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Courts Rule on Applicability of FOIA to School-Related Private Organizations

The Illinois Supreme Court and the Illinois Appellate Court recently issued two important opinions clarifying when documents must be produced, not only by public bodies, but also by nongovernmental school-related organizations in response to an Illinois Freedom of Information Act (FOIA) request. These cases should guide such organizations in how they conduct business and preserve their records.

On May 9, 2017, the Second District Appellate Court rendered its decision in *The Chicago Tribune v. The College of DuPage and the College of DuPage Foundation*, 2017 IL App (2d) 160274. Pursuant to a Memorandum of Understanding (MOU) between the College of DuPage (College), a public body, the College of DuPage Foundation (Foundation), a private nonprofit organization, the College delegated its responsibility to collect, manage, and maintain all of its private donations to the Foundation.

Thereafter, the College and the Foundation received a series of FOIA requests from the *Chicago Tribune* seeking copies of federal and Illinois grand jury subpoenas which the newspaper believed had been served upon the College and the Foundation. When the requested subpoenas were not forthcoming, the *Tribune* filed suit to obtain them.

In upholding the trial court's order that the College and the Foundation disclose the federal grand jury subpoena to the *Tribune*, the Appellate Court first determined that the subpoena was a "public record" within the meaning of the FOIA, notwithstanding the College's contention that it did not prepare, request, use, receive, possess or control it, because the subpoena had been served on the College and it pertained "to the transaction of public business..." The Court also made it clear that the subpoena continued to be a "public record" even though the College physically transferred it to the Foundation and did not keep a copy for its records; and that the College, as a "public body", was obligated to make the subpoena available to the public even though it transferred its physical possession to the Foundation pursuant to their MOU. Because the subpoena was a "public record," the College had to make a good faith

effort to obtain a copy of it for disclosure to the *Tribune*.

The Appellate Court also concluded that, by collecting, maintaining, and managing the College's private donations pursuant to the MOU, the Foundation itself was performing a "governmental function" and therefore was subject to the disclosure requirements of the FOIA. Interestingly, the Appellate Court refused to provide a definition as to what constitutes a "governmental function" under the Act. Instead, it concluded that the circumstances of each case should be examined with particular attention paid to the "public body's role and responsibilities and the specific act that it has contracted a third party to perform on its behalf." Finally, the Appellate Court decided a private entity such as the Foundation need not make all of its records available to the public, but only those that "directly relate to the governmental function performed by on behalf of a public body."

On May 18, 2017, the Illinois Supreme Court decided *Better Government Association v. Illinois High School Association*, 2017 IL 121124. In this case, the Better Government Association (BGA) served a FOIA request on both the Illinois High School Association (ISHA), a nonprofit voluntary association whose

function is to “establish by laws and various rules for interscholastic sports competition” and which “sponsors and coordinates various post-season tournaments for certain sports in which its member schools choose to compete,” and Consolidated High School District 230. The request was for the ISHA’s contracts related to accounting, legal services, sponsorships, public relations/crisis management, and licensed vendor applications for the 2012-13 and 2013-2014 fiscal years. When its request was not honored by either District 230 or the ISHA, the BGA filed suit alleging that their refusal to disclose the documents violated the FOIA.

The trial judge dismissed the BGA’s lawsuit, concluding that the ISHA was not a “public body” within the meaning of the FOIA, and that ISHA was not performing a “governmental function” on behalf of the School District as required by the Act. The Appellate Court agreed with the trial court.

Upon its own review, the Supreme Court concluded that the trial court appropriately dismissed the BGA’s lawsuit. In reaching its conclusion, the Court determined that the ISHA was not a “governmental unit” nor was it a “subsidiary body” of a governmental unit within the meaning of the Act because it was

not controlled by or subordinate to District 230. The Court found in determining whether a nonprofit is a “subsidiary body” courts should consider: 1) the extent to which the private entity maintains a separate legal existence from the public body; 2) the degree of control the public body exerts over the private entity; 3) the extent to which the private entity is publicly funded; and 4) the nature of the functions performed by the private entity. Based on these factors, it concluded that there was an insufficient nexus between the School District and the ISHA to make the ISHA a subsidiary of the School District. The Supreme Court also agreed with the School District that dismissal of the BGA’s complaint was proper because, unlike the facts in the *Chicago Tribune* case, the School District had not delegated the performance of a governmental function to the ISHA.

What these cases make clear is that our courts look to the relationship between a public body and a nonprofit entity in determining the scope of the obligation to make disclosures under the FOIA. Where there is a very close relationship between the public body and the nonprofit, such as sharing staff, subordination of the nonprofit to the control of the public

body, and the delegation of a governmental function by the public body to the nonprofit, as was the case for the College of DuPage Foundation, the courts are likely to determine that records received by either entity are public documents that must be disclosed as long as the records are directly related to the governmental function the nonprofit undertakes on behalf of the public body. Conversely, if there is not a close relationship between the public body and the nonprofit organization, and the public body never possessed the records sought under the FOIA, as was the case for the IHSA, courts are likely to determine that a records request does not come within the purview of the Act.

Many Illinois public school districts receive support from nonprofit foundations or other groups established to help them fulfill their mission to educate our children. Whether or not such groups are subject to FOIA requests will turn on the particular factual circumstances of their relationship. In the event that a school district or foundation supporting a school district receives a FOIA request related to its relationship with the other, each should act promptly to determine what their legal obligations are.

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If you have any questions concerning your legal obligations, contact one of our attorneys at 708-799-6766 or 630-928-1200.