Testimony of Better Government Association
Executive Director Jay Stewart
Before the Special Investigative Committee
December 18, 2008

I would like to thank the Committee for the opportunity to testify today.

The events of last week are deeply troubling and as a result the functioning of state government has been seriously impaired and will remain so as long as Rod Blagojevich remains Governor.

Our state is in crisis and the Better Government Association ("BGA") supports the action taken by the General Assembly by initiating these impeachment hearings. The removal of an elected official is an extraordinary event, but we are not living in ordinary times. These hearings must proceed in a manner that promotes public confidence in our government. It is imperative that the people have confidence in our rule of law, as embodied in our Constitution, and in our elected officials. Therefore, all interested parties to these hearings must be provided with an opportunity to be heard and due process must be preserved. To the extent that my testimony can assist the General Assembly in these important proceedings, I am pleased to be a part of the process and look forward to answering any questions that you may have.

It is my understanding that the Committee is interested in the BGA's successful litigation with Governor Blagojevich over his refusal to produce federal grand jury subpoenas we have requested under the Illinois Freedom of Information Act ("FOIA"). I will try to summarize events surrounding the litigation. In addition, I am submitting exhibits connected to the

litigation, including a transcript of the trial court's ruling and the written opinion of the 4th District Court of Appeals to supplement my testimony.

The BGA is a nonprofit civic watchdog group based in Chicago. Since 1923 the BGA has been dedicated to combating waste, corruption and inefficiency in state and local government.

In order to achieve our goal of improving the operation of state and local government, the BGA has traditionally relied on the tools of investigative journalism to expose wrongdoing in government and working with mass media to educate the public on our findings. Accordingly, the BGA uses FOIA on a regular basis.

During the summer of 2006 the BGA, along with many others, read news reports that Governor Blagojevich's office had recently been subpoenaed by federal investigators. At least one such news report in the July 21, 2006 edition of the Chicago Sun-Times stated that the Governor's Office refused to discuss the subpoenas. (Attached as Exhibit A).

Shortly after reading the Sun-Times article, on July 24, 2006 the BGA sent in a FOIA request to the Office of the Governor asking for copies of federal grand jury subpoenas issued to that office. (Attached as Exhibit B). The request was copied to the Public Access Counselor in Illinois Attorney General Lisa Madigan's office. (Exhibit B).

On August 7, 2006, counsel from the Governor's Office responded with a denial. (Attached as Exhibit C). The letter stated "[a]s you know, this Office cannot confirm or deny the existence of the documents requested." Never in my experience with a FOIA request have I ever received such a bizarre response. The letter went on to state 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." Section 7(1)(a) of the Act prohibits the disclosure of information if such disclosure is prohibited by federal or state law, rule or regulation.

On August 31, 2006, the BGA appealed the denial to Governor Blagojevich. (Attached as Exhibit D). The appeal contested the denial as improper, in part because hypotheticals are not grounds for denial and in asserting the exemption in Section 7(1)(a) the Governor's Office failed to specify which federal or state law, rule or regulation prohibited disclosure. (Exhibit D). The appeal was copied to General Madigan and the Public Access Counselor among others. (Exhibit D).

On September 15, 2006, counsel from the Governor's Office responded with a denial to our appeal. (Attached as Exhibit E).

On October 26, 2006 the Public Access Counselor copied the BGA on a letter written to the Governor's General Counsel. (Attached as Exhibit F). The Public Access Counselor, aware of the BGA's dispute with the Governor's Office, informed the General Counsel that under the Illinois Freedom of Information Act, requests for copies of federal grand jury subpoenas must be complied with. (Exhibit F). Despite the letter, the Governor's Office did not produce the subpoenas.

Before deciding to file suit under the Illinois Freedom of Information Act to compel production of the subpoenas, on November 7, 2006 the BGA wrote the U.S. Attorney's Office for the Northern District of Illinois and asked if such litigation would be opposed by that office.

(Attached as Exhibit G). We recognized that if the U.S. Attorney objected to the disclosure, the state court might find that release of the subpoenas would interfere with the ongoing investigation into "fraudulent hiring practices" being conducted by the U.S. Attorney. (Attached as Exhibit H).

On November 13, 2006 the U.S. Attorney's office responded and did not encourage or discourage such litigation, but certainly did not assert that our action would interfere with the ongoing investigation. (Attached as Exhibit I).

On January 4, 2007 the BGA filed suit in Sangamon County against the Office of the Governor under the Illinois Freedom of Information Act seeking production of the subpoenas. (Attached as Exhibit J). Among the documents attached as exhibits was the letter from the Public Access Counselor to the Governor's General Counsel. That same day the BGA informed the U.S. Attorney's Office of our suit. (Attached as Exhibit K).

On August 7, 2007 the BGA filed an amended complaint. (Attached as Exhibit L). The amended complaint added Governor Blagojevich as a defendant and sought the same records as the original complaint.

To date, the U.S. Attorney's Office has never asked the BGA to cease the litigation, and has not filed any pleadings with the state court to indicate that disclosure would interfere with the ongoing investigation.

The BGA filed suit for two primary reasons. First, the BGA believes the public has the right to know what is going on with its government. Public officials often seek to limit and control information when things go wrong. As the public pays for government operations

regardless of whether they are run well or poorly, we feel the public should have a clear idea of what is happening with their government.

Second, the BGA believes that the law applies to everyone, even the Governor of Illinois. He has public records relating to a very important issue, namely that his office has been served federal grand jury subpoenas. Rather than ignore this unpleasant issue, it should be aired to the fullest extent possible. Simply being Governor does not mean public records laws don't apply to you or your office. During a hearing in the trial court, Judge Kelley asked the Governor's lawyer:

> I do have one question for you Mr. Londrigan. Say a person receives a Federal Grand Jury subpoena from the Northern District of Illinois. Could that person be subject to either the contempt powers of the Court or criminal prosecution if that person voluntarily discloses that subpoena to somebody else?
>
> MR. LONDRIGAN: No, sir. (Transcript of the hearing attached as Exhibit M).

The Governor acknowledged that the law and rule on which he relied on does not prohibit disclosure of the subpoenas, yet he has continued to deny access to the documents, continued to spend public dollars on private lawyers to fight our suit, and continued to defy the requirements of the Freedom of Information Act as enacted by the General Assembly.

On January 9, 2008 Judge Kelley ruled on the Governor's Motion for Summary Judgment and the BGA's Motion for Judgment on the Pleadings. (Exhibit M). Judge Kelley ruled in favor of the BGA, finding, in part, that Federal Rule of Criminal Procedure 6(e)(2) does not prohibit the disclosure of federal grand jury subpoenas due to a request under the Illinois Freedom of Information Act. (Exhibit M). In ruling in favor of the BGA Judge Kelley relied in part on the language of the Freedom of Information Act, "[p]eople 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." (Exhibit M).

On March 3, 2008 Judge Kelley denied the Governor's motion to reconsider. (Attached as Exhibit N).

Subsequently, the Governor appealed Judge Kelley's decision to the 4th District Court of Appeals. After briefs and oral argument the 4th District Court of Appeals issued its opinion on November 19, 2008. (Attached as Exhibit O). The appellate court upheld Judge Kelley's opinion. In ruling against the Governor's argument that Rule 6(e)(2) prohibits disclosure of federal grand jury subpoenas under the Illinois Freedom of Information Act the court wrote:

> Our legislature enacted the FOIA in recognition that (1) blanket government secrecy does not serve the public interest and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the **sunshine of public scrutiny is the best antidote to public corruption**, and Illinois courts are duty-bound to enforce that policy." (Emphasis added).

The BGA has asked the 4th District to order the Governor to turn over the subpoenas we requested. The Governor has asked the 4th District to refrain from ordering production while he decides whether to appeal to the Illinois Supreme Court.

According to published reports, the Governor has spent more than $150,000 in legal fees in this matter and a similar suit in Cook County despite the clear provisions of state law. (Attached as Exhibit P).

That concludes my summary and I would be happy to answer any questions the Committee may have.

7/21/06 Chi. Sun-Times 3
2006 WLNR 12553661

Chicago Sun Times (IL)

July 21, 2006

Section: News

New fed **subpoenas** concealed: State agency heads were told to list workers but weren't told why

Dave McKinney, Eric Herman and Chris Fusco ; The Chicago Sun-Times

Gov. **Blagojevich's** administration has been hit with new **subpoenas** in a federal probe of its hiring practices but is concealing them from its own department heads and voters as election season heats up.

After the new **subpoenas** began arriving in late June, the governor's top lawyer, William Quinlan, sent internal memos asking agency chiefs and other top officials for lists of all human resources employees and computer equipment they used. He also ordered them to preserve a wide range of computer backup devices that "must not be deleted, overwritten, destroyed or modified in any manner."

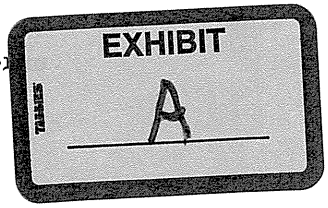
MEMOS MIRROR FED INQUIRIES

But the June 28 memos made no mention of the **subpoenas**, even though both sets of documents asked for similar information. The Chicago Sun-Times reviewed language in the **subpoenas** and obtained copies of the memos from sources who spoke on condition of anonymity.

Disclosure of the Justice Department's latest demands marks the first time any hiring-related **subpoenas** have been revealed since November, when the governor's office confirmed receiving four such **subpoenas**, then quit discussing them publicly.

Around the same time, **Blagojevich** set up a system for handling the feds' inquiries about hiring. Rather than **subpoenas** going to state agency directors, as had been the case, they were routed directly to the governor's office, which hired an outside law firm, Schiff Hardin LLP, to help respond.

The effect of the change has been a blackout on the receipt of any **subpoenas** by state agencies, even though Attorney General Lisa Madigan's office has repeatedly indicated **subpoenas** should be treated as public records, accessible in many cases



through the Freedom of Information Act. **Subpoenas** can be kept secret, however, if law enforcement officials request it.

CONTROLLING 'WHO KNEW WHAT'

A spokesman for the U.S. attorney's office in Chicago declined to comment about its communications with the governor's office or any other aspect of the hiring probe.

Abby Ottenhoff, a **Blagojevich** spokeswoman, would not say whether the feds asked the administration to keep the **subpoenas** quiet. "We can't comment on internal communications or **subpoenas**. You would have to talk to them," the feds.

But a high-level state government source said the administration's decision to stop discussing **subpoenas** came "in direct response to the earlier flurry of **subpoenas** when they were coming into agencies and the press was reporting on them."

"They were attempting to gain control of who knew what and when about **subpoenas**," the source said.

The latest **subpoenas** sought information about e-mails and correspondence sent by employees who supervised hiring in an undisclosed number of state agencies.

They also sought all computer equipment those employees used, as well as backup storage systems for agency computer servers.

The Quinlan memos contain language similar to the **subpoenas** without letting the recipients know that they were being asked to compile information in response to Justice Department requests.

"This Quinlan memo could be very misleading for folks in terms of the nature and the gravity of what these things mean," the source said. "They're not aware of the fact the feds are going to hold them accountable for turning over that information."

The new **subpoenas** came within days of the release of a letter from U.S. Attorney Patrick Fitzgerald to Madigan, alluding to "very serious allegations of endemic hiring fraud" under **Blagojevich** and asking that her own investigation into hiring be merged with the federal probe.

FALL **SUBPOENAS** HURT POLL RESULTS

The letter indicated the federal investigation began about a year ago and now focuses on whether state hiring was rigged to circumvent a U.S. Supreme Court opinion that dictated most state jobs could not be awarded on the basis of an applicant's political affiliation.

Last October and November, the feds subpoenaed the governor's office and his

child-welfare, prison and transportation departments for more than three years' worth of hiring records. The deluge of **subpoenas** took a political toll on **Blagojevich**. A tracking poll by SurveyUSA showed that 57 percent of Illinoisans disapproved of the governor's job performance in November 2005, his lowest rating in 14 months of polling.

Blagojevich has denied that any laws have been broken and insisted at the time that a job applicant's qualifications always trumped his or her politics.

Ottenhoff emphasized that the governor has been working to ferret out wrongdoing. "That's why we created the Office of Inspector General to police the system and have taken action when problems are uncovered," she said. "In some cases, that includes forwarding findings to the U.S. attorney for criminal investigation."

dmckinney@suntimes.com

eherman@suntimes.com

cfusco@suntimes.com

---- INDEX REFERENCES ----

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Government (1GO80); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Illinois (1IL01); North America (1NO39))

Language: EN

OTHER INDEXING: (CONTROLLING; JUSTICE DEPARTMENT; MEMOS; OFFICE OF INSPECTOR; US SUPREME COURT) (Abby Ottenhoff; Blagojevich; Disclosure; FALL SUBPOENAS HURT POLL RESULTS; Gov; Lisa Madigan; Madigan; Ottenhoff; Patrick Fitzgerald; Quinlan; Schiff Hardin; William Quinlan)

EDITION: Final

Word Count: 976
7/21/06 CHISUN 3
END OF DOCUMENT

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

11 East Adams, Suite 608, Chicago IL 60603
P 312-427-8330 F 312-386-9203
www.bettergov.org

EXHIBIT B

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

EXHIBIT
C

BETTER GOVERNMENT ASSOCIATION

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

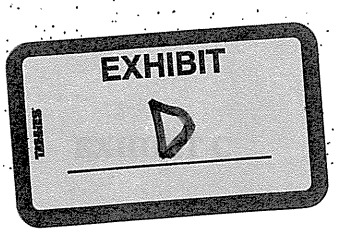
Dear Governor Blagojevich:

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 312-386-9105
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.

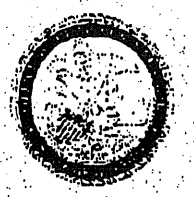
Your letter avers that "if there is some record of correspondence between your office and outside counsel retained to deal with the subpoenas that indicates hours billed or the amount billed those records would be subject to the Act..." However, your request for "copies of any and all e-mails, memoranda, 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

EXHIBIT
E



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

EXHIBIT
F

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,

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

BETTER GOVERNMENT ASSOCIATION

November 7, 2006

Mr. Gary S. Shapiro
First Assistant United States Attorney
219 S. Dearborn, Suite 500
Chicago, IL 60604

Dear Mr. Shapiro:

I am writing you to find out if the Office of the United States Attorney for the Northern District of Illinois would intervene in a lawsuit the Better Government Association ("BGA") is contemplating filing in the near future.

Beginning this summer, the BGA submitted several requests and appeals under the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.*) to the Office of the Governor. The BGA asked for, among other things, copies of any subpoenas issued to the Office of the Governor by the United States Attorney (see attached correspondence).

The Office of the Governor denied our requests for the subpoenas (see attached correspondence). A letter from the Illinois Attorney General's Public Access Counselor stating the subpoenas should be released (see attached correspondence) did not lead to the subpoenas being produced.

At this time the BGA is considering filing suit in state court seeking production of the subpoenas given the Office of the Governor's refusal to cooperate. Before filing any such suit, I would like to know if your office will file a motion to intervene in such a suit in order to halt the proceedings.

I realize that Department of Justice rules and regulations may prohibit you from answering my question. However, if there are no such prohibitions, I would appreciate a reply at your earliest convenience.

Again, the BGA is only contemplating a lawsuit at this time and outside legal counsel has not yet been retained. However, if we decide to move forward I would expect the suit to be filed before the end of the year, if not before the end of this month.

Please feel free to call me if you have any questions about this matter.

Sincerely,

Jay Stewart
Executive Director

11 East Adams, Suite 608, Chicago IL 60603
P 312-427-8330 F 312-386-9203
www.bettergov.org

EXHIBIT
G

U. S. Department of Justice

United States Attorney
Northern District of Illinois

Dirksen Federal Building
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604

June 20, 2006

Attorney General Lisa Madigan
Office of the Illinois Attorney General
State of Illinois Center, 12th Floor
100 West Randolph Street
Chicago, Illinois 60601

Dear Attorney General Madigan:

I write this letter to memorialize our conversations of May 24 and 25, 2006, and to express my appreciation for your professional handling of our request to refer your investigation of allegedly illegal hiring by the current State of Illinois administration to the Federal Bureau of Investigation and the United States Attorney's Office. Although it is not possible due to federal grand jury strictures to provide you with particularized detail of our ongoing investigation, it is appropriate to outline briefly our reasons for requesting that your office's investigation be merged into ours to avoid the problems inherent in overlapping investigations which in this case would inevitably have the net effect of ham-stringing the ability of either investigation to be completely successful.

As we have discussed, this office and the FBI began investigating allegations of fraudulent hiring practices by State of Illinois executive branch officials about one year ago, and opened a second investigation late last summer. Those investigations have now been merged and involve the alleged rigging of state employment practices to enable political hiring in violation of *Rutan* and include, among other things, the preparation of fraudulent hiring documentation. Our investigation has now implicated multiple state agencies and departments and we have developed a number of credible witnesses. [redacted]

While we were conducting our investigation, [redacted] in November 2005 your office independently also obtained information concerning fraudulent hiring practices at two state agencies and commenced an investigation of those allegations. Additionally, we understand that your office has begun its investigation of the allegations [redacted] which you believe would cause a broadening of your existing investigations to other state agencies. Since advising us of your investigations in order to make sure that our investigations were coordinated so as not to interfere with each other, it has become clear that our investigations would, in fact, cover some common ground and might involve some of the same witnesses. During the discussions between our offices

EXHIBIT
H

that ensued, we agreed that this was not an investigation in which the subject matters could be neatly divided or one where we could work effectively in parallel. In addition, both offices recognized that the inevitable duplication of effort would not only be wasteful of time, resources and manpower; but more importantly would have the potential for inadvertent interference with each other's investigation – with the inevitable result of overlapping and possibly conflicting witness interviews, confusion among witnesses as to their status and to whom they should provide information, and the impossibility of coordination due to grand jury secrecy limitations.

We are also sensitive to ensuring the maximum recovery of possible State of Illinois losses from the alleged criminal conduct we are investigating. I assure you that we will vigorously seek to protect the State's interest in this regard, as we would for any victim of an alleged crime. In particular, should there be a federal indictment resulting from our investigation, under the federal Mandatory Victim Restitution Act (MVRA) any defendants convicted in any such case must be ordered to pay full restitution to any victim. Furthermore, should the United States seek the forfeiture of assets, we would likely agree to equitably remit any forfeited assets to any victim of the crimes charged to the extent necessary to make the crime victim whole. And we can assure you that if, through our investigation and any subsequent trial, we are able to demonstrate that the State of Illinois was such a victim, we would pursue whatever remedies are available through restitution or forfeiture to return any losses sustained by Illinois to the state's coffers.

For all of these reasons, you have graciously deferred to our investigation. We recognize that significant effort was expended by your office concerning allegedly illegal hiring activities, and appreciate the professionalism of the Office of the Illinois Attorney General in concluding that the most important consideration for both our offices is that the very serious allegations of endemic hiring fraud be thoroughly and expeditiously investigated and, if appropriate, prosecuted.

On a personal note, I know that you have committed significant resources to the efforts to investigate public corruption and have assigned particularly talented attorneys to that effort. I appreciate the approach you have taken in this matter, and will be cognizant, as you suggest, that if we determine that there is criminal conduct which cannot be reached by federal prosecution and for which there is the possibility of state action, to make that information immediately available to you where appropriate. And while I know that you expect nothing more than that my office and the FBI conduct the federal investigation professionally and expeditiously, please be assured that when the circumstances of the investigation permits, I hope to publicly recognize the contribution of your office.

It goes without saying that whatever the outcome of the present inquiry, we look forward to a continuing, cooperative relationship.

Very truly yours,

Patrick J. Fitzgerald

PATRICK J. FITZGERALD
United States Attorney

U.S. Department of Justice

United States Attorney
Northern District of Illinois

Gary S. Shapiro
First Assistant United States Attorney

Everett McKinley Dirksen Building
219 S. Dearborn St., 5th Floor
Chicago, IL 60604

(312) 353-5306
Fax: (312) 353-8298

November 13, 2006

Mr. Jay Stewart
Executive Director
Better Government Association
11 East Adams, Suite 608
Chicago, Illinois 60603

Dear Mr. Stewart,

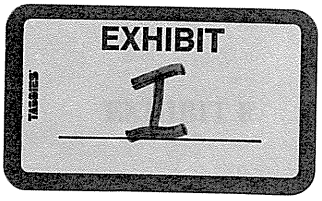
I write in reply to your letter of November 7, 2006, inquiring as to the position this office would take in the event the Better Government Association files suit in state court seeking production of, among other things, copies of any federal grand jury subpoenas which may have been served upon the Office of the Governor of the State of Illinois.

We are reluctant to opine on a hypothetical lawsuit, and can only tell you that we will only take such action as we believe is authorized by law and necessary to protect the secrecy and integrity of the federal grand jury process. Obviously, such a decision cannot be made until a lawsuit is filed and we are in a position to analyze its specifics and the relevant law.

While I cannot comment any further at this point, please do not take this letter as either encouraging or discouraging the BGA from whatever course of action you believe appropriate.

Very truly yours,

Gary S. Shapiro
First Assistant
United States Attorney



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

BETTER GOVERNMENT ASSOCIATION, and DAN SPREHE	)	
Plaintiffs,	)	
vs.	)	No.
THE OFFICE OF GOVERNOR ROD BLAGOJEVICH	)	
Defendant.	)	

COMPLAINT

NOW COMES, Plaintiffs, BETTER GOVERNMENT ASSOCIATION and DAN SPREHE, by Donald M. Craven and Howard W. Feldman, and for their complaint against Defendant, THE OFFICE OF GOVERNOR ROD BLAGOJEVICH, state as follows:

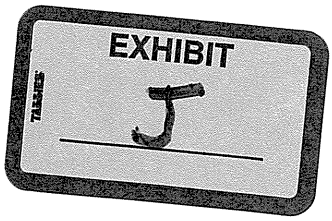
1. Plaintiffs are the BETTER GOVERNMENT ASSOCIATION (BGA) and DAN SPREHE. SPREHE is the Chief Investigator for BGA. The BGA was formed in 1923, and has as its mission to combat waste, fraud and corruption in government by conducting investigative research and litigation to expose problems; and researching policy solutions promoting transparency and accountability in government.

2. The Defendant is the Office of Governor Rod R. Blagojevich, the Governor of the State of Illinois.

3. July 24, 2006, Plaintiffs submitted a request pursuant to the Illinois Freedom of Information Act. (See Exhibit A.)

4. On August 7, 2006, Defendant denied the request. (See Exhibit B.)

5. On August 31, 2006, Plaintiffs appealed that denial. (See Exhibit C.)



6. On September 15, 2006, Defendant denied the appeal. (See Exhibit D.)

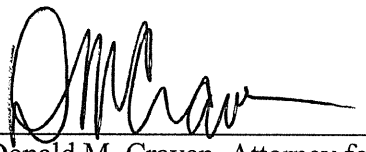
7. Certain of the records requested are the subpoenas received by the Office of the Governor from the U.S. Attorney between January 1, 2006 and July 24, 2006.

8. The exemptions claimed by the Defendant do not apply to the copies of the subpoenas requested by Plaintiffs in paragraph 1 of the FOIA request dated July 24, 2006. See Exhibit E, a letter from Attorney General Lisa Madigan to DEFENDANT on these issues.

WHEREFORE, Plaintiffs pray that this court enter an order compelling the release of these subpoenas as requested on July 24, 2006, and for costs and attorneys fees as contemplated by law.

Respectfully submitted,

BETTER GOVERNMENT ASSOCIATION and
DAN SPREHE, Plaintiffs

By: 
Donald M. Craven, Attorney for Plaintiffs

Donald M. Craven, P.C.
#6180492
1005 North Seventh Street
Springfield, IL 62702
Telephone: 217/544-1777
Facsimile: 217/544-0713
E-Mail: don@cravenlawoffice.com

Howard W. Feldman
Feldman, Wasser, Draper & Benson
1307 South Seventh Street
Springfield, IL 62703
Telephone: 217/544-3403
Facsimile: 217/544-1593

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

EXHIBIT A

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

EXHIBIT B

BETTER GOVERNMENT ASSOCIATION

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 312-386-9105
www.bettergov.org

EXHIBIT C

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.

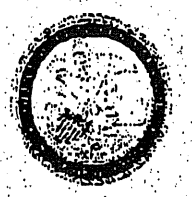
Your letter avers that "if there is some record of correspondence between your office and outside counsel retained to deal with the subpoenas that indicates hours billed or the amount billed those records would be subject to the Act..." However, your request for "copies of any and all e-mails, memoranda, 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

EXHIBIT D



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,

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

January 4, 2007

Mr. Gary S. Shapiro
First Assistant United States Attorney
219 S. Dearborn, Suite 500
Chicago, IL 60604

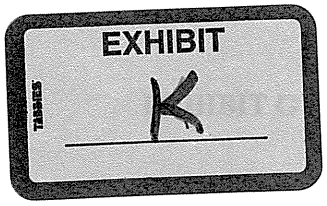
Dear Mr. Shapiro:

Attached you will find a copy of a lawsuit the BGA filed this morning in Springfield against the Office of the Governor Rod Blagojevich.

Please feel free to call me if you have any questions about this matter.

Sincerely,

Jay Stewart
Executive Director



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

BETTER GOVERNMENT ASSOCIATION, and DAN SPREHE	)	
Plaintiffs,	)	
vs.	)	No. 07-MR-5
ROD R. BLAGOJEVICH, in his capacity as Governor of the State of Illinois and THE OFFICE OF GOVERNOR ROD BLAGOJEVICH,	)	
Defendants.	)	

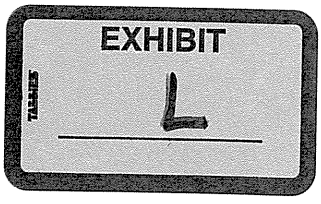
AMENDED COMPLAINT

NOW COME Plaintiffs, BETTER GOVERNMENT ASSOCIATION and DAN SPREHE, by their attorneys, Donald M. Craven and Howard W. Feldman, and for their Amended Complaint against Defendants ROD B. BLAGOJEVICH and THE OFFICE OF THE GOVERNOR ROD BLAGOJEVICH, state as follows:

1. Plaintiffs are the BETTER GOVERNMENT ASSOCIATION ("BGA") and DAN SPREHE. The BGA was formed in 1923. Its mission is to combat waste, fraud and corruption in government by conducting investigative research and litigation to expose problems, and researching policy solution promotion transparency and accountability in government.

2. Defendants are ROD B. BLAGOJEVICH, in his capacity as Governor of the State of Illinois and THE OFFICE OF THE GOVERNOR ROD BLAGOJEVICH.

3. On July 24, 2006, Plaintiffs submitted a requests to the Defendants pursuant to the Illinois Freedom of Information Act, 5 ILCS 140 ("FOIA"). (See Exhibit A.)



4. On August 7, 2006, Defendants denied the request. (See Exhibit B.)

5. On August 31, 2006, Plaintiffs appealed the denial. (See Exhibit C.)

6. On September 15, 2006, Defendants denied the appeal. (See Exhibit D.)

7. Certain of the records requested are the subpoenas received by the Office of the Governor from the United States Attorney between January 1, 2006 and July 24, 2006 ("Subpoenas").

8. The Subpoenas are public records as defined by subsection 2(c) of FOIA. That subsection states as follows:

> (c) "Public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed or under the control of any public body. "Public records" includes, but is expressly not limited to: (i) administrative manuals, procedural rules, and instructions to staff, unless exempted by Section 7(p) of this Act; (ii) final opinions and orders made in the adjudication of cases, except an educational institution's adjudication of student or employee grievance or disciplinary cases; (iii) substantive rules; (iv) statements and interpretations of policy which have been adopted by a public body; (v) final planning policies, recommendations, and decisions; (vi) factual reports, inspection reports, and studies whether prepared by or for the public body; (vii) all information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds of public bodies; (viii) the names, salaries, titles, and dates of employment of all employees and officers of public bodies; (ix) materials containing opinions concerning the rights of the state, the public, a subdivision of state or a local government, or of any private persons; (x) the name of every official and the final records of voting in all proceedings of public bodies; (xi) applications for any contract, permit, grant, or agreement except as exempted from disclosure by subsection (g) of Section 7 of this Act; (xii) each report, document, study, or publication prepared by independent consultants or other independent contractors for the public body; (xiii) all other information required by law to be made available for public inspection or copying; (xiv) information relating to any grant or contract ! made by or between a public body and another public body or private organization; (xv) waiver documents filed with the State Superintendent of

Education or the president of the University of Illinois under Section 30-12.5 of the School Code, [FN2] concerning nominees for General Assembly scholarships under Sections 30-9, 30-10, and 30-11 of the School Code; [FN3] (xvi) complaints, results of complaints, and Department of Children and Family Services staff findings of licensing violations at day care facilities, provided that personal and identifying information is not released; and (xvii) records, reports, forms, writings, letters, memoranda, books, papers, and other documentary information, regardless of physical form or characteristics, having been prepared, or having been or being used, received, possessed, or under the control of the Illinois Sports Facilities Authority dealing with the receipt or expenditure of public funds or other funds of the Authority in connection with the reconstruction, renovation, remodeling, extension, or improvement of all or substantially all of an existing "facility" as that term is defined in the Illinois Sports Facilities Authority Act.

5 ILCS 140/2

9. A public body withholding records has the burden of proving the applicability of an exemption, by citing to and explaining the particular legal basis under which the requested documents are exempt. *Lieber v. Bd. of Tr. Of S. Illinois Univ.*, 176 Ill.2d 401, 408, 680 N.E.2d 374 (1997). Despite Defendants' claims that the Subpoenas are exempt from disclosure, they have failed to specify a legal basis for this exemption as expressly required by FOIA. Defendants' cursory mention of §7(1)(a), 7(1)(f), and 7(1)(n) in their denial letters does not satisfy their burden of proving an exemption with specificity.

10. Section 7(1)(a) exempts "[i]nformation 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). However, Defendants' denials failed to specify any such federal or state rules or regulation applicable to the Subpoenas. (See Exhibits B and D.)

11. No Illinois law, rule or regulation exempts the Subpoenas.

12. No Federal law, rule or regulation exempts the Subpoenas.

13. The secrecy requirements surrounding federal grand jury proceedings do not operate so as to exempt the Subpoenas.

14. Federal Rule of Criminal Procedure 6(e)(2) states that only the following persons have an obligation of secrecy regarding matters occurring before the grand jury: grand jurors, interpreters, court reporters, operators of recording devices, persons transcribing recorded testimony, government attorneys, and government personnel assisting government attorneys in the enforcement of Federal criminal law. Grand jury witnesses or other persons who are not directly engaged in the operation of the grand jury are not subject to this secrecy requirement. *Butterworth v. Smith*, 494 U.S. 624, 634-35 (1990). Further, a recipient of a federal grand jury subpoena is not prohibited from disclosing the subpoena. *In Re Grand Jury Subpoena Duces Tecum, Dated December 89*, 1983, 575 F.Supp. 1219, 1221 (E.D.Pa., 1983). Thus, Federal Rule of Criminal Procedure 6(e)(2) does not preclude Defendants from disclosing the Subpoenas.

15. Federal Rule of Criminal Procedure 6(e)(2)(A) provides "No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

16. On November 7, 2006, Jay Stewart, Executive Director of the BGA, wrote a letter to Gary S. Shapiro, First Assistant United States Attorney, inquiring into whether the Office of the United States Attorney for the Northern District of Illinois would intervene in a lawsuit the BGA contemplated filing against the Office of the Governor Rid R. Blagojevich. (See Exhibit E.) Shapiro responded in a writing dated November 13, 2006, as follows:

> We are reluctant to opine on a hypothetical lawsuit, and can only tell you that we will only take such action as we believe is authorized by law and necessary to protect the secrecy and integrity of the federal grand jury process. Obviously, such a decision cannot be made until a lawsuit is filed and we are in a position to analyze its specifics and the relevant law.

Letter from Shapiro to Stewart (November 13, 2006). (See Exhibit F.)

17. Since this case was filed on January 4, 2007, the Office of the United States Attorney has not acted to intervene to protect this grand jury process. On January 4, 2007, Stewart wrote Shapiro, advising him that the lawsuit was no longer hypothetical, but was filed. (See. Exhibit G.)

18. Section 7(1)(f) 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). Subpoenas, by their nature, do not contain formulations of opinion, policies or actions, and, thus, cannot be exempt by this subsection. Certainly, a subpoena from a federal grand jury does not contain a draft of a state policy.

19. Section 7(1)(n) exempts "[c]ommunication between a public body and an attorney or auditor representing the public body." 5 ILCS 140/7(1)(n). Subpoenas do not represent communications between a public body and an attorney *representing* the public body, but, rather, an attorney *adverse* to the public body. Accordingly, they are not exempt by this subsection.

WHEREFORE, Plaintiffs pray that this Court enter an order compelling the release of these subpoenas as requested on July 24, 2006, and for costs and attorneys fees as contemplated by law.

BETTER GOVERNMENT ASSOCIATION and
DAN SPREHE, Plaintiffs

By: _____
Donald M. Craven, Attorney for Plaintiffs

Donald M. Craven
ARDC #6180492
Donald M. Craven, P.C.
1005 North Seventh Street
Springfield, IL 62702
Telephone: 217/544-1777
Facsimile: 217/544-0713
E-Mail: don@cravenlawoffice.com

Howard W. Feldman
Feldman, Wasser, Draper & Benson
1307 South Seventh Street
Springfield, IL 62703
Telephone: 217/544-3403
Facsimile: 217/544-1593

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded by depositing the same in a United States Post Office box in Springfield, Illinois, enclosed in an envelope, address as identified above, with proper postage fully prepaid on August 7, 2007 to:

Thomas Londrigan
Londrigan, Potter & Randle, P.C.
1227 South Seventh Street
Springfield, IL 62703

Howard W. Feldman
Feldman, Wasser, Draper & Benson
1307 South Seventh Street
Springfield, IL 62703

_____

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

11 East Adams, Suite 608, Chicago IL 60603
P 312-427-8330 F 312-386-9203
www.bettergov.org

EXHIBIT A

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

EXHIBIT B

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 312-386-9103
www.bettergov.org

EXHIBIT C

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

EXHIBIT D

BETTER GOVERNMENT ASSOCIATION

November 7, 2006

Mr. Gary S. Shapiro
First Assistant United States Attorney
219 S. Dearborn, Suite 500
Chicago, IL 60604

Dear Mr. Shapiro:

I am writing you to find out if the Office of the United States Attorney for the Northern District of Illinois would intervene in a lawsuit the Better Government Association ("BGA") is contemplating filing in the near future.

Beginning this summer, the BGA submitted several requests and appeals under the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.*) to the Office of the Governor. The BGA asked for, among other things, copies of any subpoenas issued to the Office of the Governor by the United States Attorney (see attached correspondence).

The Office of the Governor denied our requests for the subpoenas (see attached correspondence). A letter from the Illinois Attorney General's Public Access Counselor stating the subpoenas should be released (see attached correspondence) did not lead to the subpoenas being produced.

At this time the BGA is considering filing suit in state court seeking production of the subpoenas given the Office of the Governor's refusal to cooperate. Before filing any such suit, I would like to know if your office will file a motion to intervene in such a suit in order to halt the proceedings.

I realize that Department of Justice rules and regulations may prohibit you from answering my question. However, if there are no such prohibitions, I would appreciate a reply at your earliest convenience.

Again, the BGA is only contemplating a lawsuit at this time and outside legal counsel has not yet been retained. However, if we decide to move forward I would expect the suit to be filed before the end of the year, if not before the end of this month.

Please feel free to call me if you have any questions about this matter.

Sincerely,

Jay Stewart
Executive Director

11 East Adams, Suite 608, Chicago IL 60603
P 312-427-8330 F 312-386-9203
www.bettergov.org

EXHIBIT E

U.S. Department of Justice

United States Attorney
Northern District of Illinois

Gary S. Shapiro
First Assistant United States Attorney

Everett McKinley Dirksen Building
219 S. Dearborn St., 5th Floor
Chicago, IL 60604

(312) 353-5306
Fax: (312) 353-8298

November 13, 2006

Mr. Jay Stewart
Executive Director
Better Government Association
11 East Adams, Suite 608
Chicago, Illinois 60603

Dear Mr. Stewart,

I write in reply to your letter of November 7, 2006, inquiring as to the position this office would take in the event the Better Government Association files suit in state court seeking production of, among other things, copies of any federal grand jury subpoenas which may have been served upon the Office of the Governor of the State of Illinois.

We are reluctant to opine on a hypothetical lawsuit, and can only tell you that we will only take such action as we believe is authorized by law and necessary to protect the secrecy and integrity of the federal grand jury process. Obviously, such a decision cannot be made until a lawsuit is filed and we are in a position to analyze its specifics and the relevant law.

While I cannot comment any further at this point, please do not take this letter as either encouraging or discouraging the BGA from whatever course of action you believe appropriate.

Very truly yours,

Gary S. Shapiro
First Assistant
United States Attorney

EXHIBIT F

January 4, 2007

Mr. Gary S. Shapiro
First Assistant United States Attorney
219 S. Dearborn, Suite 500
Chicago, IL 60604

Dear Mr. Shapiro:

Attached you will find a copy of a lawsuit the BGA filed this morning in Springfield against the Office of the Governor Rod Blagojevich.

Please feel free to call me if you have any questions about this matter.

Sincerely,

Jay Stewart
Executive Director

EXHIBIT G

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

BETTER GOVERNMENT ASSOCIATION and DAN SPREHE,
Plaintiffs,

-vs- NO. 2007-MR-5

ROD R. BLAGOJEVICH, in his official capacity as Governor of the State of Illinois,
Defendant.

MOTION FOR SUMMARY JUDGMENT

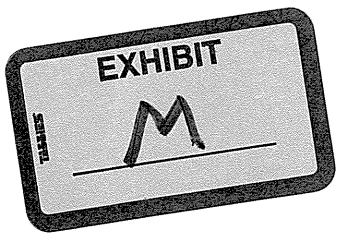
REPORT OF PROCEEDINGS of the hearing held before the Honorable PATRICK W. KELLEY on the 9th day of January, 2008.

APPEARANCES:

MR. DONALD CRAVEN and
MR. HOWARD FELMDAN
Attorneys at Law
for the Plaintiffs,

MR. THOMAS LONDRIGAN,
MR. DOUGLAS QUIVEY and
MR. WILLIAM QUINLAN
Attorneys at Law
for the Defendant.

LAURA K. BERRY, CSR#084-1931
Official Court Reporter
716 Sangamon County Complex
Springfield, IL 62701
(217) 753-6813



I N D E X

WITNESSES	DIRECT	CROSS
None		

EXHIBITS

None

P R O C E E D I N G S

THE COURT: This is 07-MR-5, Better Government Association versus Blagojevich. Cause called for hearing on Defendant's Motion for Summary Judgment, and who is going to argue for whom here for the defense, Mr. Londrigan, and the Plaintiff will be Mr. Craven.

Let me state for the record that there is an initial issue as to whether the Defendant can raise issues not set forth in his original denial of the F.O.I.A. request.

I find that the Defendant can set forth all issues, no case holds that he can't, and my review is de novo, therefore I do not believe it would be appropriate to limit the Defendant's arguments at this time, so, Mr. Londrigan?

MR. LONDRIGAN: I'm glad I don't have to reintroduce myself to the Court, with my disguise.

THE COURT: You look a little different.

MR. LONDRIGAN: And we agree that this is essentially a question of law, and it is treated, essentially, as the same thing as Cross-Motions for Summary Judgment, and we didn't burden the Court with additional briefs.

I think what is important in applying the

law to the undisputed facts in this case is the subject matter that we are attempting to address here.

I think it is also undisputed and clear that the subject matter are Federal Grand Jury subpoenas out of the First District Federal Court that are not producible under the federal F.O.I.A.

I say that, in part, because the First District Appellate Court, where this Grand Jury sits and where the United States Attorney is handling and investigating this prosecution and where the clerk holds these original subpoenas, has set up, I don't want to call it an elaborate procedure, but a procedure that's probably akin to most procedures throughout the United States in each of the districts to essentially protect the investigative function and secrecy of Grand Jury proceedings, and pursuant to that responsibility, the First District has enacted Local District Court Rule 6.2, Records of the Grand Jury in Possession of the Clerk. All records maintained by the clerk are restricted documents and shall be available only upon order of the Chief Judge. This includes Grand Jury subpoenas, and while those subpoenas have been

served and placed on individuals, the Courts, including the Northern District, before whom we think this issue should have been raised, has taken steps to protect the secrecy of information that might be learned by possible individuals who might be subject to prosecution, and as far as who witnesses may be and what evidence may or may not exist with respect to the subject of the investigation.

If I understand the position -- the legal position that's being taken by the Defendants in this case, it is that because those who are served with subpoenas are not enumerated in the statute with respect to those who must maintain secrecy, that therefore it has no application to someone in this case who might be a state officer or a statewide investigation is being investigated --

THE COURT: Isn't that what the statute says, Mr. Londrigan, it applies only to enumerated people, which means only by implication that it would not apply to other people? On the face of the statute you have some cases that might suggest otherwise.

MR. LONDRIGAN: That's -- that's true, however, that involves the responsibility of the individual

named, and if you will look at those named individuals, each of them has something to do with the transcription in the secret proceedings that are involved, and then it is expanded to (i)(ii), to other officials of government that say a United States Attorney might decide was absolutely essential in going ahead with this proceeding.

THE COURT: But never to the recipients of the subpoenas?

MR. LONDRIGAN: That's right, and I understand that.

I'm moving to that portion of the argument where the three cases that are cited here, and that are criticized by counsel in their brief as simply reading past the issue that the Court just raised, have gone further and looked at not those persons that might be subject to the statute, but to the information and the secrecy of the Grand Jury proceedings, and gave specific reasons as to why this has application to those other than those specifically enumerated in the statute.

THE COURT: Those Courts have basically legislated --

MR. LONDRIGAN: Pardon me?

THE COURT: Those Courts have legislated additional people into 6(e), 6(e)(2), they have additionally -- they have legislated additional people, in other words, they enumerated people that Congress chose not to be enumerated, but the Courts have enumerated, essentially. Anyway, that's an observation. I know what the holdings are, so --

MR. LONDRIGAN: I don't interpret those cases -- without regard to whether or not you characterize that as judicial legislation, I don't interpret those cases as addressing that issue as to who was covered or who was not covered.

What they are saying is regardless of whether or not they are enumerated in a statute, we are not going to add X, Y and Z as part of this statute. We are going to address whether or not the material requested should be protected under existing statutes and rules that are administered by Courts -- Federal Courts to determine whether or not they should be protected, and in this case, these subpoenas are treated as restricted documents by rule of court.

Federal Criminal Rule 6.2, which is Exhibit B that's attached to our brief, reads

Federal Grand Jury subpoenas are restricted documents which shall be available only on order of the Chief Judge of the United States District Court for the Northern District of Illinois, and then cites the three cases that you mentioned, two of which are from the Northern District in the 1980's, and have -- are still, I believe, good law and have been neither criticized or overruled by any of the Federal Courts, and then the Wirebound Boxes case, which I believe came out of Minnesota.

What we have here is akin to or you might say the evil cousin or evil brother of forum shopping, it is forum avoidance.

The U.S. Attorney, who is responsible for presenting this evidence to the Grand Jury, has taken the position that this disclosure could impede the investigation, and therefore interfere with the enforcement of law, and that's the underlying policy that these three Federal Court cases have determined with respect not to who is protected or who may not do something, but to whether or not the substance of these -- of this information falls under the umbrella of Grand Jury secrecy to protect the nature of the investigation.

What we have here is two cases, two parallel cases, both filed in Federal Court, or excuse me, in State Court rather than in Federal Court, because it is quite clear from these rules and these cases that they could not or would not receive the relief that they are asking for based on their interpretation of the same statute that you and I are talking about.

They have decided that they are going to -- in a case of first impression of the State Freedom of Information Act and have actually argued in their brief, that it should trump these provisions, these cases and this federal law.

The Illinois F.O.I.A., itself, turning for -- for a moment not to what the federal law was and would be and what the result would be under existing statutes and regulations and rules and court interpretation, the F.O.I.A., itself, says in the same words that was used by Mr. Quinlan to deny this request under the state statute, information -- it was denied based on 7(1)(a), information specifically prohibited from disclosure by federal or state law or rules and regulations adopted under federal or state law, and what we have argued is

that Federal Rules of Civil Procedure, which is our Exhibit A that's attached, under recording and disclosing the proceedings, which enumerates unless provided otherwise, the following persons may not disclose, it is not intended to be all inclusive with respect to the material that the Grand Jury is considering in terms of its secrecy.

Exhibit A, Federal Rule of Civil Procedure 6(e), enumerates additional persons that are required not to make disclosure, and that based upon the fact that it names several that are intimately concerned with Grand Jury proceedings does not mean that it grants a carte blanche disclosure privilege under either the federal or the state F.O.I.A.

THE COURT: What about that first sentence there, Mr. Londrigan, no obligation of secrecy may be imposed on any person, except in accordance with Rule 6(e)(2)(B), which are the enumerated people, what about that? Should I -- are you asking me to ignore that sentence?

MR. LONDRIGAN: No, these are the people that are enumerated that have direct contact with either federal law enforcement officials that are making the investigation or participating in the secret proceedings

of the Grand Jury.

THE COURT: I understand that.

MR. LONDRIGAN: We are not contending that anyone that isn't enumerated here, including the Governor or any state official, is covered or enumerated in this statute. What we are saying is that the material that's requested under the state F.O.I.A. Act is not consistent with federal law, the federal F.O.I.A., that these individuals or groups that are named here are not part of this process and could not meet the standard test in Federal Court to gain access to this information.

In other words, they couldn't show a particularized need because there was pre-existing litigation going on, they couldn't come before a judge to determine what they could receive or not receive, and what they have done is to circumvent this whole process in the Northern District in the hopes that a state court judge would interpret the state F.O.I.A. in a case of first impression differently than a federal judge would interpret the federal F.O.I.A.

The Defendants, by their own election, decided not to respond to several other of the subdivisions in our F.O.I.A., which would prevent,

in addition to 7(1)(a), which was given by the Governor's Office at the time that they refused this information.

The Court ruled earlier that this is a de novo proceeding and eliminated the waiver argument, so we are somewhat in a no man's land, because we are the only parties that haven't addressed these other provisions, but I would point out to the Court that even if the Court were still considering that issue that all of these provisions are in pari materia, they are not only in pari materia, they are within the same statute, and if you look at the language of each of these provisions, it is quite clear that they fall under the original exemption of 7(1)(a), which is information specifically prohibited from disclosure, and that's what this is addressing. It is not addressing who, it is addressing what information is specifically prohibited from disclosure by federal or state law or rules and regulations adopted under federal or state law.

If you go down to the next Subparagraph b, it includes information that, if disclosed, would constitute a clear and unwarranted invasion of

personal privacy information, and I'm talking about Subparagraph 5 now, revealing the identity of persons who file complaints or provide information to investigative, law enforcement or penal agents -- agencies provided that identification to witnesses, et cetera, all of this is linked into federal law enforcement, and if you go to Subparagraph C, further, again reading it, in pari materia, records compiled by any public body and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency, and that's exactly what's going on, albeit at the federal level, and they are asking in the case of first impression for you to interpret not who, but what they are entitled to receive, without any showing or any compliance with federal regulations or rules.

Finally, Subparagraph a is obstruct an ongoing criminal investigation. The person who is occupying the constitutional office upon whom this subpoena has been served has been asked directly for

that reason, in an exhibit that's been attached here, that it would interfere with the nature of this investigation not to produce this material.

It is our position, I think is the bottom line and will conclude my remarks, it is our position that the interpretation that they are asking that this Court make over the state F.O.I.A. is asking this Court, in fact they have asked this Court expressly to rule that the state F.O.I.A. trumps federal law, which brings us to the last issue that we assert here, both in our initial brief and in our reply brief, that if the Court gives that interpretation to the state F.O.I.A., that it does offend the law, the rules and the regulations that have been set up to decide these issues and to protect the secrecy of the Grand Jury, and to do so they are asking this Court to adopt an interpretation which would offend the supremacy clause of the United States Constitution, and by that I mean either diametrically conflict with or frustrate the purposes of the federal law, rules and regulations by which Courts, legislators and governors are required to abide, so we cited in our initial brief a landmark Illinois case that pointed

out the responsibility to a judge who sits on such important issues of constitutional moment, and it said that there is an obligation to give a constitutional interpretation, by that I mean constitutional under the federal constitution and its supremacy clause, to a federal -- to a state statute, not say that it means something different or that it trumps federal law or regulation, but to interpret it as the Illinois Courts have said that Courts of original jurisdiction should interpret it, and that's consistent with federal law.

I stand for any other questions. I have tried to make this as short and direct as to what our position is, and I know from appearing in front of you in this and other cases that you are familiar with all these briefs. I don't want to reargue any of these cases, but I think, and this is just a personal opinion, that the reason that this is visited here in the State Court in Chicago is that these petitioners, in utilization of this statute, are attempting to circumvent, to frustrate and actually come into conflict with federal rules and regulations that have been set up to decide the very issues that this Court is being asked to decide on

as a case of first impression in this state.

THE COURT: I didn't even know there was a case in Chicago, that's really no concern of mine.

I do have one question for you, Mr. Londrigan. Say a person receives a Federal Grand Jury subpoena from the Northern District of Illinois. Could that person be subject to either the contempt powers of the Court or criminal prosecution if that person voluntarily discloses that subpoena to somebody else?

MR. LONDRIGAN: No, sir.

THE COURT: All right, thank you.

MR. CRAVEN: I will be very brief, Your Honor.

The problem that the Governor has in this case is that he can't find a rule in support or a law that supports his position.

Your Honor pointed out that the -- that Paragraph A of 6(e)(2) very clearly says that no obligation or secrecy may be imposed on any person except in accordance with 6(e)(2)(B).

If the Governor wanted -- Mr. Londrigan has said if the Governor wanted to stand on the street corner and proclaim to the world that he got a subpoena from the United States Grand Jury in

Chicago, he could do so without fear of retribution.

This is a public record under the -- as defined by the Illinois Freedom of Information Act, and there is no exemption, and the Governor has yet to cite an exemption that provides a reason to withhold this document.

The Federal Rule 6 -- Federal Rule of Criminal Procedure Rule 6 doesn't apply. The local rule in the Northern District relates to matters held by the clerk, doesn't relate to matters held by witnesses before the Grand Jury.

If the Governor had been called before the Grand Jury to testify and wanted to walk out the door and proclaim to the world what he said to a Grand Jury sitting in the Northern District, he could do so, again, without fear of retribution.

7, the first exemption, the federal law exemption simply doesn't apply. They have pointed to no federal law or federal rule that applies.

They cite a couple of the law enforcement exemptions, particularly ,(c)(1) and (c)(8). It is important that the Court read those exemptions, including the prefatory language, records compiled -- I am paraphrasing, for law enforcement

purposes are exempt from disclosure, but only to the extent that disclosure would interfere with pending or actually and reasonably contemplated law enforcement proceedings or -- but only to the extent that disclosure would obstruct an ongoing criminal investigation.

There is not a fact in this record, there is not an affidavit from the Governor establishing any factual basis for the application of those exemptions.

It has been the law, and to say this is not a case of first impression, it has been the law in the State of Illinois from at least the Bowden decision in 1989 that if someone wants to assert the interference with law enforcement or obstructing an ongoing investigation, that creates a fact question, it is not enough to file -- to make the conclusion. In that case there was at least an affidavit, a conclusory affidavit, but it is not enough to just claim the conclusion that this would interfere with an ongoing investigation. There is nothing in this record to support the application of either of those exemptions.

To the contrary. There is in this record

an affidavit from my client that shows that the United States Attorney for the Northern District of Illinois was informed of this request, was informed that this litigation would be forthcoming, and was informed after litigation was filed, and they have taken no action to inform this Court that the release of these subpoenas would interfere with whatever it is that they are doing, if anything, or would obstruct anything that they are doing, if anything.

I would point the Court to the decision of Brady-Lunny vs Massey, the Sheriff of DeWitt County. We were seeking access to Sheriff's -- to jail records. The United States Attorney knew how to intervene in that case, the United States Attorney knows how to intervene in this case.

If revealing these records, if disclosing these records was going to interfere with something or obstruct something, there needs to be a factual basis to establish that.

The same with the privacy exemption. The most important language in the privacy exemption that the Governor cites, and you have to remember, the Governor fought very hard to be the Defendant in

this case. The Governor, in his official capacity, Rod Blagojevich, in his official capacity as Governor, fought very hard to be in this case.

The privacy exemption contains this language, "The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."

The Fourth District Appellate Court in the recent SIU vs Reppert decision re-enforced that that language means something when they reversed Judge Zappa's refusal to turn over an employment contract.

This is a matter of public record. This is a public record, we have a public body, we have no exemption.

I think judgment in this case is proper for the Plaintiff, and I would entertain any questions.

THE COURT: Thank you, Mr. Craven.

Anything else, Mr. Londrigan?

MR. LONDRIGAN: Yes, Your Honor. I would like to direct your attention to Rule 6(e)(3)(F), the Federal Rules of Criminal Procedure, and also the comments of the United States Supreme Court with respect to why that

process has been set up, it is on Page 8 of our brief, and, "A petition to disclose a Grand Jury matter under Rule (6)(e) must be filed in the district where the Grand Jury convened. Unless the hearing is ex-parte -- as it may be," and then it discusses about all the people you have to give notice to if you are seeking to gain information which is subject to protection as far as pursuing a criminal investigation.

Footnote 4 at the bottom of the page in interpreting this Federal Rule of Criminal Procedure says, and I am quoting, "Quite apart from practical necessity, the policies underlying Rule 6(e) dictate that a Grand Jury's supervisory court participate in reviewing such requests, as it is in the best position to determine the continuing need for Grand Jury secrecy. We conclude, therefore, that in general, requests for disclosure of Grand Jury transcripts should be directed to that Court that supervised the Grand Jury's activities."

I would point out that the nature of the information, rather than who the duty is imposed upon, is the issue that's presented to this Court, and transcripts are used interchangeably throughout these rules with respect to Grand Jury subpoenas.

This is a case that is filed in the wrong court and raising the wrong issue. In other words, what should be protected or who should produce it. It is an issue which the Courts have anticipated and set up tribunals to decide.

I believe sincerely, as does counsel on the other side, that this is an issue of law, and it is a law that cannot conflict with, compromise or otherwise reach a different result than the Federal Courts would reach in trying to protect the secrecy of materials considered by a Federal Grand Jury.

THE COURT: All right, thank you very much, Mr. Londrigan, and thank you, gentlemen, for your arguments and well-crafted briefs, which have been very helpful for me in deciding how to rule on this issue.

The State Freedom of Information Act states that each public body shall make available to any person for inspection or copying all public records, either received, possessed or under the control of that public body, however this is subject to a number of exceptions which are to be narrowly construed and which are set forth in Section 7 of the Act. The Defendant bears the burden of proving that an exception applies in any case.

Now there are a number of exceptions cited by the Defendant here. I'm going to specifically talk about two of them.

The first one is 7(1)(a) of the Freedom of Information Act, and there the issue is does federal law prohibit a witness from disclosing a Grand Jury subpoena. That's the issue under Section 7(1)(a).

A federal law we have talked about at some length today is Rule of Criminal Procedure 6(e)(2). On its face, as we have discussed, it applies only to the enumerated people and exempts everyone else, including, one could only infer, witnesses who might receive Grand Jury subpoenas.

Other rules cited by the Defendant are found, for instance, 6(e)6 requires the Clerk of Court to place subpoenas under seal, it doesn't pertain to witnesses, it deals with the confidentiality of court files, as does Federal Rule of Criminal Procedure 6(e)(3)(F) and Local Criminal Rule 6.2 of the Northern District of Illinois.

These rules deal with how information contained in sealed clerks' files or court files are to be disclosed or disseminated. They don't deal with information that has been passed out of the

courthouse like Grand Jury subpoenas.

Now of more interest to me have been the cases cited by the Defendant, specifically Caremark, Wirebound Boxes and Admiral Heating. I believe these are all District Court cases, I don't believe these are Appellate Court cases, the Federal District Court cases where the judges have judicially amended or essentially added to Rule 6(e)(2), to include Grand Jury subpoenas received by witnesses.

I believe all of these cases are distinguishable, because the subpoenas received there were to private actors, that's the words the Courts used, they are private actors and not elected government officials subject to the Freedom of Information Act.

Apparently there are no F.O.I.A. cases on point or square with this case. Nevertheless these cases seem to, as I mentioned, judicially legislate a test for disclosure of subpoenas by people not enumerated in Section 6(e)(2).

In order to diclose, a particularized need must outweigh the need for continued Grand Jury secrecy.

So I'm going to apply that test to this case, and when I do, it seems to me the Grand Jury subpoenas should be disclosed.

Here there is no competent evidence of a need for continued secrecy. The only evidence of need is what appears to be a boilerplate letter saying disclosure could impede an investigation. It was attached to the subpoena at the time of service.

Since then it has been years, I believe, since that subpoena was served, the United States Attorney's Office of the Northern District of Illinois has been given every opportunity not only to intervene, but simply to have informed this Court, either by an affidavit to the Plaintiffs or a letter giving this Court any type of information or indication that continued Grand Jury secrecy was important in this case. Had they done so, there is no way I would order that the subpoenas be disclosed.

Instead, we have information in the motion that shows the U.S. Attorney's Office was notified of a potential lawsuit as early as the Fall of 2006. In response the First Assistant U.S. Attorney, Gary Shapiro, replied in a letter to Plaintiffs stating,

and I quote, "We will only take such action as we believe is authorized by law and necessary to protect the secrecy and integrity of the Federal Grand Jury process."

They have taken no action whatsoever. Because they have stood mute, the only conclusion I can draw is that in their eyes there is no further need for secrecy.

Weighing that need for secrecy against the particularized need, we have to determine, I suppose, whether there is a particularized need. Here I believe that need is found in the Freedom of Information Act, which states in the Act, and I quote, "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."

Here, because there is no demonstrated need for secrecy, I believe the need for the public to know outweighs that, and the balance clearly favors disclosure. Thus, even if Caremark, Wirebound Boxes and Admiral Heating have judicially amended Rule 6(e)(2) to include receipt of Grand

Jury subpoenas, the subpoenas must still be disclosed.

Section 7(1)(c)(1) of the Freedom of Information Act does not apply because subpoenas are not, quote, compiled by law enforcement agencies or for law enforcement purposes, close quote. They are instead issued by the Federal Grand Jury, and for the reasons discussed earlier, there is no evidence that disclosure would obstruct an ongoing criminal investigation.

Those are the issues I'm going to address here, specifically I find the remaining arguments put forth to be without merit. I don't believe this violates any constitutional provisions. Obviously if I were going to set about ordering disclosure of files in the federal clerk's file up in Chicago, that would be a situation of constitutional implications, but here I am addressing documents that are held in the possession of the Governor of the State of Illinois, albeit Federal Grand Jury subpoenas.

I think it is telling that the Governor or anybody else can disclose a Federal Grand Jury subpoena they have received to whomever they want.

Clearly, if there were a law against it, they would be in some kind of trouble, either contempt or federal charges, but that's not the case.

So I'm going to deny the Defendant's Motion for Summary Judgment. I believe the Defendant is required under the Freedom of Information Act to disclose the subpoenas, and I believe as a corollary to that, I will allow the Plaintiff's Motion for Judgment on the Pleadings. I'm going to stay enforcement of the judgment for thirty days to give you time to appeal, and I would stay it during the pendency of the appeal. Obviously, once they are disclosed, there is nothing left to appeal. I'm not going to order an appeal bond.

Yes, sir?

MR. CRAVEN: One last -- I think, Judge, in order to allow the appeal, because there are other issues involved here, because the Act also contemplates an award of attorney's fees, I think the order of the Court should include a 304(a) finding.

THE COURT: I would make that finding. Do you want to prepare a proposed order?

MR. CRAVEN: I will prepare an order and run it by

Mr. Londrigan.

THE COURT: Okay.

MR. CRAVEN: But just so he can appeal, I think it needs to have that finding.

THE COURT: Okay.

Anything else? All right.

MR. LONDRIGAN: Judge, we have prepared a Motion to Stay. For the record, do we need to file that right now?

THE COURT: I don't believe so. I am ordering that it be stayed, obviously, and I -- you know, I assume there is going to be an appeal either way. I suppose if I had have ruled for you, there wouldn't be a need to stay, if I ruled for the other side, there would be a need to stay, otherwise, as I said, the appeal wouldn't do anybody any good if these records were already disclosed, so --

MR. QUIVEY: Your Honor, just so I am clear, is the thirty days going to start upon submission of the order after you do the the attorney fees?

THE COURT: It starts today.

MR. CRAVEN: The stay -- pardon me? I thought you said the stay would stay in effect throughout the course of the appeal?

THE COURT: If there is an appeal, there is a stay for thirty days. Now because they have thirty days to appeal, once the appeal's filed, the stay stays in place.

MR. QUIVEY: I guess my question is when does the judgment issue, is it before or after the attorney fees, because normally in Federal Court --

MR. FELDMAN: That's the reason for the 304(a) application, that says there is no just reason to delay appeal, and then we can do the attorneys' fees whenever we do the attorneys' fees.

THE COURT: After the appeal, most likely.

MR. FELDMAN: Right.

THE COURT: If it comes up at all.

MR. CRAVEN: And to answer your question, Doug, I will try and get the order down to you today.

THE COURT: I will enter any order nunc pro tunc today whenever I get it.

MR. CRAVEN: Thank you, Your Honor.

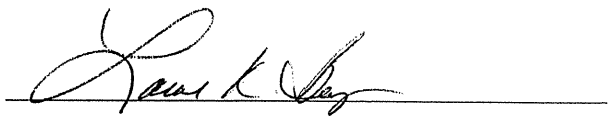
THE COURT: Thank you very much. Everybody have a good day.

(Hearing adjourned)

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

I, Laura K. Berry, an Official Court Reporter for the Circuit Court of Sangamon County, Seventh Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings held before the HONORABLE PATRICK W. KELLEY, Judge of said Court.



Laura K. Berry
Official Court Reporter
License #084-001931

Dated this 15th day

of January, 2008.

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

BETTER GOVERNMENT ASSOCIATION, and DAN SPREHE	)	
Plaintiffs,	)	
vs.	)	No. 07-MR-5
ROD R. BLAGOJEVICH, in his capacity as Governor of the State of Illinois and THE OFFICE GOVERNOR ROD BLAGOJEVICH,	)	
Defendants.	)	

FILED

MAR 0 3 2008 CTR.-1

Clerk of the Circuit Court

ORDER

CAUSE COMING for hearing on Defendant's Motion to Reconsider. The Motion to Reconsider is denied. The stay is extended for a period of 48 hours to allow the Defendant to file a notice of appeal, and if an appeal is properly filed, the stay shall continue during the pendency of the appeal unless vacated by the appellate court.

This Court will take no action on the Plaintiff's Petition for Attorneys Fees pending consideration of the merits of this matter before the Appellate Court.

Pursuant to Supreme Court Rule 304 (a), the court expressly determines that there is no just reason for delaying either enforcement or appeal or both.

Entered this 3rd day of March, 2008.

DATE: 3/4/08

Judge

EXHIBIT N

NO. 4-08-0173

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

BETTER GOVERNMENT ASSOCIATION and DAN SPREHE, Plaintiffs-Appellees, v. ROD R. BLAGOJEVICH, in His Official Capacity as Governor of the State of Illinois, Defendant-Appellant.	)))))))	Appeal from Circuit Court of Sangamon County No. 07MR5 Honorable Patrick W. Kelley, Judge Presiding.

JUSTICE STEIGMANN delivered the opinion of the court:

This case presents the question of whether the recipient of a federal grand jury subpoena, acting as a public official for the State of Illinois, has the discretion to refuse a request to disclose that subpoena, pursuant to the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 through 11 (West 2006)). We conclude that in this case, the public official does not have such discretion.

In August 2006, defendant, Rod R. Blagojevich, in his official capacity as Governor of the State of Illinois, denied the request of plaintiffs, the Better Government Association and Dan Sprehe (collectively, BGA), to disclose federal grand jury subpoenas and related correspondence, pursuant to the FOIA. In September 2006, the Governor reaffirmed his earlier denial.

In August 2007, the BGA filed an amended complaint, requesting, in part, that the trial court issue an order compelling the Governor to disclose the subpoenas.

In October 2007, the Governor filed a motion for

summary judgment. In November 2007, the BGA filed a motion for judgment on the pleadings. Following a January 2008 hearing on the parties' respective motions, the trial court (1) denied the Governor's summary-judgment motion and (2) granted the BGA's motion for judgment on the pleadings.

The Governor appeals, arguing that (1) disclosure of federal grand jury subpoenas, pursuant to the FOIA, is preempted by federal law; (2) the subpoenas the BGA seeks are exempt from disclosure under various sections of the FOIA; and (3) the trial court's order should be reversed because of newly discovered evidence. We disagree and affirm.

I. BACKGROUND

In July 2006, the BGA requested that the Governor provide copies of documents, pursuant to the FOIA (5 ILCS 140/1 through 11 (West 2006)). Specifically, the BGA sought the following:

> "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."

In August 2006, the Governor denied the BGA's request, claiming that if such subpoenas existed at all, they were exempt from disclosure, pursuant to section 7(1)(a) of the FOIA (5 ILCS 140/7(1)(a) (West 2006)). The Governor also denied the BGA's request for any correspondences related to the subpoenas as an exemption, pursuant to sections 7(1)(f) and 7(1)(n) of the FOIA (5 ILCS 140/7(1)(f), (1)(n) (West 2006)).

Later in August 2006, the BGA appealed the Governor's denial, pursuant to section 10(a) of the FOIA, which provides, in part, that "[a]ny person denied access to inspect or copy any public record may appeal the denial by sending a written notice of appeal to the head of the public body" (5 ILCS 140/10(a) (West 2006)). In September 2006, the Governor denied the BGA's appeal.

In November 2006, the BGA sent a letter to Gary Shapiro, first assistant United States Attorney for the Northern District of Illinois, inquiring whether the United States Attorney's office would intervene if the BGA filed suit against the Governor seeking disclosure of the federal grand jury subpoenas. Later in November 2006, Shapiro responded, in pertinent part, as follows:

> "We are reluctant to opine on a hypothetical lawsuit, and can only tell you that we will only take such action as we believe is authorized by law and necessary to protect the secrecy and integrity of the federal

grand jury process. Obviously, such a decision cannot be made until a lawsuit is filed and we are in a position to analyze its specifics and the relevant law."

In January 2007, the BGA (1) filed a complaint requesting, in part, that the trial court issue an order compelling the Governor to release the subpoenas and associated correspondence and (2) provided Shapiro a copy of the filed complaint. In August 2007, the BGA filed an amended complaint, requesting, in part, that the court issue an order compelling the Governor to release the subpoenas. (On appeal, the BGA does not present any argument concerning the related correspondences.)

In October 2007, the Governor filed a motion for summary judgment. In support of the motion, the Governor claimed that in addition to section 7(1)(a), the subpoenas the BGA sought were exempt from disclosure under various sections of the FOIA pertaining to "[r]ecords compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of the public body." See 5 ILCS 140/7(1)(c), (1)(c)(i), (1)(c)(vi), (1)(c)(viii) (West 2006). In November 2007, the BGA filed a motion for judgment on the pleadings.

During the January 2008 hearing on the parties' motions, the Governor argued that the BGA's complaint called for the disclosure of matters before the federal grand jury, which was prohibited by Federal Rule of Criminal Procedure 6(e)(2)

In announcing its decision, the trial court stated the following:

> "In order to disclose, a particularized need must outweigh the need for continued [g]rand [j]ury secrecy.
>
> ***
>
> Here[,] there is no competent evidence of a need for continued secrecy. The only evidence of need is what appears to be a boilerplate letter saying disclosure could impede an investigation. It was attached to the subpoena at the time of service.
>
> *** [S]ince that subpoena was served, the United States Attorney's [o]ffice [for] the Northern District of Illinois has been given every opportunity not only to intervene, but simply to have informed this [c]ourt, either by an affidavit to [the BGA] or a letter giving this [c]ourt any type of information or indication that continued [g]rand [j]ury secrecy was important in this case. ***
>
> Instead, we have information in the motion that shows the U.S. Attorney's [o]ffice was notified of a potential lawsuit as early as the Fall of 2006. ***
>
> [The United States Attorney has] taken

no action whatsoever. Because they have stood mute, the only conclusion [this court] can draw is that in their eyes[,] there is no further need for secrecy.

***

Here, because there is no demonstrated need for secrecy, I believe the need for the public to know outweighs that, and the balance clearly favors disclosure. ***

* * *

I think it is telling that the Governor or anybody else can disclose a [f]ederal [g]rand [j]ury subpoena they have received to whomever they want. Clearly, if there were a law against it, they would be in some kind of trouble, either contempt or federal charges, but that is not the case.

So I'm going to deny the [Governor's] [m]otion for [s]ummary [j]udgment. I believe the [Governor] is required under the [FOIA] to disclose the subpoenas, and I will allow [the BGA's] motion for judgment on the pleadings."

In a letter dated February 5, 2008, the United States Attorney's office for the Northern District of Illinois wrote the following to the Governor:

"In response to your inquiry, the U.S. Attorney's [o]ffice has served various grand jury subpoenas on the Office of the Governor of the State of Illinois, seeking records pursuant to an official criminal investigation of a suspected felony being conducted by a federal grand jury. With two exceptions, noted below, the U.S. Attorney's [o]ffice continues to request that you not disclose the fact that the subpoenas have been served. Any such disclosure could impede the investigation and thereby interfere with the enforcement of law. If you do not believe that you can comply with this request, I request that you contact me before making any disclosure.

Having reviewed all of the subpoenas to determine whether to renew our initial non-disclosure request, there are two subpoenas that can be disclosed, if necessary, without impeding the investigation: (1) the May 3, 2006[,] subpoena directed to the Custodian of Records, Central Management Services, Bureau of Personnel; and (2) the June 23, 2006[,] subpoena directed to the Custodian of Records, Office of the Governor of the State of

Illinois (concerning backup tapes, archives, etc. for offices under the jurisdiction of the Governor)."

Later in February 2008, the Governor filed a motion to reconsider based on newly discovered evidence--namely, the United States Attorney's February 5, 2008, letter. In March 2008, the trial court denied the Governor's motion.

This appeal followed.

II. ANALYSIS

A. The Governor's Claim That the Federal Grand Jury Subpoenas Are Exempt From Disclosure

The Governor contends that because (1) disclosure of federal grand jury subpoenas are preempted by federal law--specifically, Federal Rule of Criminal Procedure 6(e)(2) (Fed. R. Crim. P. 6(e)(2)), and (2) the subpoenas the BGA seeks are exempt from disclosure under various sections of the FOIA, the trial court erred by dismissing his motion for summary judgment and granting the BGA's motion for judgment on the pleadings. We disagree.

1. Standards of Review

a. Summary Judgment

"'Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" DesPain v. City of Collinsville, 382 Ill. App. 3d 572, 576-77, 888 N.E.2d 163, 166

(2008). "In appeals from summary judgment rulings, review is de novo." Williams v. Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008).

b. Judgment on the Pleadings

Judgment on the pleadings is appropriate when the pleadings disclose only questions of law rather than issues of material fact. County of Cook v. Philip Morris, Inc., 353 Ill. App. 3d 55, 59, 817 N.E.2d 1039, 1042 (2004). "In ruling on a motion for judgment on the pleadings, the court will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record." Gillen v. State Farm Mutual Automobile Insurance Co., 215 Ill. 2d 381, 385, 830 N.E.2d 575, 577 (2005). We review de novo a trial court's order granting a motion for judgment on the pleadings. Intersport, Inc. v. National Collegiate Athletic Ass'n, 381 Ill. App. 3d 312, 318, 885 N.E.2d 532, 538 (2008).

2. The Governor's Claim That Federal Rule of Criminal Procedure 6(e)(2) Preempts the FOIA

a. Federal Case Law

The supremacy clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. "'State law is preempted under the supremacy clause in three circumstances: (1) when the express language of a federal statute indicates an intent to preempt

state law; (2) when the scope of a federal regulation is so pervasive that it implies an intent to occupy a field exclusively; and (3) when state law actually conflicts with federal law.'" Poindexter v. State of Illinois, 229 Ill. 2d 194, 210, 890 N.E.2d 410, 421 (2008), quoting Village of Mundelein v. Wisconsin Central R.R., 227 Ill. 2d 281, 288, 882 N.E.2d 544, 549 (2008).

Federal Rule of Criminal Procedure 6(e)(2), which pertains to the federal grand jury, provides as follows:

> "(2) Secrecy.
>
> (A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).
>
> (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
>
> (i) a grand juror;
>
> (ii) an interpreter;
>
> (iii) a court reporter;
>
> (iv) an operator of a recording device;
>
> (v) a person who transcribes recorded testimony;
>
> (vi) an attorney for

> the government; or
>
> (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)." Fed. R. Crim. P. 6(e)(2).

Despite the Governor's contention that Federal Rule of Criminal Procedure 6(e)(2) prohibits disclosure of federal grand jury subpoenas, he concedes that the explicit language of the rule does not apply to the general public. Thus, if a private citizen were served with a federal grand jury subpoena, federal law would not bar him from revealing the contents of the subpoena or his thoughts about it.

Although most federal grand jury subpoena recipients usually prefer to remain silent about the matter, circumstances may prompt that person to choose to disclose its existence and content. Such circumstances may include the recipient's belief that disclosure of the subpoena's content would (1) be in his best interest to demonstrate his ongoing cooperation with the federal prosecutor (particularly if the recipient held a political position) or (2) represent the opening salvo in the recipient's contention that he is the target of a political witch hunt and the subpoena is evidence of government corruption. Regardless of the recipient's motive, under federal law, a private citizen has the discretion to reveal the subpoena, and if he chooses to do so, he will not suffer the wrath of the federal

court's contempt powers or be subject to any federal charges.

The Governor cites several federal district court cases that have expanded Rule 6(e)(2)'s disclosure prohibitions. See Board of Education of Evanston Township High School District No. 202 v. Admiral Heating & Ventilation, Inc., 513 F. Supp. 600, 604 (N.D. Ill. 1981) ("Grand jury confidentiality would be emasculated if a party seeking discovery of its proceedings could do so by routinely obtaining that information from potential (or as in this case actual) defendants"); In re Wirebound Boxes Antitrust Litigation, 126 F.R.D. 554, 556 (D. Minn. 1989) ("Absent a showing of particularized need, [federal] courts have generally barred private actors from disclosing documents created by a grand jury or at a grand jury's request, such as subpoenas, transcripts, and lists of documents"); In re Caremark International, Inc. Securities Litigation, No. 94 C 4751 (N.D. Ill. 1995) (1995 WL 557496) (where the Northern District of Illinois limited disclosure to documents not related to the investigation because it would violate the secrecy of the federal grand jury). However, we are not required to follow these federal court decisions. Instead, we may choose to do so if we find them persuasive. See Tortoriello v. Gerald Nissan of North Aurora, Inc., 379 Ill. App. 3d 214, 224, 882 N.E.2d 157, 168 (2008), quoting Lamar Whiteco Outdoor Corp. v. City of West Chicago, 355 Ill. App. 3d 352, 360, 823 N.E.2d 610, 617 (2005) ("'[a]lthough this court is not bound to follow federal district court decisions [citation], such decisions can provide guidance and serve

as persuasive authority'"). For the reasons that follow, we do not find them persuasive and, accordingly, will not follow them.

There is nothing new or novel about private citizens or public officials receiving federal grand jury subpoenas. Federal grand juries have been issuing subpoenas for over 200 years. Yet, during all this time, Congress has not seen fit to specifically restrict the behavior of subpoena recipients. Accordingly, we hold that (1) the failure of Congress to do so is not somehow an oversight and, therefore, (2) Congress has chosen not to restrict a recipient's behavior concerning what he may say or do on the matter. The federal courts that have held otherwise--that is, those courts that have decided that Congress' failure to act was the result of an oversight--have taken it upon themselves to correct this oversight by judicially amending Rule 6(e)(2). We disagree with this course of action and decline to follow it.

We also reject the Governor's argument that, as a matter of policy, revealing any aspect of the federal grand jury process is not desirable. This court's role is not policy formulation. Instead, our role is to apply--and abide by--the legislation that the policy-making bodies, Congress and the Illinois General Assembly, have enacted.

b. The Need for a Specific Prohibition for the FOIA's Disclosure Policy Not To Apply

We also reject the Governor's argument because it is inconsistent with the FOIA's language and intent. Section 1 of the FOIA states, in part, that "all persons are entitled to full and complete information regarding the affairs of government." 5

ILCS 140/1 (West 2006). This hortatory language emphasizes and calls for an expansive interpretation. Further, our legislature has authorized exemptions to the FOIA's expansive disclosure policy when a given disclosure is not just prohibited "by federal or State law or rules and regulations adopted under federal or State law" but specifically so prohibited. 5 ILCS 140/7(1)(a) (West 2006). When interpreting a statute, this court cannot disregard explicit statutory language. See Hedrick v. Bathon, 319 Ill. App. 3d 599, 604-05, 747 N.E.2d 917, 922 (2001) ("Statutory interpretation is the process by which the intent of the legislature is ascertained and given effect, primarily by looking to the statute's actual words, which are to be given their commonly accepted meanings unless otherwise defined by our General Assembly"). Therefore, this court is duty-bound to apply the actual words of the statute enacted by our legislature. Thus, an exemption restricting the expansive nature of the FOIA's disclosure provisions must be explicitly stated--that is, such a proposed disclosure must be specifically prohibited.

Because Rule 6(e)(2) does not explicitly prohibit recipients from disclosing the existence or content of federal grand jury subpoenas, we decline to follow those federal cases that have expanded that rule by judicially amending it.

3. The Governor's Claim That the Federal Grand Jury Subpoenas Are Exempt From Disclosure Under the FOIA

The Governor also contends that the federal grand jury subpoenas are exempt from disclosure under various sections of the FOIA. Specifically, the Governor asserts that sections

7(1)(a), (1)(b)(v), (1)(c)(i), (1)(c)(vi), and (1)(c)(viii) of the FOIA (5 ILCS 140/7(1)(a), (1)(b)(v), (1)(c)(i), (1)(c)(vi), (1)(c)(viii) (West 2006)) prohibit disclosure. We disagree.

a. Pertinent Sections of the FOIA

i. Legislative Intent

Section 1 of the FOIA 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." 5 ILCS 140/1 (West 2006).

ii. Inspection or Copying of Public Records

Section 3 of the FOIA states, in part, as follows:

> "Each public body shall make available to any person for inspection or copying all

public records, except as otherwise provided in [s]ection 7 of this Act." 5 ILCS 140/3(a) (West 2006).

iii. FOIA Disclosure Exemptions

Sections 7(1)(a), (1)(b), and (1)(c) of the FOIA state, in part, as follows:

"(1) The following shall be exempt from inspection and copying:

(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.

(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is

not limited to:

* * *

(v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies;

***

(c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:

(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;

* * *

(vi) constitute an invasion of personal privacy under subsection (b) of this Section;

***

(viii) obstruct an ongoing criminal investigation." 5 ILCS 140/7(1)(a), (1)(b)(v), (1)(c)(i), (1)(c)(vi), (1)(c)(viii) (West 2006).

b. Policy Underlying the FOIA

As we noted earlier, Federal Rule of Criminal Procedure 6(e)(2) gives a private citizen the discretion to choose to disclose or not disclose the receipt of a federal grand jury subpoena without running afoul of the rule or federal law. However, the FOIA eliminates such discretion from the recipient of a federal grand jury subpoena if that recipient is a public official subject to FOIA's requirements.

Here, the Governor was served with subpoenas in his official capacity as the Governor of Illinois. As such, the FOIA applies, thus mandating "full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials." 5 ILCS 140/1 (West 2006). Thus, unlike for a private citizen, the FOIA

eliminates any discretion the Governor, acting in his official capacity as Governor for the State of Illinois, has in keeping the subpoenas secret.

We are not surprised that governmental entities, including the United States Attorney, generally prefer not to reveal their activities to the public. If this were not a truism, no FOIA would be needed. Our legislature enacted the FOIA in recognition that (1) blanket government secrecy does not serve the public interest and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the sunshine of public scrutiny is the best antidote to public corruption, and Illinois courts are duty-bound to enforce that policy.

Because we previously have held that Federal Rule of Criminal Procedure 6(e)(2) does not apply, we reject the Governor's argument that section 7(1)(a) prohibits disclosure. Similarly, because the record is absolutely devoid of any evidence that the federal grand jury subpoenas were "[r]ecords compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body," we reject the Governor's argument that sections 7(1)(c)(i) and 7(1)(c)(viii) prohibit disclosure (5 ILCS 140/7(1)(c)(i), (1)(c)(viii) (West 2006)). In addition, because disclosure of information that bears on the public duties of public officials is not considered an invasion of personal privacy under the FOIA,

we reject the Governor's argument that sections 7(1)(c)(vi) and 7(1)(b) prohibit disclosure (5 ILCS 140/7(1)(c)(vi), (1)(b) (West 2006)).

Accordingly, we conclude that the trial court did not err by dismissing the Governor's summary-judgment motion and granting the BGA's motion for judgment on the pleadings.

B. The Governor's Claim of Newly Discovered Evidence

The Governor also contends that the trial court's order should be reversed because of newly discovered evidence--namely, the United States Attorney's February 5, 2008, letter. We disagree.

One intended purpose of a postruling motion is to bring to the trial court's attention newly discovered evidence that was not available at the time of the hearing at which the court ruled. Gardner v. Navistar International Transportation Corp., 213 Ill. App. 3d 242, 248, 571 N.E.2d 1107, 1111 (1991). Essentially, this type of motion seeks a "'"second bite at the apple,"'" which requires the trial court to determine whether it should admit new matters into evidence and reconsider its decision. Daniels v. Corrigan, 382 Ill. App. 3d 66, 71, 866 N.E.2d 1193, 1200 (2008), quoting O'Shield v. Lakeside Bank, 335 Ill. App. 3d 834, 838, 781 N.E.2d 1114, 1118 (2002). "A ruling on a motion to reconsider is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." Robidoux v. Oliphant, 201 Ill. 2d 324, 347, 775 N.E.2d 987, 1000 (2002).

Over 17 years ago in Gardner, 213 Ill. App. 3d at 248, 571 N.E.2d at 1111, this court rejected the plaintiff's newly discovered evidence argument because the evidence the plaintiff sought to have us consider "had been available prior to the hearing on the motion for summary judgment." In so concluding, this court wrote the following:

> "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency require that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (Emphasis in original.) Gardner, 213 Ill. App. 3d at 248-49, 571 N.E.2d at 1111.

See Robidoux, 201 Ill. 2d at 346, 775 N.E.2d at 1000 (quoting Gardner approvingly).

In this case, the evidence showed that the February 5, 2008, letter from the United States Attorney was (1) sent in response to the Governor's inquiry (as shown by the letter's introductory clause) and (2) dated more than three weeks after the trial court denied the Governor's motion for summary judgment. Because the Governor did not alert the court to the United States Attorney's letter prior to the court's January 9,

2008, hearing, we conclude that the Governor's request for a letter from the United States Attorney was made after the February 5, 2008, hearing in a frantic attempt to show that the court had erred by denying his motion.

The Governor fails to explain why the trial court or this court should be impressed with the United States Attorney's February 5, 2008, letter, given that it is conclusory and filled with bureaucratic vagueness. If the United States Attorney really believed that the Governor's disclosing of the federal grand jury subpoenas would somehow have interfered with the federal grand jury investigation, the United States Attorney could have appeared in this litigation to make known and defend the federal grand jury's interests just as it did in Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 930 (C.D. Ill. 2002).

In Brady-Lunny, 185 F. Supp. 2d at 929-30, a newspaper reporter sought information pertaining to all inmates in the custody of the DeWitt County sheriff pursuant to the FOIA. The sheriff provided the information sought for state inmates but not for federal inmates because the Code of Federal Regulations prohibited disclosure of "lists" of federal inmates (28 C.F.R. §513.34(b) (2006)). The newspaper company later sued the sheriff to compel disclosure. The United States Attorney intervened to protect the information about federal inmates and successfully moved the suit to the United States District Court for the Central District of Illinois under the federal-question doctrine (28 U.S.C. §1331 (2000)).

In granting the United States Attorney's motion for summary judgment, the district court concluded that in addition to section 513.34(b) of title 28 of the Code of Federal Regulations, the listing sought was specifically barred by sections (b)(7)(C) and (b)(7)(F) of the federal FOIA (5 U.S.C. §552(b)(7)(C), (b)(7)(F) (2000)), which pertain to disclosures that could reasonably be expected to (1) constitute an unwarranted invasions of personal privacy and (2) endanger life or physical safety, respectively. Brady-Lunny, 185 F. Supp. 2d at 932.

Assuming that the United States Attorney could make a case that the Governor's disclosing the federal grand jury subpoenas would somehow have interfered with the federal grand jury investigation--a proposition about which we remain skeptical, given that the United States Attorney remained silent for over a year after being informed of this litigation--the trial court and this court would have given respectful consideration to any stated concerns. However, given the United States Attorney's silence (except for the barely audible February 5, 2008, letter), we decline to speculate about the harm that might somehow arise to an ongoing federal investigation by the mere act of revealing the substance of the subpoenas in question.

For the reasons stated, the United States Attorney's February 5, 2008, letter was insufficient to call into question the trial court's FOIA ruling. Thus, we conclude that the court did not abuse its discretion by denying the Governor's motion to

reconsider.

In closing, this court commends the trial court's thoughtful analysis and careful explanation of its findings, which we found most helpful.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

APPLETON, P.J., and McCULLOUGH, J., concur.

saukvalley.com
Serving Dixon, Sterling & Rock Falls

Print Page

NEWS > STATE:

Judge rules governor must disclose subpoenas

Order Photos | Photo Galleries »

Illinois Gov. Rod Blagojevich. (AP Photo)

BY GATEHOUSE NEWS SERVICE

SPRINGFIELD - Gov. Rod Blagojevich must release subpoenas received from federal prosecutors who are investigating possible corruption in his administration, a Sangamon County judge ruled Wednesday.

The order from Sangamon County Circuit Judge Patrick Kelley came more than a year after Attorney General Lisa Madigan reached the same conclusion and told the governor's office that the subpoenas are public records under the state Freedom of Information Act.

The lawsuit was filed by the Chicago-based Better Government Association after U.S. attorney Patrick Fitzgerald said his office was investigating allegations of improper hiring in the governor's administration.

The governor's quest for secrecy is getting expensive for taxpayers. According to the state comptroller's office, the state has paid more than $150,000 to private attorneys who are representing the governor's office in FOIA lawsuits aimed at prying loose the subpoenas.

The state has paid more than $33,800 to Londrigan, Potter and Randle, a Springfield law firm that is representing the governor in the BGA's lawsuit. Taxpayers have paid another $124,850 to Bell, Boyd and Lloyd, a Chicago firm that is representing the governor in a pending FOIA lawsuit filed in Cook County by Judicial Watch, a Washington, D.C. government watchdog group that is seeking the same subpoenas.

Taxpayers also could end up paying the BGA because state law says the government must pay legal fees for plaintiffs who prevail in FOIA lawsuits if an information request isn't filed for commercial purposes.

"It's precisely what I expected to happen," said Paul Orfanedes, attorney for Judicial Watch. "The governor didn't want the advice of the attorney general. He wanted to get the advice he wanted to hear, so it's cost the taxpayers tens of thousands of dollars and taken up the court's time. It's disgraceful."

Kelley stayed his ruling to give Blagojevich a chance to appeal. Don Craven, BGA attorney, expects the matter will be before a higher court within 30 days.

EXHIBIT P

"The important issue to my office and my client is not attorneys' fees," Craven said. "It's the duty of every taxpayer to pay attention to how government spends tax dollars and how government operates. There have been serious allegations of wrongdoing."

Thomas Londrigan Sr., whose firm is defending the case, said no decision has been made about whether an appeal will be filed. An appeal normally takes between nine and 18 months, he said, but the case could be expedited because the record is short.

"I think federal law prevents its disclosure, and the governor was directed by the U.S. attorney's office in Chicago not to make the disclosure," Londrigan said.

Rebecca Rausch, Blagojevich spokeswoman, said much the same thing in an e-mailed response to questions. The governor, she said, is honoring a request by the U.S. attorney to keep the records secret.

"We're always happy to provide information to the public," Rausch said.

The BGA requested the subpoenas in 2006. Jay Stewart, BGA executive director, said the governor should follow Kelley's ruling.

"If the governor actually believed any of his rhetoric about ethics, there wouldn't be any appeal," Stewart said. "The last thing he really wants to do is level with the public and let them know what's going on with his administration."