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I. INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide *pro bono* legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The news media rely on freedom of information laws to obtain public records necessary for reporting on government activities, and the Reporters Committee regularly files *amicus* briefs in support of the public's rights of access to public records when such access is threatened. Here, the Office of the Special Prosecutor ("OSP") obtained a protective order with the specific goal of preventing the City of Chicago (the "City") from disclosing public records under the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.* ("FOIA" or the "Act"). The decision of the Appellate Court of Illinois, First Judicial District (the "First District") effectively blesses the use of a protective order to evade the requirements of FOIA and, as a result, threatens the continued ability of the public and the news media to access public records to which they are entitled under the Act. Accordingly, the Reporters Committee files this brief in support of Plaintiff-Appellant Better Government Association ("BGA").

II. INTRODUCTION

Protective orders procured for the express purpose of preventing a government agency from fulfilling its statutory duty to disclose public records under FOIA undermine

Illinois's statutory scheme for the release of public records. Under FOIA, the government may withhold public records based only on a clear exemption found in the Act. See *Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 407 (1997) (“When a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions applies.”) The First District’s decision, however, validates the use of a protective order sought specifically to stymie public access to records that would otherwise be required to be disclosed under FOIA.

In this case, OSP obtained a protective order expressly because it wished to prevent the City’s disclosure of public records under FOIA. *Better Gov’t Ass’n v. City of Chicago*, 2017 IL App (1st) 161376 ¶ 6. As the Appellate Court of Illinois, Fifth District has previously held, however, and as the First District’s opinion below acknowledged, see *id.* at ¶ 49, a government body may not seek a protective order to evade its obligations under FOIA. *Carbondale Convention Ctr., Inc. v. City of Carbondale*, 245 Ill. App. 3d 474 (1993). *Carbondale* is consistent with Illinois FOIA, which states that “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” 5 ILCS 140/1. The First District’s decision in this case to allow a third party—including another government entity like OSP—to seek a protective order for the purpose of engineering an exception to a public agency’s duties under FOIA would, if upheld, have negative effects, particularly in an era of increased privatization.¹

¹ This *amicus* brief addresses only the First District’s holding that certain of the requested records were not “improperly” withheld because the City withheld them pursuant to a protective order. It does not address the additional arguments in favor of reversal raised by BGA, which are fully argued in BGA’s brief.

III. ARGUMENT

The record in this case makes perfectly clear that OSP “requested the protective order ‘to prevent entities like the City from complying with [FOIA] requests for the secret grand jury materials that would inevitably end up in its hands.’” *Better Gov’t Ass’n v. City of Chicago*, 2017 IL App (1st) 161376 ¶ 6. As an initial matter, to the extent that this Court concludes that materials properly designated as grand jury materials are not subject to disclosure under FOIA pursuant to Illinois state law, a protective order designed to shield grand jury materials from disclosure under FOIA is entirely unnecessary.²

On a more fundamental level, however, the First District’s conclusion that the City did not improperly withhold records on the basis of the protective order merely because OSP—not the City—had sought the protective order, *id.* ¶ 49, 51–52, is inconsistent with the persuasive reasoning of prior Illinois case law holding that protective orders designed to elude FOIA are impermissible. In *Carbondale*, the Appellate Court of Illinois, Fifth District, found that permitting a government entity to procure a protective order preventing itself from disclosing records under FOIA “contradicts the purpose and intent of the Act under which the exemptions are intended as shields rather than swords.” 245 Ill. App. 3d at 477. In that case, a government body sought an order allowing it to withhold documents otherwise subject to FOIA. *Id.* at 476. After a newspaper was denied access to records on the basis of the protective order, the court held that the protective order could not render the records exempt from disclosure under the Act. *Id.* at 478.

² BGA argues that the protective order is being used as a basis to withhold records that are *not* grand jury materials. See Pl.’s Pet. for Leave to Appeal, 11–14.

Although the government agency that obtained the protective order in *Carbondale* was the same from which the records were sought, *id.* at 476, the Fifth District’s reasoning is equally applicable in this case. Here, one public agency obtained a protective order to prevent another public agency, the City, from disclosing public records. The court in *Carbondale* properly identified the larger problem with allowing protective orders that are sought for the purpose of evading FOIA to be used to shield information from disclosure under the Act. As stated in Judge Lewis’s concurring opinion, under such an approach, “all information regarding the affairs of government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure.” *Carbondale*, 245 Ill. App. 3d at 479 (Lewis, J., specially concurring).

Allowing a government agency to withhold public records based on a protective order sought for the express purpose of evading FOIA—regardless of whether the protective order was sought by another public agency or a third party—creates an exception to disclosure that could swallow the rule. For instance, fueled in part by greater privatization of government functions, government agencies and officials increasingly contract with third parties, creating an opportunity to do so in a manner that undermines public records laws. A recent report in the *Columbia Journalism Review* describes agreements between state and local governments and technology companies that include provisions concerning public records requests. Mya Frazier, *Big Tech’s Bid to Control FOIA*, *Columbia Journalism Review*, Feb. 2, 2018, <https://perma.cc/3JBN-S8DP>. In one instance, in an agreement with Ohio’s Tax Credit Authority, Facebook requested “prior notice” of any public records request, demanding that such notice be

sufficient to “seek a protective order or other appropriate remedy.” *Id.* Such agreements illustrate the very real possibility that, under the approach adopted by the First District, private companies will seek protective orders for the sole purpose of preventing government agencies from responding to public records requests.

Exempting records from disclosure on the basis of a protective order is also improper because it usurps the legislature’s role in determining what records should and should not be disclosed under FOIA. In enacting FOIA, the General Assembly specifically determined what records should be exempt from disclosure under the Act. Allowing a trial court to create *ad hoc* exemptions by entering protective orders for the sole purpose of restricting the lawful dissemination of otherwise public records in response to FOIA requests ignores the well settled principle that “the court cannot legislate but must interpret the law as announced by the legislature.” *Pritza v. Vill. of Lansing*, 405 Ill. App. 3d 634, 645 (2010); *see also Hill v. Catholic Charities*, 118 Ill. App. 3d 488, 492 (1983) (“It is not the court’s function to annex new provisions, remedy defects or supply omissions.”).

Public access to government records has long been regarded as essential to maintaining democratic government, and FOIA embodies this basic tenet. The use of protective orders aimed at preventing the release of public records, regardless of which party obtains the order, is inconsistent with the State’s public policy of openness and accessibility of public records, *see* 5 ILCS 140/1, and threatens to corrode the democratic principles FOIA safeguards.

IV. CONCLUSION

For the foregoing reasons, the Reporters Committee urges this Court to reverse the First District's determination that the City did not "improperly withhold" records otherwise required to be disclosed under FOIA on the basis of a protective order.

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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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is six pages.

/s/ Brendan J. Healey
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CERTIFICATE OF SERVICE

I certify on this 22nd day of February, 2018, that I caused the Brief of *Amicus Curiae* Reporters Committee For Freedom of the Press in Support of Plaintiff-Appellant to be filed with the Supreme Court of Illinois through its e-filing system.

I further certify that I caused the foregoing to be served by electronic mail upon the following counsel for the parties.

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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.

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