

LEGAL ALERT

Court Finds Education Foundation of the College of DuPage Subject to FOIA

The fundraising entity College of DuPage Foundation ("Foundation"), which is closely affiliated with the College of DuPage, has been determined to be subject to FOIA. The Foundation was found to have contracted with the College of DuPage ("COD") to perform a governmental function of the College, and that its records were therefore "public records" of a "public body" subject to FOIA. The Court was careful to note however that its holding is unlikely to apply to "parent-teacher associations, booster clubs, and other volunteer organizations that fundraise to support schools," as "[t]hose organizations are often run by volunteers, are not under contract to manage a school's entire endowment, and are not staffed by public employees who receive state health and retirement benefits."

A summary of the key findings as well as a more detailed summary of the decision in *Chicago Tribune v. College of DuPage* are set forth herein.

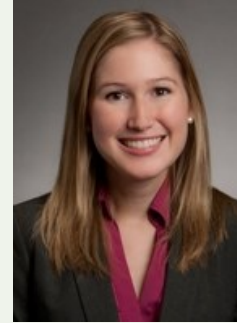
A copy of the decision of the Court can be found at:

Chicago Tribune v. College of DuPage

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Inside This Issue

Chicago Tribune v. College of DuPage
Summary of Decision.....2-3
Detailed Summary>.....4-6



IHSA Found Not To Be Performing Governmental Function and Not Subject to FOIA

This *Chicago Tribune v College of DuPage* decision from the Second District Appellate Court, in some respects is at odds from the decision from the First District Appellate Court in *Better Government Ass'n. v. Illinois High School Ass'n.*, 2016 IL App (1st) 151356 (2016). In that matter the Better Government Association (BGA) sought all of IHSA's contracts for accounting, legal, sponsorship, and public relations/crisis communications services. The IHSA is a voluntary, unincorporated association with over 800 public and private high school members. The IHSA is a 501(c)(3) charitable organization that files its own tax returns and employs a full time executive director. Its revenue is generated from the conduct of interscholastic

Key Findings of Court in *Chicago Tribune v College of DuPage* – Practice Recommendations

The Court in *Chicago Tribune v. College of DuPage* found that the College of DuPage Foundation ("FOUNDATION") contracted with the College of DuPage ("COD") to perform a governmental function, and, therefore, its records were considered a "public record" of a "public body" subject to FOIA. In determining what may constitute a non-governmental third party potentially subject to FOIA, the circumstances related to the operation of this FOUNDATION are significant. In the case of the FOUNDATION, many factors were used to determine that it was performing a governmental function of the COD:

- A memorandum of understanding was entered into by and between the FOUNDATION and the COD outlining the role of the FOUNDATION in performing the fundraising of the COD;
- The Executive Director and Assistant Executive Director of the FOUNDATION were both employed by the FOUNDATION and the COD in a dual capacity with their salaries split by each organization;
- The FOUNDATION was an ongoing business. The day-to-day business of the FOUNDATION was carried out by an 11-member staff of the COD employees, who each had phone numbers and e-mail addresses from the COD, and these staff members were members of the State Universities Retirement System;
- The FOUNDATION was the primary depository of private donations to the COD, and donors contacting the COD were directed to the FOUNDATION to make donations (the COD would not accept the same);
- The FOUNDATION maintained the endowment for the COD;
- The COD provided the FOUNDATION with fully furnished and equipped office space on the COD campus rent-free;
- The COD president, after consultation with the FOUNDATION Board, was entitled to recommend an individual to serve as the executive director of the FOUNDATION; and
- The FOUNDATION was allowed to use the COD's name, logo and marketing brand.

The Appellate Court, in its own words, suggested that its holding would most likely not apply to "parent-teacher associations, booster clubs, and other volunteer organizations that fundraise to support schools," as "[t]hose organizations are often run by volunteers, are not under contract to manage a school's entire endowment, and are not staffed by public employees who receive state health and retirement benefits."



Before a local government and its Foundation can be comfortable that FOIA will not reach the records held by the Foundation, the unit of local government and Foundation should review: their overall relationship; any contracts between the organizations; any joint employees, shared space, facilities or equipment; governmental function that may be administered by the Foundation; by-laws of the Foundation; ex-officio positions filled by the local government in the Foundation; and overall control of the Foundation by the unit of local government.

This decision could have broad implications for public bodies that outsource any governmental authority or responsibilities to non-governmental entities. However, we note that the First District and Second District Appellate Courts have taken somewhat distinct positions as to the application of Section 7(2) of the Act. [See reference herein to *Better Government Ass'n. v. Illinois High School Ass'n.*, 2016 IL App (1st) 151356 (2016)] That being said, even for those units of local government within the First District that are not necessarily bound by this recent decision of the Second District, it would be prudent to review your contracts with third-party, nongovernmental contractors to determine whether FOIA will apply to the records in possession of the third party.

In addition, if any such volunteer or charitable entity related to a school district or local government appeared to meet these same criteria identified by the Court in *Chicago Tribune v. College of DuPage*, i.e. they perform a governmental function for an entity covered by FOIA and the records would become the public records of a public body subject to FOIA, consideration should also be given to the fact that such an entity may also be subject to the requirements of the Open Meetings Act.

(cont'd from page 2)

athletic events and sponsorships. The board of directors of the IHSA is composed of elected principals from the member private and public schools, and they are not employed or paid by the IHSA. The daily operations of the IHSA were paid for from IHSA revenues and performed by the executive director and his staff as employees of the IHSA. The staff were not government employees and not participating in or eligible for any public employment benefits or pensions. The IHSA owned its own offices. Based on its analysis of the relationship of the IHSA to its member schools, the Court there found that the IHSA was not a subsidiary public body of a public school or schools under FOIA and that the IHSA was not performing a governmental function for its member schools to render IHSA subject to FOIA pursuant to section 7(2) of FOIA.

FULL SUMMARY OF APPELLATE COURT DECISION IN *CHICAGO TRIBUNE V. COLLEGE OF DUPAGE*

Second District Appellate Court Affirms Not-for-profit Foundation May Be Subject to FOIA if Performing a Governmental Function

On May 9, 2017, the Illinois Appellate Court provided insight into what constitutes a “governmental function” for purposes of Section 7(2) of the Freedom of Information Act (“Act”), 140 ILCS 5/7(2), and affirmed that a nongovernmental, not-for-profit organization, may be subject to FOIA, pursuant to Section 7(2). Section 7(2) provides:

A public record that is not in the possession of a public body but is in the possession of a *party with whom the agency has contracted to perform a governmental function on behalf of the public body*, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act. (*emphasis added*) 5 ILCS 140/7 (2).

In *Chicago Tribune v. College of DuPage*, 2017 IL App (2d) 160274 (2017), the Chicago Tribune sued the College of DuPage (“COD”) and College of DuPage Foundation (“FOUNDATION”) to obtain a federal grand jury subpoena that was served on the FOUNDATION. The COD is a “public body” as defined in the Act, created under the Public Community College Act. The FOUNDATION, however, is a not-for-profit corporation that exists to support the educational mission of the COD by raising money to fund the COD’s academic programs, capital programs and student scholarships. The relationship of the parties is memorialized via a Memorandum of Understanding (“MOU”) that designates the FOUNDATION as the primary depository of private donations on behalf of the COD.

The Chicago Tribune’s lawsuit was based on the premise that the FOUNDATION was subject to FOIA either as a subsidiary of a public body¹ or under Section 7(2) of the Act because the FOUNDATION had contracted with the COD to perform a governmental function, and the subpoena directly related to that governmental function. The COD and FOUNDATION response, relying on the decision in *Better Government Ass’n. v. Illinois High School Ass’n.*, 2016 IL App (1st) 151356 (2016), argued that: (1) the subpoena was not subject to FOIA because it was not a “public record,”

¹ Although the Chicago Tribune argued this point at trial and the Circuit Court rejected this argument, the Circuit Court ultimately granted the relief requested by Chicago Tribune under Section 7(2) of the Act. Therefore, the Second District Appellate Court rejected the Chicago Tribune’s appeal of the Circuit Court’s decision that the Foundation was not a subsidiary of a public body.

which is the threshold question under Section 7(2) of the Act; and (2) that the FOUNDATION was not performing a governmental function.

The circuit court held in favor of the Chicago Tribune, finding that although the FOUNDATION was not itself a public body or subsidiary of the COD, the FOUNDATION had contracted to perform a governmental function on behalf of the COD within the meaning of Section 7(2) and the subpoena related directly to that function. That decision was affirmed by the Illinois Appellate Court, Second District.

First, the Illinois Appellate Court found that, under the plain reading of Section 7(2) of the Act, records that are possessed by a party under contract with a public body to perform a governmental function, and that directly relate to that government function, are "public records" of said "public body." Therefore, even though a public body may not physically possess records sought in a FOIA request, under Section 7(2), the Appellate Court found that the public body must attempt to obtain them if they directly relate to a governmental function that the public body has delegated to a third party pursuant to a contract. The Second District rejected the analysis from the First District Appellate Court in *Better Government Ass'n.* where the First District held that the requested records must independently satisfy the definition of "public record" under Section 2(c) of the Act to trigger an analysis under Section 7(2) of the Act.

Second, the Appellate Court found that the FOUNDATION performed a governmental function on behalf of the COD within the meaning of Section 7(2) of the Act. In so finding, the Appellate Court rejected the FOUNDATION's "narrow" view that a governmental function is any act that can be performed only by exercising governmental power. Further, the Appellate Court rejected the COD's argument, relying on the decision in *Better Government Ass'n.*, that a "governmental function" is any act that a private entity cannot perform. Instead of making any broad-sweeping definition of a "governmental function," the Appellate Court declared that such analysis must be subject to a fact-specific inquiry "with an eye toward the particular public body's role and responsibilities and keeping in mind the specific act that it has contracted a third party to perform on its behalf." Examining the relationship between the parties, the Appellate Court found that the FOUNDATION was performing a governmental function on behalf of the COD by way of the MOU between the parties.

Specifically, the Appellate Court found persuasive the fact that after the MOU was established, the COD no longer engaged in its own fundraising efforts and all private fundraising efforts were centralized in

the FOUNDATION. It further emphasized that (1) the COD had directed individuals to make donations to the FOUNDATION, (2) the FOUNDATION and COD had “closely coordinated fundraising priorities, donor targets and other affairs” that usually would have been handled by a public college’s development office, and (3) the COD did not have a private fundraising operation separate from the FOUNDATION. In sum, the Appellate Court found that the FOUNDATION was performing all fundraising responsibilities that the COD would have been performing absent the MOU². Based on these facts, the Appellate Court held that the FOUNDATION was performing a governmental function on behalf of the COD within the meaning of Section 7(2), and therefore, any document directly related to that function (i.e. the subpoena) was subject to FOIA pursuant to Section 7(2).

² Although the Second District Appellate Court emphasized that the Foundation was performing all the fundraising functions of the College, Section 7(2) does not provide that the Foundation must have been performing all of the government function on behalf of the College. Therefore, it is difficult, at this time, to surmise whether courts in the future will construe Section 7(2) differently if the contracting foundation or other third party is not performing all of the administration of said governmental function.

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