

No. 4-08-0173

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

BETTER GOVERNMENT ASSOCIATION, and DAN SPREHE)	Appeal from the Circuit Court of Sangamon County
Plaintiffs-Appellees,)	
vs.)	No. 07-MR-5
ROD R. BLAGOJEVICH, in his capacity as) Governor of the State of Illinois and THE OFFICE))	Honorable Patrick Kelley, President Judge
GOVERNOR ROD BLAGOJEVICH,)	
Defendants-Appellants.)	

**REPLY BRIEF AND ARGUMENT
OF PLAINTIFFS-APPELLEES**

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ORAL ARGUMENT REQUESTED

ARGUMENT

This matter involves a FOIA request to the Office of the Governor for copies of subpoenas issued to that office by the U. S. Attorney for the Northern District of Illinois. The Governor has asserted several statutory exemptions, none of which apply to the requested records.

The Governor first argues that the subpoenas are exempt pursuant to Federal Rule of Criminal Procedure 6(e). Exemption (7)(1)(a) of the Illinois Freedom of Information Act exempts from disclosure any records specifically prohibited from disclosure by Federal law or rule.

Now would be a good time to remember legislative policy and rule of construction relating to exemptions to disclosure under the Illinois Act. They are to be narrowly construed, with a presumption in favor of disclosure.

Rule 6(e)(2) and (3) provide in full:

(2) Secrecy.

- (A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).
- (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
 - (i) a grand juror;
 - (ii) an interpreter;
 - (iii) a court reporter;
 - (iv) an operator of a recording device;

- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

3. Exceptions.

- (A) Disclosure of a grand-jury matter – other than the grand jury’s deliberations or any grand juror’s vote – may be made to:
 - (i) an attorney for the government for use in performing that attorney’s duty;
 - (ii) any government personnel – including those of a state, state subdivision, Indian tribe, or foreign government – that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law; or
 - (iii) a person authorized by 18 U.S.C. §3322.

As is apparent from the face of the Rule, grand jury witnesses are not among the group subject to the rule. Governor Blagojevich is not limited in his ability to release these subpoenas by Rule 6(e). The Governor admits that witnesses, nor even targets of the investigation, are not among the persons enumerated by the Rule. During the motion hearing before the Circuit court, counsel for the Governor had the⁴ following exchanges with the Court:

MR. LONDRIGAN: that's – that's true, however, that involves the responsibility of the individual named, and if you will look at those named individuals, each of them has something to do with the transcription in the secret proceedings that are involved, and then it is expanded to (i)(ii), to other officials of government that say a United States Attorney might decide was absolutely essential in going ahead with this proceeding.

THE COURT: But never to the recipients of the subpoenas?

MR. LONDRIGAN: That's right, and I understand that.

And further:

I do have one question for you, Mr. Londrigan. Say a person receives a Federal Grand Jury subpoena from the Northern District of Illinois. Could that person be subject to either the contempt powers of the Court or criminal prosecution if that person voluntarily discloses that subpoena to somebody else?

MR. LONDRIGAN: No, sir.

THE COURT: All right, thank you.

Likewise, the Committee Notes reflect that subpoenas are not specifically subject to Rule 6(e):

Rule 6(e) does not provide specific guidance on whether a grand jury's subpoena should be kept secret. Additionally, case law has not consistently stated whether the subpoenas are protected by Rule 6(e).

Fed. R. Crim. P 6(e)(6) Advisory Committee Notes to 1983 amendments.

The Governor's burden in this instance is to demonstrate that the federal Rules specifically prohibit disclosure. Given his admission that witnesses are not specifically subject to the Rule, he fails to meet his burden.

Northern District Rule 6.2 likewise fails to assist the Governor. One need not read past the Heading of the Rule. By its terms, the Rule applies only to records in the possession of the Clerk of the Court.

The Governor, who seems to paint himself now as a likely defendant (page 15 of Appellant's Brief) simply does not make the case for an exemption pursuant to federal law or rule.

Exemptions 7(1)(c)(i) and (c)(viii)

These exemptions state as follows:

(c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:

(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;

(viii) obstruct an ongoing criminal investigation.⁵ ILCS 140/7

There is simply no evidence in this record to suggest that disclosure of these subpoenas would interfere with an investigation. There are unsworn, hearsay statements from the Office of the U. S. Attorney, but there is no evidence in the record. There is

evidence the U. S. Attorney was made aware of this litigation, but the absence of a Petition to Intervene, or even an affidavit to support the Governor's conclusion, speaks volumes.

Exemptions c(vi) and b(v)

Again, there is no evidence in this record that these exemptions apply.

Plaintiff asked this Court to review the subpoenas. The Defendant objected, and the Court chose to forge ahead without an in camera inspection. Defendant presented no evidence about what appears on the face of the subpoenas, and there is no evidentiary support that the identifies of any individuals will be revealed. *Baudin v. City of Crystal Lake* 192 Ill.App.3d 530, 533, 548 N.E.2d 1110, 1111, 139 Ill.Dec. 554, 555 (Ill.App. 2 Dist.,1989) And, the sub (b) exemptions are prefaced with the language that information related to the public duties of public officials should be considered and invasion of privacy. *Reppert v. Southern Illinois University*, 375 Ill.App.3d 502, 314 Ill.Dec. 540, 874 N.E.2d 905 (2007), and *Stern v. Wheaton-Warrenville Community Unit School Dist. 200*, 2008 WL 2358726, 2 (Ill.App. 2 Dist.) (Ill.App. 2 Dist.,2008).

The subpoenas at issue are directed to the office of the Governor. Mr. Blogojevich, individually, is not a party to this matter though he now apparently refers to himself as a likely or actual defendant.

There is no evidence in this record that these subpoenas concern anything other than the public duties of public officers or employees, and these exemptions do not apply.

Supremacy Clause

Defendant's arguments relating to the Supremacy Clause fail for the same reasons stated above. Defendant simply fails to demonstrate a conflict between state and federal law. There is no federal law which prohibits the disclosure of a subpoena by a witness.

Newly Discovered Evidence

This is laughable. The Governor does not explain why he did not present a letter, or an affidavit from the U. S. Attorney until after this Court had ruled.

The record is clear that Plaintiff had notified the U. S. Attorney of this matter, and the Defendant was aware of such notification. Where is the due diligence? Where is the argument, much less any evidence, that the Governor made any attempt to contact the U. S. Attorney before the January 9 hearing in this matter? The trial court was correct on this matter.

CONCLUSION

For all of these reasons, the judgment of the Circuit Court of Sangamon County should be affirmed.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(e). The length of reply brief is seven pages.

BETTER GOVERNMENT ASSOCIATION and
DAN SPREHE, Plaintiffs-Appellees

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on:

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by placing the same in an envelope clearly address, with postage fully pre-paid, and by placing said envelope in a U. S. Mailbox on July 15, 2008.
