No. 121124

IN THE SUPREME COURT OF ILLINOIS

Better Government Association, Plaintiff-Petitioner, v. Illinois High School Association, Consolidated High School District 230, Defendants-Respondents.	Appeal from Appellate Court, First District No. 15-1356

Appeal from the Circuit Court of Cook County, 1st Judicial District
14-CH-12091
Judge Mary Mikva, Presiding

BRIEF *AMICI CURIAE* BY THE ILLINOIS PRESS ASSOCIATION AND THE ILLINOIS BROADCASTERS ASSOCIATION IN SUPPORT OF PLAINTIFF-PETITIONER BETTER GOVERNMENT ASSOCIATION

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This case presents the opportunity to this Court to explore the meaning of recent amendments to the Freedom of Information Act, and to give meaning to the legislative intention to expand the reach of FOIA to documents which public bodies may try to shield from public disclosure by the use of third party contracts. This case also invites an examination of the definition and interpretation of the meaning of the term 'public body' as used in the FOIA context.

It is our intention to provide a short statement of the principles underlying FOIA, and the impact of those principles on this case.

The General Assembly, in 2009, engaged in a significant re-write of FOIA (P.A. 96-542, eff. Jan 1, 2010). In that re-write, the General Assembly included changes to the preamble and added Section 7(2), which provides as follows:

> (2) 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)

Those amendments play significant roles in this litigation. That re-write was intended to strengthen citizens right of access to public records. One of the significant changes to the Act was the inclusion of Section 7(2), to allow access to records not in the possession of the public body, but in the possession of a contractor to the public body.

The preamble to FOIA, while not a substantive part of the statute, sets out several

statements of public policy, which are routinely cited by Illinois courts in cases decided under the Act. The preamble, in pertinent part, states as follows:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.
>
> The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.
>
> * * *
>
> Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expediently and efficiently as possible and adherence to the deadlines established in this Act.
>
> * * *

5 ILCS 140/1.

The principles of public policy set out in the preamble touch on each of the issues presented in this case–(a) the proper application of Section 7(2), requiring that the records of the IHSA be considered public records in the hands of a contractor operating pursuant to

the terms of a contract with a public body; and (b) the definition of what constitutes a public body and whether the Association was a subsidiary public body of its member schools.

A. THE IMPACT OF SECTION 7(2)

District 230 and IHSA entered into a Contract—to allow the IHSA to supervise and regulate interscholastic activities—along with six hundred and thirty-nine (639) public high schools and one hundred eighteen (118) private high schools. Nearly 85% of IHSA member schools are public schools, operating under the provisions of the School Code, and levying and spending tax dollars. (C00137). The IHSA, as demonstrated by its all-encompassing Constitution and bylaws, has been authorized by those schools to administer every facet of interscholastic athletic activity, from eligibility to academics, to rules about transfer students, to health and safety of student athletes (heat and concussions in particular) to scheduling and seeding tournaments, to limiting which schools may be scheduled as opponents, to limiting what schools may say about their own athletic programs. The IHSA controls each element of high school athletics in Illinois. To allow the IHSA to maintain secrecy of all records, including the expenditure of public funds from those public high schools, defeats the very purpose of the statute, which is that "the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 399 (2009); *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188 (1st Dist. 2004).

The very purpose of FOIA will be absolutely undercut by a ruling that a public body

(or bodies) can establish a separate, private entity, and assign to that entity specific duties to be conducted by that private body. This is not limited to just this school District and the IHSA—the same scenario plays out in many levels of government. Recent events underscore this point.

The Governor, earlier this year, created a private entity to do some of the work of the Department of Commerce and Economic Opportunity ("DCEO"). He issued an Executive Order, requiring the Department to work with the Illinois Business and Economic Development Corporation. Initially, the Corporation was staffed only with 4 public employees from DCEO, including the Director of the Department. The work of the private corporation is work previously done by public employees at DCEO.

The Executive Mansion Foundation has been rejuvenated, in an effort to raise funds to repair and renovate the Executive Mansion, clearly a governmental function. The State is apparently ceding its governmental authority and responsibility to repair and renovate the residence of the Governor to a third party—the Foundation.

Just recently, the Governor announced the creation of the Illinois State Fair Foundation—a separate entity designated to raise funds for the repair and renovation of the Illinois State Fairgrounds, property under the control of the Illinois Department of Agriculture. Again, it seems the State is ceding its governmental authority and responsibility to maintain that property to a third party.

And, in litigation still working its way through the system, the relationship between the College of DuPage and its Foundation is being examined in light of Section 7(2) of FOIA. The Foundation does all fundraising for the College, using College employees and

college facilities, yet maintains that it is a separate, and private entity, not subject to FOIA *The Chicago Tribune v. The College of DuPage*, No. 2-16-0274 (2nd Dist.).

It might be argued that there are good policy reasons to establish a third party to undertake governmental activities. Private entities can be less bureaucratic than governmental agencies; perhaps private entities can perform more efficiently and more economically than can government. Likewise, given the state of finances in Illinois, perhaps there is a need for a third party to raise funds for the Mansion and the Fairgrounds. That, however, does not change the fundamental role of these entities—they are performing governmental functions, they may in fact be establishing public policies. These entities are certainly undertaking "government activity that affect the conduct of government and the lives of any or all of the people." *Stern*, at 399.

Likewise, the IHSA is performing a governmental function–the administration and governance of high school athletics. In *Brentwood*, the United States Supreme Court addressed the issue of whether a nonprofit athletic association which regulated interscholastic sports among Tennessee's public and private high schools was a state actor under § 1983 and the Fourteenth Amendment. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).

Brentwood concluded that the evidence showed "such a 'close nexus between the State and the challenged action' that seeming private behavior 'may be fairly treated as that of the State itself." *Id.* at 295. For example, the evidence established, like here, that public school provided much of the association's financial support by giving the Association the authority to charge admission to their games. *Id.* at 299. The evidence further showed that

State Board members were appointed as members of the organization's board of control and legislative council; that public school official were acting in their official capacity when they engaged in the association's ministerial acts; the state provided retirement benefits to organization members; and the state officially endorsed student participation in association-sponsored interscholastic athletics as a substitution for physical education requirements. *Id.* at 300-01.

IHSA attempts to distinguish this case from *Brentwood* by pointing out two minor differences in the facts. IHSA states, that unlike in *Brentwood*, they do not charge dues to member schools. However, only 4% of its revenue was derived from dues paid by member schools with most of their operating budget deriving from gate receipts at the tournaments it sponsors. *Id.* at 307. IHSA points out that in *Brentwood* the association employees were eligible to participate in the state's retirement system. While this may be true, it was pointed out that the state did not pay the employees nor did the state pay any portion of the employer contribution for them. *Id.* at 313. Neither of these facts are persuasive as they were not significant factors in the Court's determination that the association was a state actor.

To be sure, the IHSA has been determined by Illinois Courts to be a state actor for purposes of application of Section 1983 and constitutional claims. "The IHSA is a state actor." *Makindu v. Illinois High School Association*, 2015 IL App (2d) 141201, ¶34. See *Petrie v. Illinois High School Association*, 75 Ill.App.3d 980, 981 (4th Dist. 1979). To "suggest that an entity like the [interscholastic association] could be a state actor, but not also a "public body" under the FOIA would undercut the stated purpose of the FOIA..." *Breighner v. Michigan High School Athletic Association*, 471 Mich. 217, 242, 683 N.W. 2d 639,

653,190 Ed. Law Rep. 532 (2004).

In addition, the IHSA has claimed governmental immunity when faced with litigation. The IHSA shields itself with a cloak of governmental immunity. See Interscholastic Association Defamation Act (745 ILCS 54/1 *et seq.)* Further, the IHSA has turned to the General Assembly to impose membership requirements to protect its governance structure from any challenges. See *e.g.* 105 ILCS 5/22-15; 105 ILCS 5/10-22.40 *et seq.*; 105 ILCS 5/22-24; 105 ILCS 5/27-1

The role of the IHSA in high school athletics has been the subject of scrutiny by the courts for quite some time. In 1979, the Fourth District Appellate Court was faced with a case involving an edict from the IHSA, pronouncing that boys could not play in an IHSA volleyball tournament. The role of the IHSA was a subject of discussion, even then:

> [T]he school is denying this young man access to athletic competition in deference to the rules of the [ISHA], a private organization which for practical purposes appears to be setting public educational policy. It behooves the court and the member schools to ask by what warrant the IHSA from its position of anonymity determines which of our young men and women shall be allowed access to the rights and privileges of public education.
>
> It appears from the pleadings that IHSA is funded by public funds membership fees from the schools derived from taxes, and receipts from athletic contests on school or other public property. *IHSA seems to enjoy the best of both worlds use of public funds and public facilities and, indeed effective control of educational policy in the field of athletics, yet it enjoys immunity from public control and even from public scrutiny.* The IHSA seems to be performing in an area that even a beginning civics student would think government would have sole responsibility. Perhaps at least one affirmative benefit of this litigation will be legislative examination of this unique and powerful role by a private organization in governmental affairs.

Petrie v. Illinois High School Association, 75 Ill. App. 3d 980 (4th Dist. 1979) (Craven, J., dissenting) (Emphasis added).

Section 7(2) is the –albeit greatly delayed–legislative examination of the application of FOIA to third party contractors such as the IHSA suggested in the dissent in *Petrie*. The records in the control of the IHSA are precisely the type of records which should be made public pursuant to the statute.

B. THE IHSA IS A SUBSIDIARY OF ILLINOIS SCHOOL DISTRICTS

FOIA has a very broad definition of a public body.

> "Public body" means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code.

5 ILCS 140/2(a)

Again, this definition should be read in conjunction with the fundamental purposes of the Act. In that 85% of member schools are public schools and 90% (or 100% at the time the Complaint was filed) of the Board of Directors were principals of public schools, IHSA has no recognizable existence, tangible or legal, without the public member school's funding, and is governed by a Board of Directors, who sit only because of their status as principals of schools. Public officials are a majority of the Board of Directors of the IHSA. Those Directors, and the representatives of those member schools are responsible for the constitution, by-laws and rules generated by the IHSA to govern the organization and high school athletics.

The Association is performing fundamental governmental duties–organizing and regulating interscholastic activities, such as athletic eligibility and training, participation in

outside activities, required scholastic achievement for participating athletes and making rules pertaining to the health and safety of the student athletes.

The IHSA receives a significant portion of their funding through collecting money via ticket sales and sponsorships of their overwhelmingly public member schools at public facilities. It is within the authority of the public schools to charge admission to their games, to which these schools delegate to the IHSA upon membership to the Association. The reason these public schools allow the IHSA to coordinate events and relinquish related gate receipts is because ISHA is the dominate statewide organization of high school athletics, and should a school choose not to join and comply with the rules, they would essentially be prevented from participating in interscholastic activities.

The IHSA meets the *Hopf v. Topcorp*, 256 Ill. App. 3d 887 (1st Dist. 1993) test. The IHSA is under the control of school districts, performing governmental functions on behalf of the school districts, and in only the very technical sense that it has a separate corporate existence is it in any way independent of school districts. The IHSA is absolutely dependent on Illinois public school districts for its existence.

Likewise, as with the Executive Mansion Foundation, the State Fair Foundation and the DCEO examples earlier, a finding that the ISHA is not a subsidiary of school districts undercuts the purposes of FOIA. To allow a governmental body to utilize a so-called private third party, and to then delegate to that third party essential governmental functions, but to then continue to fund that third party with government funds, yet claim that the activities and records of that third party are free from public scrutiny by way of FOIA and the Open Meetings Act would create a barrier to the purposes of the Act—allowing the public to

understand how its governments and government officials conduct public business.

IV. CONCLUSION

Amici Illinois Press Association and Illinois Broadcasters' Association urge this Court to reverse the decision of the trial court as to Section 7(2) of FOIA, and urge this Court to keep paramount the goals articulated by the General Assembly in the Act. There is a presumption that public records are available for public inspection. Public bodies may not use contracts with third parties to keep records from public disclosure. Exemptions to disclosure should be narrowly and liberally construed in favor of disclosure.

FOIA should be read to maximize public disclosure, even given that the general Assembly cannot keep pace with technological and other changes. The General Assembly cannot keep pace with decisions by the executive branch to 'privatize' fundamental governmental activities, but the General Assembly has recognized that the Act should be read to further the fundamental purpose of the Act:

> The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption.

5 ILCS 140/1

FOIA is not designed to award legal machinations to avoid public disclosure of the activities of public bodies and public officials and employees. To the contrary, the General Assembly has made clear, in the face of political attempts, perhaps more correctly technical, attempts, to avoid the requirements of the act, the courts should nonetheless implement the

underlying purposes of the act.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Donald M. Craven, an attorney, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding pages 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 11 pages.

Dated: December 1, 2016

Donald M. Craven

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on December 1, 2016, he caused a copy of the foregoing **Brief Amici Curiae of The Illinois Press Association and The Illinois Broadcasters Association in Support of Plaintiff-Petitioner Better Government Association** to be served via e-mail and U.S. Mail on the counsel of record indicated below:

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