

Informing Illinois Newsletter - February 2018 Edition

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Illinois Supreme Court Set to Consider Whether a Court Order Can Preempt a FOIA Request

By Raylene DeWitte Grischow

The Illinois Supreme Court is set to determine whether an agency or municipality may refuse to disclose a document requested under the Freedom of Information Act (FOIA), if a court order protects the document.

Background

The case dates back to 2004 when Richard J. Vanecko allegedly assaulted David Koschman. Mr. Vanecko is related to Chicago Mayor Richard M. Daley. Initially, there were no charges filed in the assault of Mr. Koschman. Mr. Koschman's family filed a petition for appointment of a special prosecutor to investigate whether criminal charges should be brought. The petition was granted.

While a grand jury was empaneled, the Office of Special Prosecutor filed a motion requesting a protective order be issued "to prevent entities like the City from complying with the FOIA requests for secret grand jury materials that would inevitably end up in its hands." The motion was granted and protective order was entered.

After an indictment was issued, the City of Chicago requested that the protective order be unsealed to resolve a FOIA request made by the *Chicago Sun-Times*. The motion was granted. Uncertainty followed regarding what records were covered by Judge Toomin's protective order, and a second protective order was entered prohibiting the City from complying with any FOIA request that would identify or characterize documents that were "disseminated to the [OSP] in furtherance of" the grand jury investigation.

Subsequently, the Better Government Association (BGA) sent a FOIA request to the City of Chicago seeking documents that were specifically protected by the protective order. The City denied the requests, citing section

7(1)(a) of FOIA which exempts documents from disclosure if disclosure is prohibited by “State law.” 5 ILCS 140/7(1)(a) (West 2014).

Since the FOIA request was denied, the BGA filed a complaint for injunctive and declaratory relief.^[1] The City filed a motion to dismiss arguing that the protective order was a “State law” for the purpose of section 7(1)(a) of FOIA, but the motion was denied. The reasoning being that the protective order was not “State law” for purposes of FOIA.

The City filed a motion to modify the protective order after a preliminary ruling requiring disclosure of some of the records covered by the protective order. The motion to modify was denied due to the importance of secrecy in grand jury proceedings.

Appellate Court Seeks to Adopt a “Straightforward Rule”

The story did not end there. An appeal followed and the appellate court found that the judge did not abuse his discretion when he found that a protective order was still necessary to protect certain aspects of the grand jury’s investigation. Because the court upheld the judge’s order, it was required to determine whether the City must still disclose the documents under FOIA. The court looked to the U.S. Supreme Court and ultimately determined that the broad purposes of federal FOIA were inapplicable when the agency in question was subject to an injunction. Therefore, the agency did not have the authority to release the documents requested.

The appellate court explained that Illinois FOIA only allows a court to order a public agency to produce documents when the agency has “improperly” withheld them. The court chose to adopt the “straightforward rule” and “respect for the judicial process” required that an injunction could theoretically allow a public agency to withhold materials otherwise disclosable under FOIA.

Significance and Next Steps

Under the appellate court ruling, respect for the judicial process requires that a lawful court order must take precedence over the disclosure requirements of FOIA and that a public body refusing to disclose documents because a court order commands it to do so does not always withhold those documents “improperly.” This rule does not apply if the agency helps obtain a court order and then claims that the order prevents it from releasing otherwise discoverable documents. In the wake of *Better Government Ass’n*, an agency or municipality may refuse to disclose a document if a court order demands it as long as the agency or municipality was not a party to the motion seeking the protective order.

The Illinois Supreme Court will now determine whether this rule will be upheld.

The case is *City of Chicago v. Office of the Special Prosecutor (In re Special Prosecutor)*, 2017 IL App (1st) 161376.

Town Supervisor Sentenced to 30 Months in Prison in Municipal Bond Securities Fraud Case

By Ken Yeadon

In the first case of its kind, a town supervisor in Ramapo, New York was convicted of criminal securities fraud relating to his municipality's bond offerings. The U.S. Department of Justice, along with the SEC, charged Christopher St. Lawrence with defrauding investors in municipal bonds issued by Ramapo and a corporation owned by the Town, the Ramapo Local Development Corporation, or RLDC. Ramapo is a community with a population of about 127,000, and is 30 miles from New York City.

The Ramapo case revolved around St. Lawrence's efforts to build a minor league baseball stadium despite the Town's financial problems and overwhelming voter dislike for the idea. Even though voters in 2010 had rejected the Town's guarantee of bonds to pay for the stadium and St. Lawrence publicly declared that no public money would be used to pay for the stadium, the Town paid for more than half of the stadium's cost. By August 2015, Ramapo had more than \$128 million in outstanding bonds for various municipal purposes. The RLDC had issued \$25 million in bonds to pay for the stadium's construction.

At trial in May 2017, the government proved that, in order to raise money from the sale of municipal bonds for the Town and the RLDC, St. Lawrence caused the Town and RLDC to issue official statements in connection with bond offering that lied to investors. The official statements misrepresented the deteriorating state of the Town's finances and the inability of the RLDC to make scheduled payments of principal and interest from its own money. In one instance, St. Lawrence also lied to the RLDC's bond rating service, claiming in a telephone call that the Town's general fund balance would remain unchanged from 2011 to 2012. A jury convicted St. Lawrence after a four week trial in federal district court.

The Ramapo case is unlikely to be the last public finance prosecution. The municipal bond market is worth more than \$3.7 trillion, and is an important source of capital for local infrastructure projects. Both the Department of Justice and SEC have emphasized the importance of protecting investors in, and the integrity of, this market. The SEC itself formed a unit that specializes in the municipal bond market comprised of attorneys and investigators, and part of the unit works out of the SEC's Chicago Regional Office.

The Ramapo case shows that the courts are likely to take very seriously fraud involving the municipal bond markets. When he was sentenced in December 2017, St. Lawrence was 67 years old and had been a life-long resident of Ramapo. He has been elected Town Supervisor multiple times. During his 16 years of service as Town Supervisor, he had done a number of good things for the Town.

St. Lawrence was nonetheless sentenced to 30 months in prison and fined \$75,000. In sentencing St. Lawrence, the judge called his crimes serious, and said that St. Lawrence had compromised the municipal bond market by lying continuously over the years and hiding the Town's financial problems to get the baseball stadium and other projects done. According to local media accounts, the judge said that St. Lawrence "thought it was a great idea, even though his constituents didn't," referring to the baseball stadium. "He chose over and over to scheme, hide the truth and lie over the years." In her concluding remarks, the judge said that, if St. Lawrence had told the truth, "it would be a disagreement over policy and there would be no fraud."

The Ramapo case also highlights a common misconception about the securities laws, as well as the federal wire and mail fraud laws. St. Lawrence argued at trial that he was innocent of the charges because no investors were

harmful, the bonds were repaid in full and on time, and that he did not personally gain from the fraud. None of that matters. The law does not require that anyone actually have lost money, or made money, to be found guilty of fraud. The government only needs to show that the individuals charged with fraud knowingly and intentionally engaged in a scheme to defraud investors by making material misrepresentations, which is what the trial evidence showed that St. Lawrence did.

2018 PAC Opinions

By Charles Schmadeke

No. 18-001

A FOIA request was issued that sought an unredacted copy of a resignation letter from a village president. The PAC opinion stated that while redacted information may be characterized as the opinion of the village president concerning the circumstances related to his resignation, there was no basis to conclude that the statement was made in the context of pre-decisional, deliberative process. Hence, the email was not exempt from disclosure pursuant to Section 7(1)(f) of FOIA.

Section 7(1)(n) of FOIA exempts from disclosure “records relating to a public body’s adjudication of an employee’s grievance for disciplinary cases.” The Illinois Appellate Court has construed “adjudication” as a “formalized legal process that results in a final enforceable decision.” According to the PAC opinion, the village president’s resignation did not represent an ongoing adjudication of employee grievances, and the village did not meet its burden under 7(1)(n) of demonstrating that the redacted information was exempt from disclosure.

[1] *City of Chicago v. Office of the Special Prosecutor (In re Special Prosecutor)*, 2017 IL App (1st) 161376.

For more information, please contact Charles Schmadeke.

Related People



Charles R. Schmadeke

Partner in Charge of Springfield Office

📞 217-467-4914

