



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 26, 2006

Via Facsimile & U.S. Mail

Mr. William Quinlan
General Counsel
Office of the Governor
James R. Thompson Center
100 West Randolph Street, 16th Floor
Chicago, Illinois 60601

Dear Mr. Quinlan:

The Office of the Attorney General has received numerous inquiries regarding whether the Office of the Governor and agencies under the Governor's control must produce Federal grand jury subpoenas for inspection and copying pursuant to the provisions of the Freedom of Information Act (the Act) (5 ILCS 140/1 *et seq.* (West 2004)). Among those who have inquired is the Better Government Association (BGA), whose request for copies of certain Federal subpoenas was denied by the Office of the Governor. Based upon the information with which we have been furnished, the exceptions to the disclosure requirements of the Act cited by the Governor's office do not authorize withholding the subpoenas. The purpose of this letter is to ensure that the Office of the Governor and the agencies under the Governor's control properly respond to requests for information pursuant to the Act.

During the period from July through October 17, 2006, the BGA and the Office of the Governor have exchanged a number of letters concerning the BGA's request for copies of the Federal grand jury subpoenas. (Copies of these letters are attached.) On July 24, 2006, the BGA filed its initial request for information with the Office of the Governor seeking, among other documents, copies of any and all subpoenas for records or testimony issued to the State of Illinois by the United States Attorney's office between January 1, 2006, and July 24, 2006. On August 7, 2006, Ms. Allison Benway, Legal Counsel for the Office of the Governor, responded to the BGA by stating that the Office of the Governor "cannot confirm or deny the existence of the documents requested," and that "even if the Office were to have documents responsive to your

request, such documents would be exempt from release per Section 7(1)(a) of the Freedom of Information Act." On August, 31, 2006, the BGA appealed the denial of its request.

The Office of the Governor denied this appeal on September 15, 2006. In that letter, in response to the BGA's request for other documents relating to subpoenas issued by the United States Attorney's office, Ms. Benway stated that the Governor's office would consider a request for such records if the BGA was interested in "re-styling" it. The denial letter failed to indicate, as required by the Act, that the requestor has a right to seek relief in the Circuit Court. 5 ILCS 140/9(a) (West 2004).

The BGA then sent a revised Freedom of Information Act request (FOIA request) to the Office of the Governor on September 22, 2006. This revised FOIA request sought "all public records *** related to any subpoenas issued by the United States Attorney's Office." Ms. Benway responded to the revised FOIA request on October 17, 2006, by providing some responsive documents, but stating without further elaboration, that "[c]ertain documents have been withheld pursuant to 7(1)(f) and 7(1)(n) of the Act." The BGA has indicated that the response did not include the Federal subpoenas sought in both their original and revised FOIA requests.

The Act requires that "[e]ach public body shall, promptly, either comply with or deny a written request for public records" (5 ILCS 140/3(c) (West 2004)) and, if denying the request, shall provide the "reasons for the denial." 5 ILCS 140/9(a) (West 2004). In its August 7, 2006, response to the BGA's request for copies of the Federal subpoenas, the Office of the Governor stated, "this Office cannot confirm or deny the existence of the documents requested. Nonetheless, even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) [5 ILCS 140/7(1)(a) (West 2004)] of the Freedom of Information Act." A response refusing to confirm or deny the existence of requested records does not comply with the requirements of the Act.

The Act also provides that "[e]ach public body shall make available to any person for inspection or copying all public records," unless excepted by the Act. 5 ILCS 140/3(a) (West 2004). The Act defines "public records" to include all records and other documentary materials "having been prepared, or having been or being used, received, possessed or under the control of any public body." 5 ILCS 140/2(c) (West 2004). Federal grand jury subpoenas received by a public body, including the Office of the Governor or other State agencies, are not excluded from the expansive definition of "public records." Thus, they may be withheld from disclosure only if they fall within one of the narrow exceptions contained in the Act.

The Act states that its exemptions "should be seen as limited exceptions to the general rule that the people have a right to know 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." 5 ILCS 140/1 (West 2004). Illinois courts have repeatedly upheld this view, holding that "when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in Section 7 of the Act applies." *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463 (2003). A public body withholding records has the burden of proving that the records in question fall within the exemption that it has claimed. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 198 (2004). Thus, in responding to the request for information under the Act, the Office of the Governor was required to enunciate its legal basis for withholding the requested records from disclosure. Ms. Benway's August 7, 2006, denial letter cited only subsection 7(1)(a) of the Act as the basis for withholding copies of any Federal grand jury subpoenas received by the Office of the Governor or any State agencies under the Governor's control. The mere citation to subsection 7(1)(a) of the Act without more does not satisfy that requirement.

Subsection 7(1)(a) of the Act exempts from disclosure records that are "specifically prohibited from disclosure by federal or State law or rules and regulations adopted under Federal or State law." 5 ILCS 140/7(1)(a) (West 2004). In her denial of the BGA request, Ms. Benway cited no State or Federal laws or regulatory provisions which would except Federal subpoenas from disclosure under subsection 7(1)(a), nor did she provide any further explanation as to the legal basis upon which the Office of the Governor was precluded from even identifying the existence of subpoenas responsive to the BGA's request. Based on the clear language of subsection 7(1)(a), unless the Federal grand jury subpoenas are "specifically prohibited from disclosure" by Federal or State law, rule, or regulation, this exemption is not applicable.

Our research has disclosed no Federal or State statute, rule, or regulation that specifically prohibits an officer or agency of the State of Illinois from releasing a Federal grand jury subpoena pursuant to a FOIA request.

In her October 17, 2006, response to the BGA's request for "a copy of all public records *** related to any subpoenas issued by the United States Attorney's office," Ms. Benway stated that "[c]ertain documents have been withheld pursuant to Sections 7(1)(f) and 7(1)(n) of the Act." Although the BGA request encompasses the subpoenas as well as all related documents, it is not clear from her response whether Ms. Benway intended to assert subsections 7(1)(f) and 7(1)(n) as a reason for withholding copies of the subpoenas. To the extent that the Office of the Governor was relying on the exemptions in subsections 7(1)(f) and 7(1)(n) of the Act as a basis for withholding copies of Federal grand jury subpoenas, these subsections clearly do not apply.

Federal grand jury subpoenas do not fall within the category of documents described in subsection 7(1)(f), which exempts “[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated.” 5 ILCS 140/7(1)(f) (West 2004). Subsection 7(1)(n) covers:

[c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies. 5 ILCS 140/7(1)(n) (West 2004).

Federal grand jury subpoenas issued to the Office of the Governor or any State agencies under the Governor’s control are not communications between those entities and an attorney representing them. Likewise, these subpoenas were not “prepared or compiled by or for” the Office of the Governor or any State agencies under the Governor’s control.

In addition to Ms. Benway’s written denials of the BGA’s requests, the Office of the Governor has made public statements indicating that its basis for refusing to release copies of subpoenas may relate to the secrecy requirements surrounding Federal grand jury proceedings. In considering this argument, we analyzed Federal Rule of Criminal Procedure 6(e)(2), which codifies the traditional rule of secrecy of Federal grand jury proceedings. Our review of the law has failed to find support for the position that the Federal grand jury secrecy rules preclude the Office of the Governor or state agencies under the Governor’s control from releasing subpoenas under the Act.

Rule 6(e)(2) generally prohibits a specified group of persons – grand jurors, interpreters, stenographers, operators of recording devices, typists, government attorneys, and government personnel who assist government attorneys in the enforcement of Federal criminal law – from disclosing “matters occurring before the grand jury.” Fed. R. Crim. P. 6(e)(2). The group of persons covered by the rule’s obligation of secrecy does not include witnesses called upon to testify or provide documents to the grand jury. The rule also clearly provides that “[n]o obligation of secrecy may be imposed on any person except in accordance with this rule.” Fed. R. Crim. P. 6(e)(2).

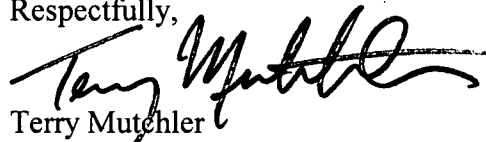
Courts interpreting Rule 6(e)(2) have held repeatedly that the prohibition against disclosure does not extend to grand jury witnesses or other persons who are not directly engaged in the operations of the grand jury. *Butterworth v. Smith*, 494 U.S. 624, 634-35 (1990); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *Halperin v. Berlandi*, 114 F.R.D. 8,

Mr. William Quinlan
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15 (D. Mass. 1986); *In re Langswager*, 392 F. Supp. 783, 788 (N.D. Ill. 1975); Fed. R. Crim. P. 6(e)(2) advisory committee's note. Thus, grand jury witnesses are not precluded from disclosing any knowledge they may have concerning the subject or scope of inquiry of a Federal grand jury. *In re Caremark International, Inc. Securities Litigation*, 94 C 4751 (N.D. Ill. July 24, 1997). Likewise, a recipient of a Federal grand jury subpoena is not precluded from disclosing the subpoena to others. See *In re Grand Jury Subpoena Duces Tecum, Dated December 9, 1983*, 575 F. Supp. 1219, 1221 (E.D. Pa., 1983); *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979). Thus, the rules governing grand jury secrecy do not prohibit the Governor's Office or agencies under the Governor's control from disclosing Federal subpoenas in response to a request under the Act.

The responses of the Office of the Governor to the BGA's requests for disclosure of copies of Federal grand jury subpoenas clearly do not satisfy the requirements of the Act. The Office of the Governor has failed to establish that the Federal grand jury subpoenas fall within the exemptions in subsections 7(1)(a), 7(1)(f), or 7(1)(n) of the Act or that the United States Attorney has taken steps to mandate secrecy of the grand jury subpoenas. Without legal support, the Office of the Governor and the agencies under his control cannot withhold Federal grand jury subpoenas in their possession and must release these documents pursuant to a FOIA request.

Respectfully,



Terry Mutchler
Public Access Counselor
Assistant Attorney General

cc: Dan Sprehe, Better Government Association



State of Illinois – Office of the Governor
Capitol Building – Room 207
Springfield, IL 62706-1150

July 24, 2006

Pursuant to the Illinois Freedom of Information Act (FOIA – 5 ILCS 140), the Better Government Association requests the following records be produced:

1. Copies of any and all subpoenas for records or testimony, issued to the State of Illinois by the United States Attorney's Office, between January 1, 2006 and July 24, 2006;
2. Copies of any and all e-mails, memoranda, and other correspondence between the Office of the Governor and any executive agency, with regard to said subpoenas and/or the production of records for compliance thereof;

I am a representative of a public interest organization that publishes or disseminates information, and this request is made as part of newsgathering and not for commercial use.

While the law allows your office to withhold information deemed "exempt" under the terms of the act (5 ILCS 140/7), you are required to release any remaining portions, to which the exemption(s) does not apply. In addition, detailed explanations of any redactions must be provided, specifically how the information withheld is statutorily exempt.

I am prepared to make an administrative appeal, in the event your office's response is unsatisfactory. Please indicate the official to whom such an appeal should be directed.

I am prepared to pay any fees associated with duplicating these documents, which can be sent to the Better Government Association – 11 East Adams Street, Suite 608, Chicago, IL 60603.

Illinois law requires your office respond to this request within seven (7) working days. If you have any questions regarding this request, please feel free to contact me at (312) 427-8330. Thank you in advance for your cooperation.

Sincerely,


Dan Sprehe
Chief Investigator

CC: Office of the Governor – General Counsel William Quinlan
Illinois Attorney General, Public Access Counselor Terry Mutchler



OFFICE OF THE GOVERNOR

JRTC, 100 WEST RANDOLPH, SUITE 16
CHICAGO, ILLINOIS 60601

ROD R. BLAGOJEVICH
GOVERNOR

August 7, 2006

VIA FACSIMILE

Dan Sprehe
Chief Investigator
Better Government Association
11 East Adams, Suite 608
Chicago, Illinois 60603
(312) 386-9203

Dear Mr. Sprehe:

This letter is in response to your Freedom of Information Act request dated July 24, 2006 and received by the Office of the Governor on July 27, 2006.

Your first request for "any and all subpoenas for records or testimony, issued to the State of Illinois by the United States Attorney's Office, between January 1, 2006 and July 24, 2006" is denied. As you know, this Office cannot confirm or deny the existence of the documents requested. Nonetheless, even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) of the Freedom of Information Act. You have a right to appeal this denial to the Governor's Office.

Your second request for "copies of any and all e-mails, memoranda, and other correspondence between the Office of the Governor and any executive agency, with regard to said subpoenas" is denied pursuant to sections 7(1)(f) and 7(1)(n) of the Freedom of Information Act.

Please contact me with any questions.

Sincerely,

Allison M. Benway
Legal Counsel



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August 31, 2006

The Honorable Rod Blagojevich
Governor
Office of the Governor
100 W. Randolph, Suite 16
Chicago, IL 60601

Re: Freedom of Information Act Request

Dear Governor Blagojevich:

I hereby appeal the denial of my July 24, 2006 Freedom of Information Act (FOIA) request for "any and all subpoenas for records or testimony, issued to the State of Illinois by the United States Attorney's Office, between January 1, 2006 and July 24, 2006" and "copies of any and all emails, memoranda, and other correspondence between the Office of the Governor and any executive agency, with regard to said subpoenas." (July 24, 2006 request letter and August 7, 2006 denial letter attached).

I have several objections to the August 7, 2006 denial of both of my requests that serve as the basis for my appeal. In responding to my first request your counsel stated "[a]s you know, this Office cannot confirm or deny the existence of the documents requested." Given that earlier subpoenas were acknowledged by your administration, I was in fact unaware of this enigmatic position. The statement itself is completely non-responsive and absent any specific reference to a legitimate statutory exemption to disclosure I treat it as a flat denial. The law is clear that denials must include "the reasons for the denial," thus the denial is improper. 5 ILCS 140/9(a).

I next address the hypothetical laid out by your counsel that "even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) of the Freedom of Information Act." I do not believe that hypothetical denials carry any weight with Illinois courts. Further, if counsel invokes Section 7(1)(a), hypothetically or not, it would be appreciated if he or she would specifically reference the "federal or State law or rules and regulations adopted under federal or State law" that prohibit disclosure. 5 ILCS 140/7(1)(a). Absent a specific reference to the alleged law, rule or regulation prohibiting disclosure I consider the denial based on Section 7(1)(a) erroneous and without legal authority.

11 East Adams, Suite 608, Chicago IL 60603

P 312-427-8330 F 312-386-9203

www.bettergov.org

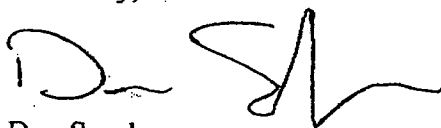
The denial of my second request seemingly contradicts the existence/nonexistence dichotomy presented by the response to the first request. If there are no subpoenas, a possibility suggested in the first response, then there should be no "emails, memoranda, and other correspondence" related to the subpoenas and thus no need to invoke an exemption for imaginary records. Your counsel did not claim an inability to confirm or deny the existence of the "emails, memoranda, and other correspondence," she asserted two exemptions, Sections 7(1)(f) and 7(1)(n), which leads me to conclude the records in the first request do in fact exist.

The denial under Section (1)(f) is improper because that particular exemption does not cover records that reflect final decisions or orders of an agency. For example, emails directing personnel staff to supply hiring records to the Office of the Governor are not "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated," they are directives. To the extent the requested records go beyond preliminary drafts, opinions and the like, they are subject to disclosure and if particular records contain both exempt and nonexempt information then your office is required to "delete the information which is exempt and make the remaining information available for inspection and copying." 5 ILCS 140/8. A blanket denial based on Section (1)(f) is improper.

The denial under Section 7(1)(n) is overly broad. For example, if there is some record of correspondence between your office and outside counsel retained to deal with the subpoenas that indicates hours billed or the amount billed those records would be subject to the Act without violating any aspect of the attorney client privilege. If particular records contain both exempt and nonexempt information then your office is required to "delete the information which is exempt and make the remaining information available for inspection and copying." 5 ILCS 140/8. A blanket denial based on Section (1)(n) is improper.

If you or your counsel have any questions about this appeal, please feel free to call me at (312) 386-9201. I look forward to your reply and hope it is reflective of your vows to make Illinois government more transparent and accountable.

Sincerely,



Dan Sprehe
Chief Investigator

Cc: Allison Benway
William Quinlan
Bradley Tusk
Hon. Lisa Madigan
Terri Mutchler



OFFICE OF THE GOVERNOR

JRTC, 100 WEST RANDOLPH, SUITE 16
CHICAGO, ILLINOIS 60601

ROD R. BLAGOJEVICH
GOVERNOR

September 15, 2006

Dan Sprehe

~~Chief Investigator~~

Better Government Association

11 East Adams

Suite 608

Chicago, Illinois 60603

(312) 386-9203

Dear Mr. Sprehe:

This letter is in response to the appeal of your July 24, 2006 Freedom of Information Act request dated August 31, 2006 and received by the Governor's Office of Citizens Assistance on September 6, 2006.

Your appeal of our Office's denial to provide "copies of any and all subpoenas for records or testimony" is denied.

Your appeal of our Office's denial to provide "copies of any and all e-mails, memoranda, and other correspondence between the Office of the Governor and any executive agency, with regard to said subpoenas" is denied.

Your letter avers that "if there is some record of correspondence between your office and outside counsel retained to deal with the subpoenas that indicates hours billed or the amount billed those records would be subject to the Act..." However, your request for "copies of any and all e-mails, memoranda, and other correspondence between the Office of the Governor and any executive agency with regard to said subpoenas" does not encompass such documents. If you are interested in re-styling your request to include such documents, the Office would be happy to consider it.

Please contact me with any questions.

Sincerely,

Allison M. Benway
Legal Counsel



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September 22, 2006

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The Honorable Rod Blagojevich
Governor of Illinois
Office of the Governor
100 W. Randolph, Suite 16
Chicago, IL 60601

Re: Freedom of Information Act Request

Dear Governor Blagojevich:

I hereby request a copy of all public records, including, but not limited to, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information, emails and all other documentary materials related to any subpoenas issued by the United States Attorney's Office between January 1, 2006 and September 22, 2006, to the State of Illinois, including, but not limited to, the Office of the Governor.

I am a representative of a public interest organization that publishes or disseminates information and this request is made as part of news gathering and not for a commercial use.

The Illinois Freedom of Information Act provides that all non-exempt portions of any partially exempt record must be disclosed. Further, the Act requires that your office respond to this request within seven working days after receipt.

If you have any questions about this request please call me.

Sincerely,

Dan Sprehe
Chief Investigator

Cc: Allison Benway
William Quinlan
Hon. Lisa Madigan
Terri Mutchler



OFFICE OF THE GOVERNOR

JRTC, 100 W. RANDOLPH, SUITE 16
CHICAGO, ILLINOIS, 60601

ROD R. BLAGOJEVICH
GOVERNOR

October 17, 2006

Dan Sprehe
Chief Investigator
Better Government Association
11 East Adams
Suite 608
Chicago, Illinois 60603
(312) 386-9203

Dear Mr. Sprehe:


This letter is in response to your Freedom of Information Act request dated September 22, 2006 and received by the Office of the Governor on September 26, 2006.

Please find enclosed documents responsive to your request for "a copy of all public records, including, but not limited to, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information, emails and all other documentary materials related to any subpoenas issued by the United States Attorney's Office between January 1, 2006 and September 22, 2006, to the State of Illinois, including, but not limited to, the Office of the Governor."

Certain documents have been withheld pursuant to Sections 7(1)(f) and 7(1)(n) of the Act.

Please contact me with any questions.

Sincerely,


Allison M. Benway
Legal Counsel