Case No. 122349

In the Supreme Court of Illinois

INSTITUTE FOR JUSTICE, Plaintiff-Appellee-Petitioner, v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, Defendant-Appellant-Respondent.	)	On Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, Case Nos 1-16-2141, 1-16-2294 (consol.) There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 14 CH 19381 Hon. J. Rodolfo Garcia, *Judge Presiding*

BRIEF OF AMICI CURIAE ILLINOIS POLICY INSTITUTE AND EDGAR COUNTY WATCHDOGS IN SUPPORT OF PETITIONER

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POINTS AND AUTHORITIES

INTEREST OF AMICI CURIAE

The Illinois Policy Institute ("IPI") is an independent research and education organization that generates public-policy solutions aimed at promoting personal freedom and prosperity in Illinois. To further its mission and goals, IPI frequently makes requests for government records with state agencies and local governments through the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 140. This case concerns IPI because it could affect its ability to obtain timely and adequate responses to its FOIA requests for government records. IPI seeks to ensure that citizens of the state of Illinois have open access to important state and local government records and documents through FOIA, not only because such access is helpful to its mission of making good public policy, but also because such access is good public policy itself.

The Edgar County Watchdogs ("ECW") is a group of concerned citizens that seeks to foster accountability, truth, and transparency in local governing bodies in Illinois. In pursuing its goals, ECW frequently relies on FOIA to collect, compile, and research public records of local public bodies. This case concerns ECW because it could affect its ability to collect public records through FOIA. ECW seeks to ensure that citizens of the state of Illinois have open access to local government records and documents through FOIA in order to ensure that local governments and their officials remain transparent to their citizens and are held accountable under the law.

INTRODUCTION

In enacting FOIA, the Illinois General Assembly provided a right to access government records to the public, subject to certain exemptions, with a presumption towards disclosing such government records. *See* 5 ILCS 140/1.2, 3. In reality, those seeking government records via FOIA must overcome multiple hurdles in order to obtain them. The Appellate Court's opinion in this case adds to these barriers without any basis in the law.

Petitioner Institute for Justice ("IJ") made a FOIA request with the Department of Financial and Professional Responsibility ("Department") for certain complaints related to hair braiding and cosmetology. The Department unlawfully denied the request, and IJ filed a lawsuit seeking an injunction to force the Department to turn over the relevant complaints. While IJ's lawsuit was pending, the General Assembly passed, and Governor Pat Quinn signed, an amendment to § 4-24 of the Barber Act, 225 ILCS 410/4-24 that exempted from FOIA disclosure the exact category of complaints that IJ's request sought (the "Amendment").

The issue in this case is whether the Amendment applies retroactively to IJ's FOIA request even though the Amendment does not state that it applies retroactively. The circuit court refused to retroactively apply the Amendment to IJ's request and granted an injunction ordering the Department to disclose

the records to IJ. The Appellate Court reversed, holding that, because IJ sought injunctive relief, the court must retroactively apply the Amendment.[1]

Amici curiae IPI and ECW request that this Court grant the IJ's petition for leave to appeal and reverse the Appellate Court's decision because the text of FOIA provided IJ with a substantive claim for public records at the time it made its request, and the Appellate Court's decision undermines FOIA's purpose: providing the public full and complete information regarding the affairs of government. Indeed, if the Appellate Court's decision is allowed to stand, citizens will likely become even more reluctant to file lawsuits to vindicate their right to public records under FOIA, and public bodies will be further emboldened to deny FOIA requests because they will be less likely to be held accountable.

ARGUMENT

I. The purpose of FOIA is to give citizens broad access to public records.

The main purpose of FOIA is to ensure that the public is given full and complete information regarding the affairs of government. *Hoffman v. Dep't of Corr.*, 158 Ill. App. 3d 473, 475 (1st Dist. 1987). FOIA itself states that access to full and complete information regarding the affairs of government is

[1] The First District issued an opinion in *Christopher J. Perry and Perry & Associates, LLC v. Illinois Department of Professional and Financial Responsibility*, 2017 Ill. App. 161780, the same day as its Opinion in this case. These cases involved the same legal issue and the argument section of the two opinions are identical. On June 22, 2017, Perry filed a Petition for Leave to Appeal with this Court (Case No. 122411).

"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. In enacting FOIA, the General Assembly recognized that blanket government secrecy does not serve the public interest and that the sunshine of public scrutiny is the best antidote to public corruption. *Better Gov't Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 818 (4th Dist. 2008).

FOIA declares that operating openly and providing public records as expediently and efficiently as possible is a fundamental obligation of government. 5 ILCS 140/1. And FOIA establishes a presumption of openness towards public requests for inspection of government records, subject to the exemptions listed in the Act. 5 ILCS 140/1.2; *Ill. Educ. Ass'n v. Ill. State Bd. of Educ.*, 204 Ill. 2d 456, 462 (2003)

Because public policy favors maximum disclosure of public records, this Court has repeatedly held that FOIA's exceptions to its default rule of disclosure must be read narrowly. *Ill. Educ. Ass'n*, 204 Ill. 2d at 463. When a public body invokes one of the exceptions listed in FOIA, it must give written notice specifying the particular exemption claimed to authorize the denial. *Lieber v. Bd. of Trs. of S. Ill. Univ.*, 176 Ill. 2d 401, 408 (1997); 5 ILCS 140/9(b). If the party seeking disclosure of information under FOIA challenges a public body's denial in court, the public body has the burden of

proving that the records in question fall within the exemption it has claimed. *Ill. Educ. Ass'n*, 204 Ill. 2d at 464.

II. In practice, citizens seeking public records through FOIA commonly face undue barriers.

Despite these principles supporting full and complete information regarding the affairs of government, in practice, citizens and organizations such as amici curiae often have great difficulty obtaining public records from public bodies via FOIA.

Sometimes this may be the result of a lack of resources. FOIA officers are often unable to respond to FOIA requests by the statutory deadline because of the large number of requests they receive. Alyssa Harmon, *Illinois's Freedom of Information Act: More Access or More Hurdles?*, 33 N. Ill. U. L. Rev. 601, 615 (2013). Further, FOIA officers are rarely supervised to ensure that they timely respond to requests. *Id.* And FOIA officers often have other job responsibilities that compete with their FOIA obligations for priority.

Even where FOIA officers have the resources they would need to timely and fully respond to a FOIA request, they might lack the incentive to do so – and might actually have incentives *not* to release records. *See* Harmon, *supra* at 613. A FOIA officer suffers no legal repercussions for wrongfully withholding documents a citizen requests through FOIA[2] but could be subject to internal reprimands or other consequences for erroneously releasing

[2] Recent legislation makes it a crime to "conceal[]" a public record "without lawful authority and with the intent to defraud" but does not criminalize ordinary wrongful denials of FOIA requests. *See* 50 ILCS 205/4(a).

documents that are exempt from FOIA – making a FOIA officer's safest course to err on the side of caution and default to nondisclosure when unsure. *See id*.

In some circumstances, the political sensitivity of requested records may provide additional reason to delay or fail to respond. *See* Mary M. Cheh, *Making Freedom of Information Laws Actually Work: The Case of the District of Columbia*, 13 UDC-DCSL L. Rev. 335, 349 (2010). The identity of the requestor may also affect whether the government agency delays or responds to a request. *See* Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. City L. Rev. 387, 416 (2010). Indeed, a public body may be more inclined to deny requests from individuals and groups perceived as having opposing goals and viewpoints. *See* Harmon, *supra* at 613; Cox, *supra* at 416. Studies have shown that requests from journalists and political activists are routinely denied. *See* David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws*, 15 Comm. L. & Pol'y 203, 206 (2010). These concerns are not theoretical to amici curiae IPI and ECW, whose viewpoints and efforts to hold public bodies and officials accountable are well known by many officials at the public bodies to which they submit FOIA requests. *See e.g.*, Steve Mills, *Small-town watchdogs search for misconduct, misspending*, Chi. Trib. (Mar. 2, 2015), https://goo.gl/xrmN5K (noting that local officials

know ECW and that ECW members "rub a lot of public officials the wrong way").

A person whose FOIA request is denied or not answered by a public body has only two options to remedy such denial: seek review by the Public Access Counselor ("PAC"), 5 ILCS 10/9.5(a), or file a lawsuit, 5 ILCS 140/11(a). Neither of these options promises swift relief to a citizen whose FOIA request has been wrongfully denied – and neither provides a strong incentive for FOIA officers to comply with requests.

Seeking review by the PAC does not guarantee a FOIA requestor prompt relief, or any relief at all. An appeal before the PAC can take a long time – months, a year, or even longer – because the law imposes no deadline for the PAC to resolve a case. And the PAC is not required to issue a binding decision; it can merely provide a non-reviewable non-binding opinion, which a public body is free to disregard. *See* 5 ILCS 10/9.5(f). And even if a requestor does win a binding decision from the PAC, a public body can seek administrative review in the courts, forcing the requestor to endure further months of delay and bear significant additional costs.

Of course, the time and money that lawsuits require deters many citizens from challenging the denial of their FOIA requests. Indeed, even organizations that frequently make FOIA requests and have some resources, such as the amici, do not have enough resources to file a lawsuit every time that they believe a request was wrongfully denied. Because of this,

government agencies know they are unlikely to be challenged for illegitimately denying a FOIA request. *See* Harmon, *supra* at 613 (suggesting that only about three percent of requests are litigated in court or appealed administratively). Even if one assumes most public officials would not willfully violate the law, a FOIA officer's knowledge that a citizen is unlikely to sue may make him or her more likely, in close or otherwise difficult cases, to err on the side of non-disclosure.

One problem with litigating to obtain requested records is that the information citizens seek through FOIA is time-sensitive and therefore becomes less valuable over time – so that success in court would come too late to be useful. *See* Cheh, *supra* at 349. Even though courts are supposed to prioritize FOIA lawsuits over most other cases, 5 ILCS 140/11(h), these cases still take months or years. (For example, amicus curiae IPI is still awaiting a decision from the Circuit Court in a straightforward FOIA case filed in November 2013, *Reeder v. Ill. Dep't of Corrs.*, Sangamon County Circuit Court No. 2013-MR-1074.) As a result, by forcing citizens to pursue records through litigation, public bodies and officials can delay damaging disclosures and avoid political accountability, contravening FOIA's purpose.

FOIA's provision authorizing awards of attorneys' fees to prevailing FOIA plaintiffs, 5 ILCS 140/11(i), does not provide a strong deterrent against wrongful denial of FOIA requests. Of course the officials who deny FOIA requests do not pay the fee awards; taxpayers do. And, again, a public body

can be confident that, in most cases, a FOIA requestor will not challenge a denial in court – so attorneys' fees never become an issue. And in the rare case where a plaintiff does sue to challenge an indefensible denial of a FOIA request, the public body can respond by simply offering to produce the records that it should have produced in the first place in exchange for the requestor waiving his or her right to attorneys' fees – an offer a plaintiff can hardly refuse. In fact, amicus curiae IPI has had this experience: more than once, it has filed a lawsuit challenging the denial of a FOIA request, and the public body has promptly offered to produce the records in exchange for a release of any claim for attorneys' fees.

III. The Appellate Court's decision adds to the barriers for citizens seeking public records via FOIA, and does so contrary to law.

As the previous section explains, it is already typically easy for public bodies to avoid fulfilling their obligations under FOIA – and, conversely, difficult for citizens to enforce their rights under FOIA – despite the state's strong public policy favoring disclosure of public records. The Appellate Court's decision would make this bad situation worse by adding to the barriers that members of the public, including the amici, face when requesting public records through FOIA. It is also contrary to the law.

A. The Appellate Court's decision places additional barriers to those seeking access to public records.

Allowing the Appellate Court's decision to stand would provide another reason *not* to file a lawsuit challenging a denial of a request for records. As

discussed above, even before the Appellate Court's decision, a person whose FOIA request was illegally denied by a public body faced substantial barriers to filing a lawsuit. After the Appellate Court's decision, a potential plaintiff must add another barrier to the calculus of determining whether the costs of filing suit to obtain public records illegally denied outweigh the benefits – that he or she could be denied access to public records *to which he or she was legally entitled at the time of the FOIA request* because the law was amended to exclude such records while the case was pending.

As a result, government agencies would be held even less accountable for their denials of requests for public records than they are now and therefore would have even more incentive to illegally deny a legitimate FOIA request because it will be even less likely that such a person would file a lawsuit to obtain such records. One consequence, then, of the Appellate Court's decision is that the intent of FOIA – giving full and complete information regarding the affairs of government, *Hoffman*, 158 Ill. App. 3d at 475 – will further be thwarted.

Another consequence of allowing the Appellate Court's decision to stand will be increased incentive by public bodies to lobby the legislature to amend FOIA to add exemptions for records sought by individuals that the public body does not want to disclose. When a public body gets requests for records that it does not want to disclose, the Appellate Court's decision gives it a clear strategy. First, the public body can delay responding to such a request,

or not respond to the request at all. Again, the public body and its officials are unlikely to face any negative consequences for doing so. Even in the increasingly unlikely event that a requestor files a lawsuit, the public body can employ the second part of the strategy: lobbying the legislature for an exemption. Indeed, that appears to be exactly what happened in the case before this Court: after IJ issued a FOIA requesting seeking hair braiding and cosmetology complaints, the Department wrote and submitted a bill to the Illinois legislature that would exempt the disclosure of such records from FOIA. *See* House of Representatives, Transcription of Debates, State of Illinois, 98th General Assembly, 115th Legislative Day, at 52 (April 4, 2014), https://goo.gl/nRyUyd.

The result of the Appellate Court's decision is that even though the Department had no legal basis on which to deny IJ's FOIA request at the time it was made, the Department will not have to turn over those public records. Thus, the Appellate Court's decision allows a public body to justify its past illegal acts with no consequences, undermining FOIA's own promise of access to government records.

This leads to another consequence of the Appellate Court's opinion: the public's trust in government will be further undermined. What is the Illinois citizen to think upon learning that, yes, they *were* entitled to certain public records when they made their FOIA request, but, no, they still cannot have the records because, after the agency illegally denied their request, it lobbied

its friends in the legislature to pass a law to justify its denial after the fact? Regrettably, Illinoisans have been given many reasons over the years to distrust state and local governments and their officials. Allowing the Appellate Court's decision to stand could only deepen their distrust.

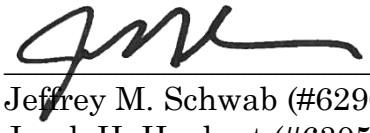
B. The Appellate Court's decision is contrary to law.

The Appellate Court's decision not only contravenes the public policy underlying FOIA; it also contradicts the law. It ignores the accrued statutory right that a person making a FOIA request for public records has to such records *at the time the request is made*. As Justice Delort noted in his dissent to the Appellate Court's opinion, the right to obtain the public records from the Department vested at the time when IJ made its FOIA request – before the enactment of the Amendment. Opinion, ¶ 40 (Delort J., dissenting) (A16). As this Court has held, where a law is amended during the pendency of a lawsuit for injunctive relief, and the law does not specify whether it applies retroactively, then the amended law will only apply retroactively to that lawsuit only if the amendment to the law is procedural in nature, not if the amendment is a substantive change in the law. *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 32. An amendment to a law is substantive if it affects a right accrued or a claim arising under the former law. 5 ILCS 70/4. Because IJ had a substantive claim for public records at the time it made its request, the Amendment cannot be retroactively applied to it.

CONCLUSION

The principles that the General Assembly set forth in FOIA support a broad understanding of the public's ability to obtain public records from state and local governments in Illinois. But in practice, numerous barriers exist for one seeking public records under FOIA. Courts should not add to these barriers unless such barriers are clearly set forth by the legislature itself. Where the legislature has not sought to impose retroactive application limiting an existing right to public records, the courts should not impose one because access to public records is a vested right provided to a person making a FOIA request at the time of the request. Therefore, amici curiae IPI and ECW respectfully request that the Court grant the IJ's petition for leave to appeal and reverse the Appellate Court's opinion.

Dated: July 20, 2017



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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 13 pages.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Jeffrey M. Schwab, an attorney, certify that on July 20, 2017, I caused the foregoing Brief of Amici Curiae Illinois Policy Institute and Edgar County Watchdogs in Support of Petitioner to be served via electronic mail on all attorneys on the attached service list.

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