No. 122949

IN THE SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF CHICAGO LAW DEPARTMENT, CITY OF CHICAGO MAYOR'S OFFICE, CHICAGO POLICE DEPARTMENT, and OFFICE OF THE SPECIAL PROSECUTOR, DAN K. WEBB,

Defendants-Appellees.

On Appeal from the Illinois Appellate Court for the First Judicial District
Appeal Nos. 16-1376, 16-1892, 16-2071

Heard on Appeal by the Illinois Appellate Court for the First Judicial District from the Circuit Court of Cook County, Illinois
County Department, Chancery Division, Case No. 15 CH 04183

BRIEF OF DEFENDANT-APPELLEE OFFICE OF THE SPECIAL PROSECUTOR, DAN K. WEBB

Daniel Rubinstein
Sean G. Wieber
Patrick R. O'Meara
Michael A. Meneghini
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5700

Attorneys for Office of the Special Prosecutor, Dan K. Webb

ORAL ARGUMENT REQUESTED

E-FILED
5/15/2018 5:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE

This case involves requests made by the Better Government Association (the "BGA") under the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.* ("FOIA"). The BGA submitted one request to the Office of the Special Prosecutor, Dan K. Webb (the "OSP"), and sent copies of a second request to the City of Chicago Law Department, Mayor's Office, and Police Department (collectively, the "City"). The BGA's requests sought different documents, all of which relate to an investigation conducted by a grand jury overseen by the OSP. After the OSP and the City denied the BGA's requests, the BGA sued them in the Chancery Division of the Circuit Court of Cook County asserting the denials were improper.

Both the OSP and the City moved to dismiss the BGA's Complaint on the grounds that the requested materials were exempt from FOIA under 5 ILCS 140/7(1)(a) ("Section 7(1)(a)") because "State law" specifically prohibited their disclosure. Judge Mikva of the Chancery Division granted the OSP's motion, holding that the materials were exempt from FOIA because of the grand jury secrecy provision in 725 ILCS 5/112-6. But Judge Mikva denied the City's motion, finding that the protective orders entered in the underlying case related to the grand jury investigation (on which the City based its exemption claim) were not "State law" for purposes of Section 7(1)(a).

The City then filed a motion to modify the protective orders before Judge Toomin—the judge who oversaw the grand jury investigation. Judge Toomin denied the City's motion, and the City appealed. After further proceedings before the Chancery court, Judge Mikva granted the BGA judgment on the pleadings, ordering the City to produce the requested records. The City appealed that ruling, too. The BGA then obtained a Rule 304(a) certificate to appeal the dismissal of its claim against the OSP.

The Appellate Court affirmed Judge Toomin's order denying the motion to modify his protective orders, reversed Judge Mikva's order granting the BGA's motion for judgment on the pleadings (and denying the City's motion for judgment on the pleadings), and affirmed in part and reversed in part Judge Mikva's order dismissing the BGA's FOIA complaint against the OSP. On the BGA's appeal of its claim against the OSP, the Appellate Court found that Judge Mikva correctly dismissed the BGA's requests for (1) documents sufficient to show all witnesses interviewed by the OSP and (2) all statements by and communications with "Daley family members," their attorneys, and Mara Georges because they sought "matters occurring before the grand jury." The Appellate Court reversed and remanded for an *in camera* inspection of the OSP's attorney fee invoices (BGA's third FOIA request) to determine what portions, if any, of those records may be disclosed consistent with 725 ILCS 5/112-6.

All issues in this appeal are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. Whether the Appellate Court correctly found that (1) documents showing the names of every person interviewed by a prosecutor in connection with a grand jury investigation and (2) statements and communications with, by, or to grand jury witnesses or their lawyers were "matters occurring before the grand jury" and thus within the scope of Section 112-6 of the Code of Criminal Procedure of 1963.

II. Whether the Appellate Court correctly held that documents properly considered "matters occurring before the grand jury" are exempt from FOIA under Section 7(1)(a) regardless of whether any additional Section 7 exemptions also apply to such documents because FOIA's general presumption that public records are open to inspection does not trigger the "when a law so directs" exception to Section 112-6 of the Code of Criminal Procedure of 1963.

STATEMENT OF JURISDICTION

This Court granted the BGA's petition for leave to appeal from the Appellate Court. Therefore, this Court has jurisdiction pursuant to Illinois Supreme Court Rule 315.

STATEMENT OF FACTS

A. The OSP's investigation

In 2004, Richard J. Vanecko punched David Koschman in the face after an altercation arose between their two groups of friends on Chicago's Division Street. (C00319–21.[1]) Koschman died from injuries caused by Vanecko's physical assault soon afterward. (C00322–23.) The Chicago Police Department investigated the incident in 2004, and conducted a separate reinvestigation in 2011, but neither investigation led to charges against Vanecko or anyone else. (C00259–62, C00281.)

Following a petition by Koschman's mother, Judge Toomin appointed Dan K. Webb as Special Prosecutor. (C00451.) Judge Toomin ordered Webb to investigate (1) "whether criminal charges should be brought against any person in connection with the homicide of David Koschman in the spring of 2004" and (2) "whether, from 2004 to the present, employees of the Chicago Police Department and the Cook County State's Attorney's Office acted intentionally to suppress and conceal evidence, furnish false evidence, and generally impede the investigation into Mr. Koschman's death." (C00311.) Judge Toomin further ordered Webb to "submit a final report to this Court and for the benefit of the Cook County Board of Commissioners detailing the progress and ultimate results of the investigation and any criminal prosecutions commenced." (*Id.*)

As part of Webb's investigation, Webb empaneled a special Cook County grand jury. (C00316.) Over the course of its 17-month investigation, the grand jury obtained

[1] Citations to "C___" refer to the record from proceedings before Judge Toomin. Citations to "SR___" reference the record of the proceedings before Judge Mikva, which was prepared as a supplemental record. Citations to the Report of the Special Prosecutor—such as this one—are to the record from the proceedings before Judge Toomin, but the supplemental record also contains a copy of the report. (*See* SR00185 *et seq.*)

information from 146 individual witnesses through a combination of witness interviews and grand jury testimony. (C00317.) In addition, the OSP reviewed over 22,000 documents totaling more than 300,000 pages. (C00318.)

Webb and the grand jury completed their first investigative assignment on December 3, 2012, when the grand jury returned an indictment against Vanecko for involuntary manslaughter in connection with Koschman's death. (C00312.) On January 31, 2014, Vanecko pled guilty to the charge of involuntary manslaughter. (C01541.) Webb and the grand jury completed their second investigative assignment on September 18, 2013, when the OSP informed the Court that Webb would not seek further indictments against the Chicago Police Department or the Cook County State's Attorney's Office personnel for their actions related to the Koschman matter, at which point the grand jury was discharged. (C00455–56, C00460.) Webb filed his court-ordered report with the court that same day; the court temporarily placed the report under seal to preserve Vanecko's right to a fair trial. (C00297–301; C00302–04.) The court unsealed the report and released it to the public on February 4, 2014, days after Vanecko entered his guilty plea. (C01541.)

B. Judge Toomin's protective orders

Judge Toomin's April 23, 2012 order appointing Webb as Special Prosecutor vested Webb and the OSP with the same powers, authority, and responsibilities as the elected State's Attorney of Cook County (limited only by the subject matter of the investigation). (C00287–88; *see generally* 55 ILCS 5/3-9008(b).) In furtherance of the State's Attorney's statutory duty to safeguard grand jury material from improper disclosure (*see* 725 ILCS 5/112-6(b)), the OSP asked Judge Toomin to enter a protective order prohibiting any party that received materials related to the grand jury's investigation from disseminating them to the public (the "2012 Order"). (C01540.)

The 2012 Order placed under seal "all Grand Jury materials, including but not limited to subpoenas, target letters, and other correspondence related to the service of a Grand Jury Subpoena, sent by the [OSP] to any individual or entity in connection with this investigation." (C00294–95.) It specifically applied to "[a]ny individual[] or entit[y] who receive[s] Grand Jury materials from the [OSP] . . . ." (C00294.) Judge Toomin issued the 2012 Order "to protect the sanctity of the investigation of the [OSP] and the work of the special grand jury." (C00728.)

After the *Chicago Sun-Times* submitted a FOIA request to the City in 2014 seeking "copies of all subpoenas city officials received from [the OSP]" and "all documents and records provided to [the OSP]," Judge Toomin entered a second order clarifying the scope of the 2012 Order (the "2014 Order"). (C00726, C00729.) The 2014 Order prohibited the City from complying with any FOIA request that "ident[ified]" or "characteriz[ed]" documents as having been "disseminated to the [OSP] in furtherance of its investigation into the death of David Koschman." (C00729.) The Court reiterated that the 2012 Order "remains in full force and effect" and "limits only the identification of any documents or other records as being grand jury materials." (*Id.*)

C. The BGA's FOIA requests

On January 23, 2015, the BGA e-mailed a FOIA request to the OSP, which sought:

> (1) Documents sufficient to show the names of everyone interviewed by Dan Webb's special prosecutors in relation to the David Koschman/Richard Vanecko case.
>
> (2) Copies of any and all statements by and communications with Daley family members and their attorneys; and the same information for Mara Georges.
>
> (3) Copies of any and all itemized invoices and billing records for the special prosecutor's team.

(SR00016.) The OSP sent a response letter denying the BGA's entire request because all of the materials requested were exempt from FOIA under Section 7(1)(a). (SR00012.)

The BGA sent the City a similar FOIA request the same day. (SR00012.) This request sought essentially the same documents that the *Chicago Sun-Times* had previously requested, and again identified and characterized the documents requested as being related to the investigation of the death of David Koschman. (SR00012–13.) The City denied the request, stating that the documents were exempt from FOIA because both the 2012 Order and 2014 Order were "State law" that prohibited it from disseminating the requested grand jury materials. (SR00013.)

D. The BGA's FOIA lawsuit

The BGA subsequently filed a Complaint against the OSP and the City in the Chancery Division of the Circuit Court of Cook County, claiming both had improperly denied its FOIA requests. (SR00009–15.) The OSP and the City each moved to dismiss under 735 ILCS 5/2-619, asserting that the materials were exempt from FOIA under Section 7(1)(a). (SR00139–58, SR00119–36.)

Judge Mikva of the Chancery Division granted the OSP's motion in full, holding that the grand jury secrecy provision in 725 ILCS 5/112-6(c) categorically prohibited the disclosure of all the materials the BGA sought. (SR00752–53.) Judge Mikva, however, held that the 2012 and 2014 Orders were not "State law" under Section 7(1)(a) of FOIA and denied the City's motion on that basis. (SR00754–55.) Judge Mikva's order suggested that the BGA move to intervene in the underlying *In re Appointment of Special Prosecutor* case before Judge Toomin, requesting that his honor modify the 2012 Order and 2014 Order to permit the City to produce the material the BGA had requested. (SR00756.)

When the BGA elected not to follow Judge Mikva's suggested course of action, the City eventually filed its own motion before Judge Toomin, requesting modification of the 2012 Order and the 2014 Order. (C01151.) The BGA filed a brief in support (C01503), and the OSP filed a brief opposing the relief (C01506.) Judge Toomin eventually issued a 21-page order declining to modify the orders. (C01538–58.) The court found that the documents the BGA sought from the City were "matters occurring before the grand jury" within the scope of his orders, and that an enduring interest in keeping the sealed documents secret outweighed any interest in modifying the orders. (C01550, C01556–58.) While acknowledging that some of the reasons for secrecy are removed after indictment, the court based its decision on the importance of safeguarding the deliberations of grand jurors and the witnesses who played a role in the grand jury's investigation to preserve the legitimacy and functionality of the grand jury as an institution. (C01547–49, C01557–58.)

After Judge Toomin denied the City's request, the BGA and the City filed cross-motions for judgment on the pleadings before Judge Mikva. (SR01336–47; SR01480–81.) The court granted the BGA's motion and denied the City's motion for the same reasons that it denied the City's motion to dismiss. (SR01746–54, SR01769–70.)

E. The Appellate Court's decision

Three appeals followed the orders discussed above, which the Appellate Court consolidated: (1) the City's appeal of Judge Toomin's order denying the City's motion to modify the 2012 Order and the 2014 Order; (2) the City's appeal of Judge Mikva's order granting the BGA's motion for judgment on the pleadings; and (3) the BGA's appeal of Judge Mikva's order granting the OSP's motion to dismiss. *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶¶ 28–29.

In the City's appeal of Judge Toomin's order declining to modify the protective orders, the Appellate Court noted that a trial court enjoys a great deal of latitude with respect to protective orders, and found that Judge Toomin fully explained why he denied the City's motion. *Id.* at ¶¶ 32–33. Judge Toomin "specifically found that even though the grand jury had been discharged, and Vanecko had been indicted and sentenced, secrecy was still justified by (1) the institutional legitimacy of the grand jury, (2) the need to assure freedom of deliberation of future grand juries and the participation of future witnesses, and (3) the need to ensure witnesses that the confidentiality of their testimony would not be lifted tomorrow." *Id.* at ¶ 33 (internal quotations omitted). The Appellate Court held that Judge Toomin did not abuse his discretion in finding "the need for particularized secrecy still existed" and affirmed his order refusing to modify the 2012 Order and 2014 Order.

In the City's appeal of Judge Mikva's decision, the Appellate Court reversed the order granting the BGA's motion for judgment on the pleadings and granted the City's motion for judgment on the pleadings. The Appellate Court did so by applying the "straightforward rule" established by the Supreme Court of the United States in *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 387 (1980), which held that "constru[ing] the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." *Id.* at ¶¶ 43, 53. Thus, the Appellate Court held that "respect for the judicial process" required Judge Toomin's lawful court order to take precedence over the disclosure

requirements of FOIA, and that it was not "improper" for the City to refuse to disclose documents because a court order commanded it to do so. *Id.* at ¶ 46.

Lastly, in the BGA's appeal of Judge Mikva's order granting the OSP's motion to dismiss, the Appellate Court affirmed Judge Mikva's decision with respect to the first and second FOIA requests ("for documents showing names of every person interviewed by Webb in connection with his investigation" and for "copies of all statements by and communications with 'Daley family members,' their attorneys, and Mara Georges, the City's Corporation Counsel," respectively), but reversed and remanded with respect to the third request (for the OSP's "itemized invoices and billing records"). *Id.* at ¶¶ 64–66. The Appellate Court found that Judge Mikva correctly determined that the BGA's first and second FOIA requests sought documents that categorically constituted "matters occurring before the grand jury" and were thus exempt from disclosure under section 112-6. *Id.* at ¶¶ 64–65. These materials would "clearly reveal" the identities of witnesses, as well as their testimony, and "the strategy or direction of the investigation." *Id.* Secrecy of these materials was "clearly critical to the integrity of the grand jury process." *Id.* at ¶ 64.

For the third FOIA request, while acknowledging that the disclosure of the attorney fee invoices may reveal the strategy or direction of the investigation, the Appellate Court found that they were not categorically exempt *Id.* at ¶ 67. Thus, the Appellate Court reversed the dismissal of "the portion of count III of BGA's complaint that sought disclosure of the OSP's attorney fee invoices," and remanded for an *in camera* review to "determine what, if any, portions of the requested records may be disclosed notwithstanding section 112-6 of the Code's prohibition on disclosure of information regarding 'matters occurring before the grand jury.'" *Id.* at ¶¶ 67–68. It instructed the

court to "be mindful that 'the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.'" *Id.* at ¶ 69.

The Appellate Court also rejected the BGA's argument that *all* of the records it requested from the OSP must be disclosed due to the "when a law so directs" clause in 725 ILCS 5/112-6(c). *Id.* at ¶ 63. The court held "that adopting the BGA's expansive interpretation of 'when a law so directs' would render the secrecy provisions in section 112-6 of the Code 'a dead letter,' because FOIA would effectively nullify them." *Id.*

STANDARD OF REVIEW

The court reviews a grant of a section 2-619 motion to dismiss *de novo*. *Better Gov't Ass'n v. Illinois High Sch. Ass'n*, 2017 IL 121124, ¶ 21 (affirming dismissal of the BGA's complaint); *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 141 (2006). The court reviews the judgment, not the reasoning, and it may affirm on any ground in the record, regardless of whether the court relied on those grounds or whether the court's reasoning was correct. *Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 97 (1995); *People v. Nash*, 173 Ill. 2d 423, 432 (1996).

ARGUMENT

While ostensibly about two FOIA requests, this case is about the future of grand jury secrecy in Illinois. The Appellate Court here affirmed Judge Mikva's dismissal of the BGA's complaint against the OSP as to its first and second requests, which sought (1) a list of all the witnesses the OSP interviewed while overseeing the grand jury investigation, and (2) statements made by certain of those witnesses, as well as the OSP's other communications with them and their attorneys. In this Court, the BGA argues that those documents—which are quintessential examples of "matters occurring before the grand jury," and thus forbidden from public disclosure under 725 ILCS 5/112-6(c)—*must* be

disclosed to the public because of FOIA. The BGA not only disagrees with the Appellate Court's conclusion that the documents it seeks are "matters occurring before the grand jury," it also argues the documents are not exempt *even if* they are "matters occurring before the grand jury."

That is not, and cannot be, the law. Thus, this Court should affirm Judge Mikva's dismissal of the BGA's Complaint as to its first and second FOIA requests for two reasons.

First, as Judge Mikva held and the Appellate Court agreed, the BGA's requests sought "matters occurring before the grand jury" as defined by both Illinois and federal precedent, which this Court has deemed instructive. (*Infra* § I.A.) As the Appellate Court recognized, 725 ILCS 5/112-6(c)'s prohibition against disclosing "matters occurring before the grand jury" forbids prosecutors from disseminating anything that would reveal "the identity of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *See Bd. of Educ. v. Verisario*, 143 Ill. App. 3d 1000, 1007 (2d Dist. 1986). On their face, the BGA's first and second requests seek information about the identity of witnesses and the substance of their testimony, and would plainly reveal the strategy and direction of the grand jury investigation that the OSP oversaw.

The BGA quibbles with the Appellate Court's analysis on two grounds, both of which fail. It first takes aim at the Appellate Court's interpretation of the phrase "matters occurring before the grand jury," positing that the phrase must be given a "narrow" meaning here because this is a FOIA case. But the BGA's suggestion that 725 ILCS 5/112-6(c) must have a narrower—and thus different—meaning in FOIA cases than it does elsewhere is unsupported by this Court's cases. (*Infra* § I.B.1.) Further, the BGA's

proposed limitation of "matters occurring before the grand jury" to no more than the "evidence presented to the grand jury and transcripts of the proceedings" would inexorably lead to the disclosure of what *Verisario* and decades of federal precedent hold to be matters occurring before the grand jury. (*Infra* § I.B.2.) The BGA's second gripe is that Judge Mikva lacked an evidentiary basis to decide that its requests sought exempt material. Nothing in FOIA, however, requires courts to engage in a futile *in camera* review where a request seeks categorically exempt material. (*Infra* § I.C.)

Second, the BGA argues that the OSP must disclose the requested records *even if* they constitute "matters that actually did occur before the grand jury." This is so, says the BGA, because FOIA is "a law" that "directs" disclosure of non-exempt records. This simply cannot be right. Both Judge Mikva and the Appellate Court correctly rejected this argument, finding that FOIA's *general* presumption that public records are open to inspection and copying is not specific enough to trump 725 ILCS 5/112-6(c)'s *specific* directive of secrecy. (*Infra* § II.A.) Under the BGA's "harmonious" reading of how the two statutes interact, a "matter occurring before the grand jury" is not exempt from FOIA under Section 7(1)(a) *unless* an *additional* Section 7 exemption applies. This implicitly repeals part of 725 ILCS 5/112-6(c), which this Court's cases unequivocally disfavor. The Court should make no exception here, as the BGA's position would eviscerate the tradition of grand jury secrecy. (*Infra* § II.B.) Indeed, the Appellate Court here remarked that the BGA's "expansive interpretation of 'when a law so directs' would render the secrecy provisions . . . 'a dead letter,' because FOIA would effectively nullify them." *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 63.

Finally, the BGA ends its brief with two pages of invective against the OSP dressed up as an argument that purportedly applies the Appellate Court's "improperly withheld" standard. The BGA's argument is bereft of legal authority, save one forty-year-old Eighth Circuit opinion that is irrelevant to the argument the BGA advances. Suffice it to say that should this Court agree with the OSP that the materials the BGA seeks are exempt from FOIA, then the OSP cannot have "improperly withheld" those materials.

For these reasons, as explained more fully below, the Court should affirm the Appellate Court's decision as to the OSP.

I. The Appellate Court correctly rejected the BGA's narrow interpretation of "matters occurring before the grand jury."

The BGA contends the Appellate Court erred in applying an "unduly broad interpretation" of the phrase "matters occurring before the grand jury." (BGA Br. at 44.) This Court should reject its argument for three reasons. First, the BGA's argument is at odds with all precedent construing that phrase, as the Appellate Court's decision is an uncontroversial application of *Verisario* and similar federal case law to the BGA's FOIA requests. Second, the BGA's "narrow" interpretation of that phrase is based on a FOIA-specific canon of construction that is entirely of the BGA's own invention. Third, even if the BGA's argument was textually sound (it is not), it presents an unworkable standard because it is divorced from the practical realities of grand jury investigations. Finally, the substance of the BGA's FOIA request itself provided the court an adequate evidentiary basis to determine that the BGA sought matters occurring before the grand jury.

A. The Appellate Court's decision is firmly supported by well-established precedent interpreting the phrase "matters occurring before the grand jury," which the BGA ignores.

The BGA frames its argument over the meaning of the phrase "matters occurring before the grand jury" this way: "the Appellate Court erred in holding that records of a prosecutor that were not presented to the grand jury and that would not disclose what took place in the grand jury room are 'specifically prohibited' from disclosure." (BGA Br. at 31.) While the BGA repeatedly characterizes the Appellate Court's decision this way, i.e., about records "not presented to the grand jury and that would not disclose what took place" in the grand jury room, the foregoing quote from the BGA's brief does not cite to the Appellate Court's opinion. Nor could it, as it does not fairly summarize the Appellate Court's reasoning. Indeed, while making a different claim, the BGA belabors the point that Judge Mikva did not review the records the BGA requested or require the OSP to submit an affidavit regarding their contents (BGA Br. at 44), so there would be no basis for the Appellate Court to base its decision on a finding that the records had been "presented" or "would not disclose" what took place in the grand jury room.

No such finding was needed here. The Appellate Court's ruling is grounded in over thirty years of Illinois law, and decades more of federal precedent (on which the applicable Illinois law is based). *See In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 69 (noting that "the phrase 'matters occurring before the grand jury' has been defined not only by *Verisario*, but through a well-established body of federal case law"). As the Appellate Court noted (*id.* at ¶ 68), the General Assembly borrowed the phrase "matters occurring before the grand jury" from Federal Rule of Criminal Procedure 6(e), on which Section 112-6 was modeled. *People ex rel. Sears v. Romiti*, 50 Ill. 2d 51, 58 (1971). The tradition of grand jury secrecy that Rule 6(e) codified "broadly" interprets the

term "matters occurring before the grand jury." *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1176 (10th Cir. 2006). The spectrum of matters occurring before the grand jury includes testimony or materials that could identify those cooperating with or targeted by the government's inquiry. *See, e.g.*, *In the Matter of: Eyecare Physicians of Am.*, 100 F.3d 514, 519 (7th Cir. 1996).

Finding that Illinois intended to bring along with that phrase the same meaning ascribed to it by federal courts, *Verisario* construed "matters occurring before the grand jury" in Section 112-6 to protect the "essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process." *Verisario*, 143 Ill. App. 3d at 1005–07. Important here, that "essence" includes anything that would reveal "the identity of witnesses or jurors, the substance of the testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *Id.* at 1007. That discussion from *Verisario* is echoed in countless federal decisions, some of which the Appellate Court expressly relied on. *See In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 69 (noting, for example, that *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980), "held that the term 'matters occurring before the grand jury' in the federal rule encompasses (1) the identities of witnesses or jurors, (2) the substance of testimony, (3) the strategy or direction of the investigation, and (4) the deliberations or questions of jurors, and the like," and that *In re Grand Jury Investigation*, 610 F.2d 202, 216 (5th Cir. 1980), held that the federal rule prohibits disclosure of "anything which 'may *tend to reveal* what transpired before the grand jury." (emphasis added)).

Applying those principles, the Appellate Court found that "Judge Mikva correctly determined" that the BGA's requests for (1) documents showing the names of every person interviewed by the OSP in connection with its investigation, and (2) copies of all statements by and communications with "Daley family members, their attorneys, and Mara Georges, the City's Corporation Counsel," fell within the scope of section 112-6 because the disclosures "would clearly reveal the 'identity of witnesses'" and the "strategy or direction of the investigation." (*Id*. at ¶¶ 64–65 (quoting *Verisario*, 143 Ill. App. 3d at 1007).) That is a rote application of precedent interpreting the phrase "matters occurring before the grand jury" to the BGA's requests to the OSP. By arguing otherwise, the BGA advocates that this Court radically depart from the established meaning of that term.

While the BGA mostly resorts to FOIA-specific principles of statutory interpretation to try to gut *Verisario* and these federal decisions (*see infra* § I.B.1), it also attempts to appropriate *Verisario* as supporting a "limited scope" and "narrow interpretation of the phrase." (BGA Br. at 31–32.) It does this by focusing on some of *Verisario*'s flowery language fixated on the literal grand jury room. (*E.g.*, *id.* (quoting *Verisario*, 143 Ill. App. 3d at 1007 (statute "shield[s] 'only the essence of what takes place in the grand jury room").) But this is the BGA cherry-picking what it likes and ignoring the rest, i.e., the portions of that same paragraph which note the statute's purpose is to "protect the identity of witnesses" and "the strategy or direction of the investigation." *Verisario*, 143 Ill. App. 3d at 1007.

The Appellate Court's decision was a well-reasoned application of well-established Illinois and federal case law. The BGA's first and second FOIA requests seek information that will reveal the identities of witnesses, the substance of witness testimony, the questions

of jurors, and the strategy or direction of the investigation. The Appellate Court correctly held that these were "matters occurring before the grand jury."

B. The BGA's statutory interpretation argument misconstrues this Court's cases on the narrowness of FOIA exemptions and is at odds with the practical, real-world mechanics of a grand jury investigation.

The BGA tries to undermine the established meaning of "matters occurring before the grand jury" applied by the Appellate Court. It offers a competing "narrow" interpretation of the phrase by urging this Court to adopt a new interpretive principle it has never applied before—i.e., that a statute has a different meaning when serving as a Section 7(1)(a) exemption than it does elsewhere—which BGA then applies to dictionary definitions for some of the words in the statute at hand. (BGA Br. at 29–31.) This makes no sense, and the result is at odds with how grand jury investigations actually work.

1. This Court's decisions have never required courts to interpret a statute differently when it serves as the basis for a Section 7(1)(a) exemption than how it is interpreted in other contexts.

Section VII.C of the BGA's brief uses some form of the word "narrow" 12 times to justify its interpretation of "matters occurring before the grand jury." As shown above, the reason for the BGA's emphasis on narrow construction is apparent: the BGA's requests for (1) a list of all witnesses the OSP interviewed and (2) statements by, and communications the OSP had with, certain witnesses during its investigation constitute "matters occurring before the grand jury" as that phrase has been interpreted by *Verisario* and federal case law. Thus, the BGA advocates that, because this is a FOIA case, the phrase "matters occurring before the grand jury" must mean something else. (*See, e.g.*, BGA Br. at 29 ("The relevant grand jury phrase is 'matters occurring before the grand jury.' It is beyond dispute that this Court's decisions require all FOIA exemptions to be narrowly construed, and this Court has not only applied that rule when interpreting the

provisions of FOIA itself, but also exemptions that derive from the secrecy provisions in another statute, as is the case here.").)

While the narrow construction principle the BGA invokes is common in FOIA litigation, it does not work the way the BGA applies it here. The BGA is employing the narrow construction principle to *depart* from a statute's accepted meaning when that statute is invoked as a Section 7(1)(a) exemption. (*See* BGA Br. at 29–31.) No case of this Court applies it this way. To support its argument, the BGA principally relies on *S. Illinoisan v. Illinois Dep't of Pub. Health*, 218 Ill. 2d 390, 416 (2006), which does mention the narrow construction doctrine while deciding whether the requested information was exempt under the Cancer Registry Act (the asserted Section 7(1)(a) exemption). But in that case, unlike here, there was no precedent that construed the Cancer Registry Act in a way that rendered the documents exempt under Section 7(1)(a). Instead, this Court found the pro-disclosure policies of *both* FOIA and the Cancer Registry Act helpful in arriving at the correct interpretation of the statute where the answer was unclear. *Id.* at 423. ("Given this uncertainty in interpretation, we are especially mindful of the public policy which underpins both the Registry Act and the FOIA: to ensure public disclosure of government information that is not otherwise protected."). Here, by contrast, there is no "uncertainty" over what "matters occurring before the grand jury" means and whether it applies to the documents the BGA seeks.

The few other cases the BGA cites to support its novel argument that the "narrow construction" principle works the way the BGA applies it here are even further off the mark. *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65* (cited by the BGA at 29–30) did not require the Court to pick the narrower of two plausible interpretations of "identifying

information"; the records the plaintiff in that case requested could not be used to identify the students to which the records pertained, so the text of the statute resolved the statutory interpretation issue without the need to consider which party's interpretation was narrower. 128 Ill. 2d 373, 379 (1989). Similarly, *State Journal-Register v. Univ. of Illinois Springfield* applied the definitions set forth in the statute itself to the records requested, and is devoid of analysis seeking to divine the narrowest possible meaning of the statute. 2013 IL App (4th) 120881, ¶¶ 70–74.

Beyond not involving Section 7(1)(a) (and thus not supporting the BGA's point that "matters occurring before the grand jury" should be construed narrowly), the BGA's reliance on *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 410 (1997), is further misplaced, as one hardly needs to "narrowly" construe the word "students" to exclude those not yet enrolled in a university. (*See* BGA Br. at 30.) In another non-Section 7(1)(a) case, this Court in *Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 471 (2003), mentions construing the attorney-client privilege exemption (Section 7(1)(n)) narrowly. But even in non-FOIA contexts, this Court's cases hold that the attorney-client "privilege is to be strictly confined within its narrowest limits." *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 32.

In short, adopting the BGA's "narrow" construction of section 112-6 would require this Court to hold that "matters occurring before the grand jury" has one meaning for FOIA litigation and another meaning elsewhere. This Court has never held that FOIA works that way, and nothing in the FOIA statute requires such an absurd and unworkable result.

2. The BGA's proposed "narrow" interpretation of "matters occurring before the grand jury" is unrealistic and unworkable.

Armed with its unprecedented broad view of the "narrow construction" principle applied to FOIA exemptions, the BGA proceeds to select the "narrowest" dictionary definitions of the words "occur" and "before" to make its case. (BGA Br. at 31.) According to the BGA, these definitions "make clear" that, at least in the FOIA context, the correct interpretation of "matters occurring before the grand jury" is strictly confined to "only information disclosing what took place in the presence of the grand jury, such as evidence presented to the grand jury and transcripts of the proceedings." (*Id*.)

Beyond being at odds with the precedent discussed above (*supra* § I.A), the BGA's narrow construction of "matters occurring before the grand jury"—defined by its focus on what took place within the four corners of "the grand jury room" (e.g., BGA Br. at 44)—disregards the practical realities of a grand jury investigation and would lead to undesirable results. The BGA does not appreciate the reality that a grand jury investigation is, by nature, an evolving, iterative process between the prosecutor and the grand jury itself. This is especially true where the grand jury sits for an extended period of time, such as here, where the grand jury sat for 17 months on a single case. (C00317.)

Indeed, the underlying investigative work conducted by prosecutors in such cases is done at the behest and direction of the grand jury itself, which may request that prosecutors interview certain witnesses or investigate certain things. *See*, *e.g.*, Administrative Office of the Illinois Courts, "A Handbook for Illinois Jurors – Grand Jury" (grand jury "has a right under the law to make its own investigation unaided by the Court

and assisted by any prosecuting attorney").[2] Typically, the grand jurors do not meet each and every day. *Cf. id.* ("During the time of your service, you should report promptly as directed and accept your duties with seriousness. . . . As grand jurors . . . you will meet at such times as the Court may direct or order on its own motion or that of the State's Attorney or Attorney General.") Therefore, when grand jurors request that prosecutors undertake specific investigative inquiries, the prosecutors often carry out the grand jury's requests while the grand jury is not meeting. By necessity, much of this occurs outside of the grand jury room, as the grand jury's investigation can involve, for example, visiting the scene of the crime, gathering records pursuant to grand jury subpoenas, and tracking down witnesses and/or their counsel, pursuant to grand jury subpoenas or otherwise.

Sometimes, a grand jury's queries and directions to a prosecutor may lead to dead ends, and thus prosecutors may elect not to present those witnesses or the resulting evidence to the grand jury (which the BGA acknowledges is entirely proper under Illinois law, even for *relevant* evidence). (*See* BGA Brief at 33.[3]) Evidence acquired by those lines of inquiry is no less a "matter[] occurring before the grand jury" than that which is ultimately presented to the grand jury, as the fact the prosecutor's inquiries took place reveals something about the strategy and direction of the grand jury's investigation. Of course, the common law/*Verisario* definition of "matters occurring before the grand jury" accounts for this, but the BGA's definition does not.

---

[2] Available at http://www.illinoiscourts.gov/CircuitCourt/Jury/GrandJury.pdf (last accessed May 8, 2018).

[3] *Citing People v. Creque*, 72 Ill. 2d 515, 525 (1978) ("The prosecutor is under no duty to present all the incriminating evidence he has, nor to inform the grand jurors of the existence of additional or more direct evidence."); *People v. Beu*, 268 Ill. App. 3d 93, 97–98 (2d Dist. 1994) ("[T]he prosecutor has no duty to present exculpatory evidence to the grand jury.").

Indeed, the BGA goes to great lengths to attempt to distinguish evidence allegedly "acquire[d] . . . independently of the grand jury" and not "present[ed] . . . to the grand jury" from "matters occurring before the grand jury." (BGA Br. at 33.) But plainly, evidence that prosecutors collect at the grand jury's direction—whether expressly or based on the grand jury's general investigatory directives—no less reveals the strategy and direction of the grand jury's investigation than the universe of evidence physically presented to the grand jury within the four corners of a conference room. The BGA cites this Court's decision in *Nelson v. Kendall Cty.*, 2014 IL 116303, as somehow supportive of its argument that evidence which prosecutors collect but do not present to the grand jury is subject to FOIA. (BGA Br. at 33–34.) But *Nelson* held only that the State's Attorney is a FOIA-able entity; it did not involve a request for records related to an investigation where a grand jury had been empaneled. *Id.* at ¶ 35. And, contrary to the BGA's hyperbole, adopting the OSP's interpretation leaves ample "prosecutorial records" subject to FOIA (*see* BGA Br. at 33–34); just not certain records related to a grand jury investigation.

Further, absurd results will flow from the BGA's incorrect proposed "rule." Prosecutors use grand jury secrecy to encourage witnesses to cooperate. Under the BGA's narrow construction of the grand jury secrecy provision, which protects "only information disclosing what took place in the presence of the grand jury, such as evidence presented to the grand jury and transcripts of the proceedings" (BGA Br. at 31), prosecutors could no longer promise potential witnesses that their identities and testimony (if submitted in the form of a witness statement, for example) will remain secret because they will not know at the outset if the witness has material information that will end up presented to the grand jury.

Moreover, prosecutors will be incentivized to, or certainly easily could, eviscerate the BGA's proposal by simply conducting entire investigations *in the presence of the grand jury* so that they can continue to use the promise of secrecy to encourage witness cooperation in this way. Prosecutors might, for example, contact potential witnesses while sitting in the actual room with the grand jury and narrate the entire process. Or they might formally present every last witness statement and every bit of evidence that they collect to the grand jury, regardless of its probative value. Otherwise, a witness's name or the source of certain evidence could eventually be released to the public and that individual would forever be associated with the investigation of that crime. This would waste grand jurors' time and could unnecessarily place them in a room for extended periods of time, day after day. In short, the BGA's "rule" risks both undermining the effectiveness of grand jury investigations and wasting finite public resources, including the time of both prosecutors and the citizens of Illinois when they are called upon to serve as grand jurors.

C. The substance of the BGA's FOIA requests provided an adequate basis to dismiss its Complaint.

Finally, the BGA bemoans that there "certainly was no ***evidentiary*** basis for the Appellate Court to conclude 'that disclosure of these materials would reveal the identity of witnesses, as well as their testimony and the "strategy or direction of the investigation",' because the records were never furnished for *in camera* inspection, described in affidavits, or even listed on an index under FOIA." (BGA Br. at 44 (double emphasis in original).)

Consider, however, what the BGA asked for in its first two requests: (1) "Documents sufficient to show the names of everyone interviewed by Dan Webb's special prosecutors in relation to the David Koschman/Richard Vanecko case," and (2) "Copies of any and all statements by and communications with Daley family members

and their attorneys; and the same information for Mara Georges." (SR00016.) On their face, both requests seek "the identity of witnesses" and information about those witnesses' statements, i.e., their testimony, which plainly fall within the scope of "matters occurring before the grand jury" as defined by the case law discussed above. (*Supra* § I.A.)

Judge Mikva held, and the Appellate Court affirmed, that as a matter of statutory interpretation, the documents requested in the BGA's first two FOIA requests were categorically "matters occurring before the grand jury" and thus exempt as a matter of law. Suppose that the BGA submitted a request for "[t]est questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license" to a public body that employs such employment procedures. *See* 5 ILCS 140/7(1)(q) (exempting such material); *cf. Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 766–68 (1st Dist. 2009) (standards used to evaluate firefighter applicants' physical abilities test were exempt). The agency receiving that request would not be required to furnish its test questions or scoring keys to the court for *in camera* review to substantiate that they are, in fact, exempt. Responsive materials are, by definition, exempt.

So too here. The only reason the BGA is able to suggest otherwise is based on its overly narrow position on what constitutes "matters occurring before the grand jury," which it claims required the court to undertake an analysis of whether each item requested was presented to the grand jury. If it is wrong about that (and it is), those first two requests could only be understood as seeking exempt information.

II. The BGA's argument about the interplay of FOIA and section 112-6(c) should be rejected because it renders the latter's grand jury secrecy provision a dead letter and undermines its purpose.

The BGA's other argument for reversing the Appellate Court and overturning Judge Mikva's ruling is a jumble of self-interested statutory machinations. Section 112-6(c)'s

prohibition against disclosing matters occurring before the grand jury contains two enumerated exceptions. *See* 725 ILCS 5/112-6(c). One of them permits "[d]isclosure otherwise prohibited by this Section of matters occurring before the Grand Jury . . . *when a law so directs*." 725 ILCS 5/112-6(c)(3) (emphasis added). According to the BGA, FOIA is "a law" that "so directs" disclosure of "matters occurring before the Grand Jury" unless one of the specifically enumerated Section 7 exemptions *also* covers the requested record. (BGA Br. at 35–36.)

The BGA cites no authority in support of its interpretation of the "when a law so directs" exception, and this Court should reject it for two reasons. First, the BGA's position is wrong as a matter of statutory interpretation. Second, the BGA's interpretation implicitly overrules or modifies portions of 725 ILCS 5/112-6 and undermines its fundamental purpose.

A. The Appellate Court correctly interpreted the "when a law so directs" exception in 725 ILCS 5/112-6(c).

The BGA contends that the Appellate Court "ignored BGA's explanation of how the two statutes fit together harmoniously." (BGA Br. at 36.) Rather than "ignore" the BGA's convoluted argument, the Appellate Court considered and rejected it, just as Judge Mikva did. Judge Mikva held that FOIA was not "the kind of *specific law* that would 'direct' the disclosure of otherwise confidential grand jury materials." (SR00752 (emphasis added).) The Appellate Court agreed, although it articulated its holding slightly differently, interpreting "the clause 'when a law so directs'" to refer to "situations of particularized necessity, such as disclosure to a court clerk or to confront a witness in a criminal trial with his prior contrary testimony." *In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 63.

The BGA, however, misconstrues the Appellate Court's statement and accuses it of "judicially importing language like 'addresses situations of particularized necessity' into the grand jury statute." (BGA Br. at 37.) The court, however, did not "import" words into the statute. What both Judge Mikva and the Appellate Court actually did was to apply the interpretive principle for resolving conflicts between two statutory provisions this Court has endorsed, i.e., that when "a general statutory provision and a more specific one relate to the same subject, [the court] will presume that the legislature intended the more specific statute to govern." *Moon v. Rhode,* 2016 IL 119572, ¶ 29 (citation omitted).

Here, 725 ILCS 5/112-6 specifically forbids the disclosure of "matters occurring before the grand gury," whereas FOIA contains only a general presumption that non-exempt public records must be disclosed. Given those conflicting provisions, and 725 ILCS 5/112-6's more specific application to "matters occurring before the grand jury," both courts correctly interpreted "when a law so directs" as requiring something more than FOIA's blanket pro-disclosure presumption. Further, interpreting 725 ILCS 5/112-6 this way better effectuates the statute's stated purpose of keeping "matters occurring before the grand jury" secret. *See, e.g., In re Parentage of J.W.*, 2013 IL 114817, ¶ 37 ("In determining [legislative] intent, we may properly consider the statutory language, the reason and necessity for the law, the evils to be remedied and the statute's ultimate purpose and objective.").

Both courts' interpretation is also consistent with existing precedent, which the General Assembly has impliedly endorsed. In *Taliani v. Herrmann*, 2011 IL App (3d) 090138, a prisoner sought to use FOIA to obtain transcripts of the grand jury proceedings from a criminal case. *Id*. at 3. The court noted that Section 7 of FOIA exempts records

from disclosure if prohibited by state law, and then found that "Section 112-6 . . . is a state law that prohibits the disclosure of grand jury transcripts without a court order and thus exempts them from [FOIA]." *Id.* ¶¶ 12–13. The prisoner was "only entitled to a copy of the grand jury transcripts pursuant to section 112-6(c)," and the mechanisms for such disclosure did not include FOIA requests. *Id.* If *Taliani*'s construction of the statute was wrong and the General Assembly intended FOIA to direct disclosure of grand jury records except when FOIA already exempts them, it would have legislatively overruled the decision by amending one or both statutes. *See Pritza v. Vill. of Lansing*, 405 Ill. App. 3d 634, 645 (1st Dist. 2010) ("Where the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent." (citation omitted)). It never did so, despite amending Section 7 of FOIA no fewer than eleven times since *Taliani* was decided.[4]

B. The BGA's interpretation overrules 725 ILCS 5/112-6 by implication and undermines its purpose.

Under the BGA's interpretation of 725 ILCS 5/112-6, for a "matter occurring before the grand jury" to be exempt, it needs to fall into one of the enumerated statutory exemptions. (BGA Br. at 37.) In its own words:

> [W]hen a record is covered by a specific FOIA exemption (interference with a *pending investigation, etc.*), FOIA does not "direct" that the record be released and the "when a law so directs" clause does not apply. In that case, the prohibition on release of matters occurring before the grand jury would still apply, and the exemptions that protect the very kinds of things that

[4] *See* Pub. Act 97-783, § 5 (eff. July 13, 2012); Pub. Act 97-813, § 15 (eff. July 13, 2012); Pub. Act 97-847, Art. 4, § 4-10 (eff. Sept. 22, 2012); Pub. Act 97-1065, § 5 (eff. Aug. 24, 2012); Pub. Act 97-1129, § 5-10 (eff. Aug. 28, 2012); Pub. Act 98-463, § 20 (eff. Aug. 16, 2013); Pub. Act 98-578, § 5 (eff. Aug. 27, 2013); Pub. Act 98-695, § 5 (eff. July 3, 2014); Pub. Act 99-298, § 5 (eff. Aug. 6, 2015); Pub. Act 99-346, § 5 (eff. Jan. 1, 2016); Pub. Act 99-642, § 20 (eff. July 28, 2016).

> animate *any legitimate need for grand jury secrecy* would become mandatory instead of discretionary.

(*Id.* (emphasis added).) As suggested by the above example (in which the word "etc." is doing a lot of work), the Section 7 FOIA exemptions that the BGA proposes to replace the current law on grand jury secrecy focus primarily on the disclosure of grand jury material's effect on *pending* investigations and *pending* trials. *See, e.g.*, Section 140(7)(d)(i), (iii).

Thus, the BGA's position assumes that the enactment of FOIA implicitly repealed, or at least considerably modified, 725 ILCS 5/112-6. Indeed, the BGA comes right out and admits this when it criticizes the Appellate Court for relying on this Court's decision in *Romiti* because it "predates the enactment of FOIA by more than a decade," suggesting that this Court's pronouncements about the interpretation of 725 ILCS 5/112-6 should be different after FOIA was enacted. (*See* BGA Br. at 32.)

This Court's precedents are quite clear, however, that the implicit modification or repeal of a law is disfavored. *See, e.g.*, *Lily Lake Rd. Defs. v. Cty. of McHenry*, 156 Ill. 2d 1, 9 (1993) ("As a general rule, repeals by implication are not favored. Where there is an alleged conflict between two legislative enactments, this court has a duty to construe those statutes in a manner that avoids an inconsistency and gives effect to both enactments, where such a construction is reasonably possible. An implied repeal results only when the terms and necessary operation of a later statute are repugnant to and cannot be harmonized with the terms and effect of an earlier statute." (citations omitted)); *see also Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled. . . . Before holding that the result of the earlier consideration has been repealed or qualified, it is

reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end[.]" (citation omitted)). Here, the General Assembly did not use "language showing that it ha[d] made a considered determination" to modify the grand jury secrecy provision of 725 ILCS 5/112-6, so the Court should reject the BGA's argument.

The Court should be especially reluctant to adopt the BGA's position because it ignores that the institutional interests in continued grand jury secrecy are larger than any single case, and persist even after the investigation has ended. Those interests include, for example, "encourag[ing] uninhibited deliberations by the grand jurors" and "encourag[ing] witnesses to testify before the grand jury without fear of public disclosure." *People v. Johnson*, 31 Ill. 2d 602, 606 (1964) (citing 8 Wigmore on Evidence § 2360 (3d ed. 1940); *see also Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979) ("[I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony," and "would be less likely to testify fully and frankly, as they would be open to retribution.").

Indeed, contrary to the BGA's rhetorical efforts to minimize the value of grand jury secrecy to further its own ends in this case (*see* BGA Br. at 32), this Court has long emphasized the importance that "the work of the [grand jury] is surrounded by secrecy and vested with solemnity." *People v. Munson*, 319 Ill. 596, 604 (1925). Although some interests served by grand jury secrecy become less pronounced post-conviction (i.e., preventing perjury), continued grand jury secrecy furthers the important institutional purpose of assuring the freedom of deliberation of future grand juries and the participation

of future witnesses. *E.g.*, *People v. French*, 61 Ill. App. 2d 439, 442 (2d Dist. 1965); *see also People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 59 ("[T]he purpose of secrecy within the grand jury statute is not merely to bring a defendant into custody, but also serves a larger purpose.").

Here, the Appellate Court correctly recognized that adopting the BGA's "harmonious" construction of the two statutes would undermine future investigations and risks jeopardizing the proper function of the grand jury in our system of criminal procedure. *See In re Appointment of Special Prosecutor*, 2017 IL App (1st) 161376, ¶ 39. ("Candid, complete, and trustworthy testimony is vital to the grand jury's role. As a matter of common sense, a witness who knows that testimony and material he provides to the grand jury is secret, and *will be kept secret*, will be more frank and truthful than a witness who fears his identity might be disclosed at some later time." (emphasis in original)). Indeed, the Appellate Court put it much more strongly than that, remarking that the BGA's "expansive interpretation" that FOIA is "a law [that] so directs" would "render the secrecy provisions in section 112-6 of the Code 'a dead letter,' because FOIA would effectively nullify them." *Id.* at ¶ 63. The BGA's interpretation of how "when a law so directs" interacts with FOIA thus "cannot be correct in light of the absurd consequences that stem from [it]." *People v. Hanna*, 207 Ill. 2d 486, 497 (2003).

In short, the BGA's argument should be rejected because it runs afoul of this Court's cases criticizing repeals by implication. It reduces the grand jury secrecy provision to nothing, with no work to do that is not already done by FOIA, which will gut the grand jury's institutional protections that are integral to its proper function.

III. Nothing was improper about the OSP's denial of the BGA's FOIA requests for grand jury materials.

The BGA makes a final argument, which is conditioned on this Court ruling in the City's favor on the grounds that it could not have "improperly withheld" the requested records due to its reliance on Judge Toomin's protective order. (BGA Br. at 45.) If the Court so holds, the BGA posits that the OSP improperly withheld the records it seeks. (*See* BGA Br. at 45–46.) The BGA's argument is baseless and wrong.

The BGA's argument has no basis in the Appellate Court's decision or the *GTE Sylvania* decision on which it is based. Nor does the BGA cite any other legal authority on the "improper withholding" doctrine whatsoever. The sole case it cites is a forty-year-old Eighth Circuit opinion that provides no support for the BGA's implied claim that it somehow violates FOIA for a public body to issue a report on a subject while also withholding *different information* on the same subject that is legitimately exempt from FOIA. Instead, *State of N.D. ex rel. Olson v. Andrus*, 581 F.2d 177 (8th Cir. 1978), held that "by voluntarily surrendering the documents in [a previous] litigation, the government waived its right to assert that [those same] documents are exempt from disclosure in this action," i.e., a *different* litigation. *Id.* at 179. Here, the BGA's point is that the OSP "improperly withheld" certain information related to the grand jury's investigation because it released completely different information in its report. *Olson* does not speak to that situation.

The BGA's argument is all the more egregious because the OSP was ordered, as part of its appointment, to "submit a final report to [Judge Toomin] and for the benefit of the Cook County Board of Commissioners detailing the progress and ultimate results of the investigation and any criminal prosecutions commenced." (C00311.) The OSP did

not, as the BGA claims, "release the report only to hide behind a protective order and the grand jury secrecy provisions." (BGA Br. at 45.) The OSP was simply fulfilling both its court-mandated duty as a special prosecutor *and* its obligations not to release "matters occurring before the grand jury" imposed, on pain of contempt, by 725 ILCS 5/112-6.

In any case, the Court should reject the BGA's argument because it would require holding that the OSP's withholding was improper *even if* the records the BGA requested are exempt under Section 7(1)(a). Whatever the precise contours of an "improperly withheld" doctrine might be, the BGA's proposal must fall outside it, as it swoops in materials that are, as a matter of law, exempt from FOIA. That cannot be, and is not, right.

CONCLUSION

For the foregoing reasons, the OSP respectfully requests that this Court affirm the judgment of the Illinois Appellate Court.

Date: May 15, 2018

Respectfully submitted,

THE OFFICE OF THE SPECIAL PROSECUTOR, DAN K. WEBB

/s/ Sean G. Wieber
One of Its Attorneys

Daniel D. Rubinstein
Sean G. Wieber
Patrick R. O'Meara
Michael A. Meneghini
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5700
drubinstein@winston.com
swieber@winston.com
pomeara@winston.com
mmeneghini@winston.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

/s/ Sean G. Wieber
One of the OSP's Attorneys

CERTIFICATE OF SERVICE

I, the undersigned attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certify that I caused the foregoing BRIEF OF DEFENDANT-APPELLEE OFFICE OF THE SPECIAL PROSECUTOR, DAN K. WEBB to be served upon the Illinois Supreme Court, by E-File-And-Serve, and upon the below named parties electronically and via E-mail, to the below stated email addresses, on May 15, 2018. The original thirteen (13) copies of the brief will be sent to the Clerk of the Supreme Court upon receipt of the electronically submitted stamped brief. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Matthew Topic
Counsel for Plaintiff-Appellant
LOEVY & LOEVY
311 N. Aberdeen, Third Fl.
Chicago, IL 60607
matt@loevy.com

Irina Y. Dmitrieva
Assistant Corporation Counsel
30 North LaSalle Street - Suite 800
Chicago, IL 60602
irina.dmitrieva@cityofchicago.org

Brendan J. Healey, Esq.
MANDELL MENKES LLC
One North Franklin, Suite 3600
Chicago, Illinois 60606
bhealey@mandellmenkes.com

/s/ Sean G. Wieber
One of the OSP's Attorneys

E-FILED
5/15/2018 5:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

No. 122949

IN THE SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF CHICAGO LAW DEPARTMENT, CITY OF CHICAGO MAYOR'S OFFICE, CHICAGO POLICE DEPARTMENT, and OFFICE OF THE SPECIAL PROSECUTOR, DAN K. WEBB,

Defendants-Appellees.

On Appeal from the Illinois Appellate Court for the First Judicial District
Appeal Nos. 16-1376, 16-1892, 16-2071

Heard on Appeal by the Illinois Appellate Court for the First Judicial District from the Circuit Court of Cook County, Illinois
County Department, Chancery Division, Case No. 15 CH 04183

NOTICE OF FILING

To: Counsel of Record

Please take notice that an electronic copy of Defendant-Appellee Office of the Special Prosecutor's Brief was submitted to the Clerk's Office for filing on May 15, 2018. On that same date, counsel for Defendant-Appellee Office of the Special Prosecutor served upon counsel for Plaintiff-Appellant Better Government Association and Defendant-Appellee City of Chicago Law Department, City of Chicago Mayor's Office, and Chicago Police Department via E-mail a copy of the brief. The original and thirteen (13) copies of the brief will be sent to the Clerk of the Supreme Court upon receipt of the electronically submitted file-stamped brief.

/s/ Sean G. Wieber
One of the OSP's Attorneys

E-FILED
5/15/2018 5:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

CERTIFICATE OF SERVICE

I, the undersigned attorney, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certify that I caused the foregoing NOTICE OF FILING and the documents referenced therein to be served upon the Illinois Supreme Court, by E-File-And-Serve, and upon the below named parties electronically and via E-mail, to the below stated email addresses, on May 15, 2018. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Matthew Topic
Counsel for Plaintiff-Appellant
LOEVY & LOEVY
311 N. Aberdeen, Third Fl.
Chicago, IL 60607
matt@loevy.com

Irina Y. Dmitrieva
Assistant Corporation Counsel
30 North LaSalle Street - Suite 800
Chicago, IL 60602
irina.dmitrieva@cityofchicago.org

Brendan J. Healey, Esq.
MANDELL MENKES LLC
One North Franklin, Suite 3600
Chicago, Illinois 60606
bhealey@mandellmenkes.com

/s/ Sean G. Wieber
One of the OSP's Attorneys

E-FILED
5/15/2018 5:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK