separate legal existence.

As the First District observed, the IHSA "is a voluntary, non-profit, private association made up [of] more than 700 [now more than 800] Illinois public and private high schools located throughout the State." *See Mount Carmel High Sch. v. IHSA*, 279 Ill. App. 3d 122, 123 (1st Dist. 1996). It is undisputed that the IHSA has an independent legal existence separate and apart from its member schools because it has separate standing to sue and be sued. *See* 735 ILCS 5/2-209.1 ("A voluntary unincorporated association may sue and be sued in its own name, and may complain and defend in all actions."). In *Nixon v. Smith*, No. 10 C 1382, 2011 U.S. Dist. LEXIS 82317, at *5 (N.D. Ill. July 26, 2011), the court explained that "[u]nder Illinois law, a party to litigation must have a legal existence, either natural or artificial to sue or be sued." The court further found that "[a]s a general matter, departments within a governing unit lack the requisite separate legal existence to be sued. . . . On the other hand, if pursuant to statute the defendant operates under its own control and authority, it will be considered a separate suable entity." *Id.* at *6 (internal citations and quotations omitted). *See also Hall v. Village of Flossmoor Police Dep't*, No. 11-CV-5283, 2012 U.S. Dist. LEXIS 13311, at

*5 (N.D. Ill. Feb. 1, 2012) (holding that a police department has no separate legal existence from the municipality it served); *contra Jackson v. Rosemont*, 180 Ill. App. 3d 932, 937-38 (1st Dist. 1988) (holding that a stadium owned and operated by a municipality was not separate from the municipality). As an entity with the independent capacity to sue or be sued, the IHSA is not a mere division, department, or "subsidiary" of its member schools or any public body, and thus has a separate legal existence.

IHSA is also recognized as a 501(c)(3) charitable organization, and the Illinois Attorney General Secretary of State lists IHSA as a registered Charitable Trust in its database. C. 154. The IRS recognizes the IHSA as a separate legal entity because it files its own tax returns and has its own Federal Employer Identification Number. C. 154-155. IHSA withholds payroll taxes and other required deductions, and issues W-2 forms annually to its employees. C. 155. IHSA also owns its headquarters building solely in its own name. *Id.* The above is further evidence that the IHSA has a separate legal existence, independent from its member schools or any public body.

Moreover, the reference to IHSA in certain Illinois statutes does not undermine its independent existence apart from the government. BGA Brief at 9-10, 26. Many industries and professions are governed by statute in Illinois, including insurance companies, attorneys, and doctors. Statutes recognizing or imposing duties on these industries or professionals do not make them public bodies subject to FOIA. *See Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism & Drug Dependence*, 64 Ill. App.3d 94, 95 (entity that was "required to comply with numerous government regulations" was found not to be a subsidiary of a public body); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974) ("The mere fact that a business is

subject to state regulation does not by itself convert its action into that of the State."). Various Illinois statutes make reference to private code and private code-making agencies. For example, the Fire Protection District Act allows Districts to adopt fire codes consistent with national codes. 70 ILCS 705/11. Other private codes, such as the BOCA (Building Officials and Code Administrators International) Code, plumbing codes, and electrical codes are incorporated into Illinois law and local building codes. *See, e.g.*, Ill. Admin. Code tit. 71, § 400.210(B); Ill. Admin. Code tit. 77, §820.20(b)(7).

That does not mean that code-making organizations such as the National Fire Protection Association and other-code making authorities are public bodies or are performing government services.

Even recognition and funding of a private entity in an Illinois statute does not convert that entity into a governmental actor. For example, Special Olympics Illinois, like the IHSA, is a 501(c)(3) not-for profit corporation that during 2015 "conducted over 250 sports training and competition opportunities at various locations throughout the state." Tax Return Filing, Special Olympics Illinois, https://www.soill.org/wp-content/uploads/2013/04/2015-SOILL-990-IRS.pdf (last visited January 26, 2017). The Illinois legislature provides funding for the Special Olympics of Illinois via statute. 20 ILCS 1605/21.9(b). But that does not transform Special Olympics of Illinois into a governmental entity.

Indeed, if the IHSA was considered by the legislature to be a subsidiary public body, then it could be directly governed through the regulatory process rather than through the passage of multiple statutes deferring to it various responsibilities. The legislature's enactment of special legislation to shield IHSA from liability for defamation

(which arose from the *Hood* case and the holding that IHSA did not have immunity) supports IHSA's argument. *See* 745 ILCS 54/1. Had the legislature intended for IHSA to be considered a governmental body, it would not have singled out defamation, but instead would have passed legislation clarifying that IHSA and organizations like it are considered a local governmental entities for purposes of tort immunity. The legislature did not do so, however, reaffirming that the Second District was correct in concluding that IHSA was *not* a governmental body. Likewise, the statute authorizing the appointment of a liaison to "facilitate communication and coordination between the General Assembly and the [IHSA] on matters relative to the continuing development of interscholastic athletic and activity participation," supports the conclusion that the IHSA is non-governmental. *See* 105 ILCS 5/22-24. A liaison would not be required if the legislature considered the IHSA to be part of the government.

B. Nature of Functions

The First District framed the relevant question as: are the functions performed by the entity "necessarily governmental"? A. 166. Traditional, necessary governmental functions include services such as policing, fire-fighting, emergency services, public education, public libraries, preserving the peace, regulating the use and maintenance of roads, operating jails, regulating traffic, and collecting waste. *See State ex rel Am. Ctr. For Economic Equality v. Jackson*, 53 N.E.3d 788, 794 (Ohio App. 2015). "Black's Law Dictionary defines 'governmental function' as 'a government agency's conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is *carried out for the benefit of the general public.*'" *Barry v. Ret. Bd.*, 357 Ill. App. 3d 749, 779-780 (1st Dist. 2005) (quoting Black's Law Dictionary 704 (7th ed. 1999)) (emphasis in original); *see also Brugger v. Joseph Academy, Inc.*, 202 Ill. 2d 435, 438

(2002) (under the Tort Immunity Act, "'public business' requires the pursuit of an activity that benefits the entire community without limitation") (citations omitted). The IHSA's limited services do not fall within the traditional categories of governmental functions, are not mandated by law, are not carried out for the benefit of the general public, and apply only to participants.

BGA attempts to confuse the issue by conflating education with services that "enhance" students' educational experience. However, the IHSA is not providing education. Unlike education, participation in athletics is voluntary and only ancillary to education. A. 166. Comprehensive Illinois laws and regulations governing education mandate that schools provide a number of specific activities such as physical education (105 ILCS 5/27-6) and lessons on preventing the use of steroids (105 ILCS 5/27-23.3). None of these laws or regulations require schools to offer interscholastic competition or require students to participate in interscholastic competition, nor is there any provision requiring a school to join the IHSA.. Consistent with this legislative scheme, courts in Illinois and elsewhere throughout the country have repeatedly distinguished athletics from education and held that the right to education does not include any right to participate in sports. *Jordan by Edwards v. O'Fallon Twp. High Sch. Dist. No. 203 Bd. Of Educ.*, 302 Ill. App. 3d 1070, 1076 (5th Dist. 1999) ("Students can need, want, and expect to participate in interscholastic athletics, but students are not entitled to participate in them. Football is neither an integral part of a quality education nor a requirement under any rule or regulation governing education in this State."); *Proulx v. Illinois High School Ass'n*, 125 Ill. App. 3d 781, 786 (4th Dist. 1984) ("[T]he relationship of education to athletics is far from clear. If the 'right' is to find a basis for protection, it must be on

due process of law . . . . We believe that the better reasoned authorities find no such interests."); *Kulovitz v. Illinois High School Ass'n*, 462 F. Supp. 875, 878 (N.D. Ill. 1978). Therefore, although sports may "provide enrichment to the educational experience," as established by the authority cited above, interscholastic athletics and other activities are not equivalent to education itself. C. 172.

Moreover, the IHSA's role is limited and not as deep and pervasive as BGA claims. The IHSA provides the framework and rules for participation in the activities it oversees. Just as rules of competition are inherent to participation in a sport and reflect the participants' agreement on what rules to play under, the IHSA's rules are simply the agreed upon rules of participation. Individual member schools run and supervise their own teams. There are numerous non-IHSA sports and student activities such as club sports and extracurricular programs that are not governed by IHSA. The IHSA also does not control the internal decisions of school districts or schools relating to education, staffing decisions or student discipline other than as pertaining to eligibility for events the IHSA oversees.. Thus, while the IHSA can establish coaching qualifications, and can bar students, teachers or others from participating or coaching in an IHSA event for violation of IHSA rules, that bar only extends to the IHSA-related events. It cannot suspend a student, fire a teacher, or prevent them from teaching in the classroom or engaging in any other activities at the school.

The fact that IHSA's organization of sports and activities is not a function that is typically, let alone necessarily, performed by the government demonstrates that the IHSA does not perform a governmental function. *See Martin v. Halliburton*, 601 F.3d 381, 384 (5th Cir. 2010) (defining "governmental function" pursuant to an Army regulation as a

function that is "so intimately related to the public interest as to mandate performance by Government employees"). Indeed, the functions performed by the IHSA are more often performed by private leagues and associations at both the amateur and professional level, including USA Volleyball, USA Hockey, Little League, Special Olympics, the National Football League, Major League Baseball, the NBA, the NHL, NASCAR, etc., all of which are non-governmental entities. Given that the IHSA's role in organizing and regulating athletics is the same as the role played by these purely private organizations, the IHSA's functions cannot be governmental in nature.

Citing no relevant authority, BGA requests that this Court define governmental function to broadly include "discretionary functions that benefit the general public or relate to community interests." BGA Brief at 19. The community at large may have an *interest* in high school athletic contests, but that does not make the function governmental. Indeed, hospitals and even grocery stores serve a community interest, but it cannot be argued that hospitals or grocery stores are necessarily governmental.

As the circuit court recognized, BGA's argument would set a dangerous precedent whereby any private organization that provides services to public schools (or otherwise serves "community interests") could be construed as performing a government function and deemed covered by FOIA. Supp. Rec. Vol. 3 R. 60:13-24; 61:1-14. The legislature could not have intended FOIA to apply to voluntary organizations that provide after school reading programs or to a for-profit corporation that provides school lunches, thereby requiring them to open up all of their records to the public. In *Rockford*, the court specifically cautioned, "[T]he fact that the private company's acts may be connected with a governmental function cannot create a public body where none existed

before. If it were to do so most parties contracting with the State would be subsidiaries." 64 Ill. App. 3d at 97; see *also Perry Cty. Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1026-27 (Ind. Ct. App. 1999) (working closely with a government entity and having similar goals as a governmental entity does not transform a private entity into a public agency). The circuit court reasoned that there are "a number of private organizations that support the public and private schools and it does not make them all governmental actors." Supp. Rec. Vol. 3 R. 65:6-17. For the same reasons, the tangential relationship between education and the IHSA's oversight of athletic competition does not transform the IHSA into a public body.

Finally, no governmental functions were delegated to the IHSA. The IHSA instead performs a function that would be difficult if not impossible for a governmental entity such as an individual school or individual school district to carry out. Schools are not in the business of organizing statewide interscholastic competition or setting rules for competition. Such functions are best performed by outside entities and there is no need for such entities to be governmental. This case is in no way analogous to a situation where policing or any other essential and clearly governmental function is privatized.

C. Degree of Governmental Control

As BGA acknowledges, consistent with this Court's analysis under the Tort Immunity Act, "[w]hen the government exercises day-to-day supervision, the entity is more likely to be considered a subsidiary body than if the government provides only general supervision." BGA Brief at 15-16, citing *Hopf I*, 170 Ill. App. 3d at 91-92. The independence of an entity's board of directors and employees are "extremely significant factors" in analyzing whether an entity is under direct governmental control such that it

meets the definition of a subsidiary public body subject to FOIA. *Rockford*, 64 Ill. App. 3d at 96.

The Hickman Affidavit establishes that the IHSA's day-to-day decisions are made its Executive Director and administrative staff, all of whom are IHSA employees, and not the employees of any school or school district. C. 155. As in *Hopf I*, the IHSA has "full control over its employees and has the right to dismiss them or to hire additional employees," the IHSA's employees are paid out of the IHSA's funds, they are not subject to state regulations regarding public employees, and they are not eligible for state retirement or insurance benefits. *Hopf I*, 256 Ill. App. 3d at 89. There is no "direct government control" over the IHSA's operations.

Additionally, the IHSA's Board members serve in their individual capacities and not as representatives of the schools that employ them. Individual principals from public and private schools are elected to the Board. C. 155. As such, an elected Board member can change jobs during his or her tenure so long as the person continues to meet the requirements of his or her seat. *Id.* While the Board is responsible to the membership, the Board does not report back to and is not beholden to any particular school or district. *See Breighner*, 471 Mich. at 224 (Michigan High School Athletic Association was not a "public body" subject to the Michigan FOIA in part because the Association was governed by its board of directors and not the individual member schools).

Moreover, private schools are afforded the opportunity to fully participate in the governance of the IHSA. Each school, whether private or public, has a vote to elect the members of the Board. While there is a requirement that at least one Board member be from a private school, there is no limit on the number of Board members who come from

private member schools as opposed to public schools. C. 175; 154-155. As such, there is no provision that would prohibit the majority or even all of the Board or Legislative Committee from consisting of principals from private schools. C. 154-155. *See Hood*, 359 Ill. App. 3d at 1070 ("[A]lthough public schools form the bulk of the IHSA's membership, private schools still make up a significant portion of the organization and may play a key role in its decision making . . ."). Under the IHSA's Constitution, all schools—both public and private—have the right to vote on any proposed changes to the Constitution or By-laws. C. 156.

The IHSA's organizational setup further demonstrates that it is not owned or controlled by public schools. As a not-for-profit organization, the IHSA does not have any owners. *See, e.g.*, 805 ILCS 105/106.05 (Not-for-profit corporation shall not issue shares and no dividend, property or part of the money or assets shall be paid to members). Nor do the IHSA's members have any economic rights in the event the IHSA is dissolved. The members' only rights exist by virtue of the IHSA's Constitution and By-laws, which each private and public member school adopts as its own. C. 173-174.

BGA's superficial conclusion that the IHSA is subject to government control because a majority of IHSA's membership is comprised of public schools is refuted by the undisputed facts above. There are many examples of voluntary organizations in the educational context that would become public under this presumption as the majority of their members hold public positions. Examples include the Illinois Association of School Administrators (http://www.iasaedu.org/ (last visited Jan. 26, 2017)), Illinois Principals Association (http://www.ilprincipals.org/about-ipa/about-ipa-1 (last visited Jan. 26, 2017)), Illinois Elementary School Association (which provides a similar function as

IHSA for elementary schools) (https://www.iesa.org/administration/mission.asp (last visited Jan. 26, 2017)), Illinois Association of School Boards (http://www.iasb.com/whatis/ (last visited Jan. 26, 2017)), Illinois Association of Regional Superintendents of Schools (http://iarss.org/wp-content/uploads/2015/01/Constitution-and-ByLaws-6-6-2014.pdf (last visited Jan. 26, 2017)), and Illinois Alliance of Administrators of Special Education (http://www.iaase.org/static.asp?path=2887 (last visited Jan. 26, 2017)). These organizations, and others like them, serve an important role in the collective efforts of educational professionals to improve their craft, and no public interest can be served by imposing the requirements of FOIA on them.

Finally, the lack of any public funding for the IHSA weighs in favor of finding that there is an absence of government control. BGA cites *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001), for the proposition that the IHSA receives governmental financial support because it purportedly earns its revenue "largely from the efforts of public school students in events held at public facilities." BGA Brief at 27. *Brentwood* is inapposite because it did not determine whether the Tennessee Association was subject to the open records laws, and only determined whether it was a state actor for civil rights purposes. Moreover, *Brentwood* is distinguishable because, unlike the IHSA, the Tennessee athletic association received dues from its member schools. 531 U.S. at 299. The IHSA does not charge any dues to its member schools[6] and it does not charge schools any entry fees to its events. C. 154. *Cf Breighner*, 471

[6] The IHSA Constitution permits the IHSA to charge membership dues, but the uncontroverted evidence establishes that it does not do so.

Mich. at 227 (finding that, like here, the Michigan high school association was not a recipient of public funding because it did not charge dues to schools and it paid fees for using host facilities). BGA also ignores that the IHSA holds many events at private schools—289 times during the 2013-14 season. In 2015, 4 of 16 state tournament series wresting events were hosted at private schools. C. 327.

Additionally, schools do not donate their facilities to the IHSA. IHSA contracts with host schools and other venue owners and compensates them for the use of their facilities by providing a minimum guarantee and splitting any profit in excess of the guarantee. C. 328. The circuit court observed that the IHSA is no different than any other organization that rents space to hold events in schools. Supp. Rec. Vol. 3 R. 25: 7-14. ("But schools do all—make their facility available to all sorts of organizations without charging market rent. And I do not believe that turns all of those organizations into governmental actors."). *See also Hopf II,* 256 Ill. App. 3d at 897 (finding that corporations were not subsidiaries of a public entity subject to FOIA, in part because Evanston sold land to the corporation instead of donating it).

In contrast to *Brentwood*, the IHSA's member schools are not "giv[ing] up sources of their own income to their collective association." 531 U.S. at 299. The IHSA undertakes the financial risk and provides a guarantee to host schools regardless of the revenue generated. It is only through the IHSA's administration that schools are able to collectively compete in such events. *See Breighner*, 471 Mich. At 228-29 ("Without the MHSAA's leadership and organizational effort, no revenue from tournament games would be generated for any entity, including MHSAA member schools. In short, MHSAA creates its own 'market' and revenue therefrom that would otherwise not exist

without its effort.") (emphasis omitted). The same is true of the IHSA, without which there would be no state tournaments.

Furthermore, under Illinois law, an entity may receive government funds and still not be considered a "public body" subject to FOIA. Special Olympics, referenced above, is but one of the many examples. For example, in *Hopf II*, the court found that the corporations formed by the City of Evanston and Northwestern were not subsidiaries of public bodies subject to FOIA even though their operating expenses were paid for by the government. *Hopf II,* 256 Ill. App. 3d at 891. In *Rockford*, the entity's receipt of 90% of its funding from the government was found to be insufficient to characterize it as a public body. *Rockford*, 64 Ill. App. 3d at 95. If entities like those at issue in *Hopf II* and *Rockford* are not subject to FOIA despite their receipt of significant government funds, then the IHSA, which receives no public funds at all and is functioning without governmental control, clearly cannot be subject to FOIA.

Finally, in analyzing whether an entity receives public funds, courts consider whether the dismissal of the entity's committee members would impact the public tax burden. *See Pope v. Parkinson*, 48 Ill. App. 3d 797, 799 (4th Dist. 1977). (no public funding received because "[i]n the event of such a dismissal [of a committee member], the public tax burden will be neither increased nor decreased."). Here, the removal of a member of the Board of Directors or of an IHSA employee would not impact the public tax burden because Board members do not receive any compensation and IHSA employees are paid only from IHSA funds generated through ticket sales and sponsorships. C. 155.

VI. THE RECORDS SOUGHT DO NOT QUALIFY AS PUBLIC RECORDS UNDER SECTION 7(2)

The discussion above makes clear that, the IHSA is not a subsidiary of a public body engaged in a governmental function. It follows then that the documents it generates do not pertain to the "transaction of public business" that were "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)) which would require their production under section 7(2) of FOIA. This conclusion is underscored by BGA's request itself which seeks information relative to IHSA's *private sponsors*. It is axiomatic that private sponsorships have nothing to do with government functions. The IHSA adopts and incorporates the arguments made by District 230 relative to this issue in its separately filed brief.

VII. *AMICI* ARE UNPERSUASIVE

Amici's arguments are plagued by the same flaw that undermines the arguments advanced by the BGA—that somehow the public policy of promoting disclosure of public records supplants the need to determine whether the entity whose records are sought are subject to FOIA in the first instance. *Amici* invite this Court to all but ignore the plain language of the FOIA as well as its undisputed and intended purpose to sanction invasion of records of a private entity that is not otherwise within FOIA's reach. *Amici* purport to use section 7(2) in a manner expressly not intended by the legislature. To be clear, section 7(2) cannot be read to permit access into records that are otherwise not accessible under FOIA. *Amici's* parade of horribles does not alter this conclusion.

Amici make much of the Governor's privatization of certain functions, implying that one of the motives for the move is to shield the activities from public scrutiny. Not so. There is simply no meaningful similarity between the transfer of actual governmental

authority (which involves governmental function) to a private entity and the activities of the IHSA, which performs no governmental function and is entirely independent of any public body.

Amici, as does the BGA, seek to use this appeal as a wedge to breach the careful contours of FOIA as established by the legislature and construed by Illinois courts. But neither BGA nor *amici* advance a logical or valid reason for doing so. By contrast, the amicus brief sought to be filed by the Metropolitan Pier and Exposition Authority and Navy Pier, Inc., illustrates the dangers of an FOIA with no limits.

Amici's argument is further undermined by its misstatement of facts and law. The unrebutted Hickman Affidavit established that the IHSA does not expend "public funds" from public schools and it does not perform governmental functions. Board members are not acting in their "official capacity" as principals in their role. There is no basis for asserting that IHSA has no legal existence without public school funding – IHSA currently exists without such funding.

Amici misrepresent the *Breighner* decision which they inaccurately represent as supporting their argument that if a private entity is a governmental actor for purposes of federal law, then it is a public body for purposes of FOIA. *Breighner* held the opposite. *See Breighner*, 471 Mich. at 228, n.3.

Finally, as explained above, it is the tort immunity ruling in *Hood*, and not the rejected arguments advanced in that case that control.

CONCLUSION

The result which the BGA and *amici* urge would significantly transform the landscape of interscholastic athletics in Illinois. Functions which have historically been

privately handled under a voluntary cooperative framework would be transformed into government functions imposed on an already overburdened and financially challenged system. Significantly, the ability to effectively negotiate and obtain highly sought after sponsorships – necessary to relieve participants from the burden of bearing the costs of organizing competitions – would be undermined. Just like countless other organizations, the IHSA is a private actor performing a non-governmental function. Its ability to do so for the benefit of its member schools should not be put at risk.

WHEREFORE, for the foregoing reasons, ILLINOIS HIGH SCHOOL ASSOCIATION respectfully requests that this Court affirm the judgment of the Appellate Court.

January 27, 2016

Respectfully submitted,

ILLINOIS HIGH SCHOOL ASSOCIATION

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No. 121124

IN THE
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BETTER GOVERNMENT ASSOCIATION,
Plaintiff-Appellant,
v.
ILLINOIS HIGH SCHOOL ASSOCIATION, CONSOLIDATED HIGH SCHOOL DISTRICT 230,
Defendants-Appellees.

On leave to appeal from the Appellate Court of Illinois, First District, No. 15-1356

There on appeal from the Circuit Court of Cook County, Chancery Division, No. 2014 CH 12091

Honorable Mary L. Mikva, Judge Presiding

CERTIFICATE OF DEFENDANT-APPELLEE

I certify that this Brief conforms to the requirements of Rules 341(a) and (b). The length of Defendant-Appellee Illinois High School Association's Brief and Argument is 43 pages.

January 27, 2016

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 27, 2017 he caused to be electronically filed with the Supreme Court of the State of Illinois Defendant-Appellee Illinois High School Association's Brief and Argument, a copy of same was served upon all counsel of record on the attached Service List via email on January 27, 2017.

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