OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 26, 2006

Via Facsimile & U.S. Mail

Mr. William Quinlan
General Counsel
Office of the Governor
James R. Thompson Center
100 West Randolph Street, 16th Floor
Chicago, Illinois 60601

Dear Mr. Quinlan:

The Office of the Attorney General has received numerous inquiries regarding whether the Office of the Governor and agencies under the Governor's control must produce Federal grand jury subpoenas for inspection and copying pursuant to the provisions of the Freedom of Information Act (the Act) (5 ILCS 140/1 *et seq.* (West 2004). Among those who have inquired is the Better Government Association (BGA), whose request for copies of certain Federal subpoenas was denied by the Office of the Governor. Based upon the information with which we have been furnished, the exceptions to the disclosure requirements of the Act cited by the Governor's office do not authorize withholding the subpoenas. The purpose of this letter is to ensure that the Office of the Governor and the agencies under the Governor's control properly respond to requests for information pursuant to the Act.

During the period from July through October 17, 2006, the BGA and the Office of the Governor have exchanged a number of letters concerning the BGA's request for copies of the Federal grand jury subpoenas. (Copies of these letters are attached.) On July 24, 2006, the BGA filed its initial request for information with the Office of the Governor seeking, among other documents, copies of any and all subpoenas for records or testimony issued to the State of Illinois by the United States Attorney's office between January 1, 2006, and July 24, 2006. On August 7, 2006, Ms. Allison Benway, Legal Counsel for the Office of the Governor, responded to the BGA by stating that the Office of the Governor "cannot confirm or deny the existence of the documents requested," and that "even if the Office were to have documents responsive to your

request, such documents would be exempt from release per Section 7(1)(a) of the Freedom of Information Act." On August, 31, 2006, the BGA appealed the denial of its request.

The Office of the Governor denied this appeal on September 15, 2006. In that letter, in response to the BGA's request for other documents relating to subpoenas issued by the United States Attorney's office, Ms. Benway stated that the Governor's office would consider a request for such records if the BGA was interested in "re-styling" it. The denial letter failed to indicate, as required by the Act, that the requestor has a right to seek relief in the Circuit Court. 5 ILCS 140/9(a) (West 2004).

The BGA then sent a revised Freedom of Information Act request (FOIA request) to the Office of the Governor on September 22, 2006. This revised FOIA request sought "all public records *** related to any subpoenas issued by the United States Attorney's Office." Ms. Benway responded to the revised FOIA request on October 17, 2006, by providing some responsive documents, but stating without further elaboration, that "[c]ertain documents have been withheld pursuant to 7(1)(f) and 7(1)(n) of the Act." The BGA has indicated that the response did not include the Federal subpoenas sought in both their original and revised FOIA requests.

The Act requires that "[e]ach public body shall, promptly, either comply with or deny a written request for public records" (5 ILCS 140/3(c) (West 2004)) and, if denying the request, shall provide the "reasons for the denial." 5 ILCS 140/9(a) (West 2004). In its August 7, 2006, response to the BGA's request for copies of the Federal subpoenas, the Office of the Governor stated, "this Office cannot confirm or deny the existence of the documents requested. Nonetheless, even if this Office were to have documents responsive to your request, such documents would be exempt from release under Section 7(1)(a) [5 ILCS 140/7(1)(a) (West 2004)] of the Freedom of Information Act." A response refusing to confirm or deny the existence of requested records does not comply with the requirements of the Act.

The Act also provides that "[e]ach public body shall make available to any person for inspection or copying all public records," unless excepted by the Act. 5 ILCS 140/3(a) (West 2004). The Act defines "public records" to include all records and other documentary materials "having been prepared, or having been or being used, received, possessed or under the control of any public body." 5 ILCS 140/2(c) (West 2004). Federal grand jury subpoenas received by a public body, including the Office of the Governor or other State agencies, are not excluded from the expansive definition of "public records." Thus, they may be withheld from disclosure only if they fall within one of the narrow exceptions contained in the Act.

The Act states that its exemptions "should be seen as limited exceptions to the general rule that the people have a right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." 5 ILCS 140/1 (West 2004). Illinois courts have repeatedly upheld this view, holding that "when a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in Section 7 of the Act applies." *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 463 (2003). A public body withholding records has the burden of proving that the records in question fall within the exemption that it has claimed. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 198 (2004). Thus, in responding to the request for information under the Act, the Office of the Governor was required to enunciate its legal basis for withholding the requested records from disclosure. Ms. Benway's August 7, 2006, denial letter cited only subsection 7(1)(a) of the Act as the basis for withholding copies of any Federal grand jury subpoenas received by the Office of the Governor or any State agencies under the Governor's control. The mere citation to subsection 7(1)(a) of the Act without more does not satisfy that requirement.

Subsection 7(1)(a) of the Act exempts from disclosure records that are "specifically prohibited from disclosure by federal or State law or rules and regulations adopted under Federal or State law." 5 ILCS 140/7(1)(a) (West 2004). In her denial of the BGA request, Ms. Benway cited no State or Federal laws or regulatory provisions which would except Federal subpoenas from disclosure under subsection 7(1)(a), nor did she provide any further explanation as to the legal basis upon which the Office of the Governor was precluded from even identifying the existence of subpoenas responsive to the BGA's request. Based on the clear language of subsection 7(1)(a), unless the Federal grand jury subpoenas are "specifically prohibited from disclosure" by Federal or State law, rule, or regulation, this exemption is not applicable.

Our research has disclosed no Federal or State statute, rule, or regulation that specifically prohibits an officer or agency of the State of Illinois from releasing a Federal grand jury subpoena pursuant to a FOIA request.

In her October 17, 2006, response to the BGA's request for "a copy of all public records *** related to any subpoenas issued by the United States Attorney's office," Ms. Benway stated that "[c]ertain documents have been withheld pursuant to Sections 7(1)(f) and 7(1)(n) of the Act." Although the BGA request encompasses the subpoenas as well as all related documents, it is not clear from her response whether Ms. Benway intended to assert subsections 7(1)(f) and 7(1)(n) as a reason for withholding copies of the subpoenas. To the extent that the Office of the Governor was relying on the exemptions in subsections 7(1)(f) and 7(1)(n) of the Act as a basis for withholding copies of Federal grand jury subpoenas, these subsections clearly do not apply.

Federal grand jury subpoenas do not fall within the category of documents described in subsection 7(1)(f), which exempts "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated." 5 ILCS 140/7(1)(f) (West 2004). Subsection 7(1)(n) covers:

> [c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies. 5 ILCS 140/7(1)(n) (West 2004).

Federal grand jury subpoenas issued to the Office of the Governor or any State agencies under the Governor's control are not communications between those entities and an attorney representing them. Likewise, these subpoenas were not "prepared or compiled by or for" the Office of the Governor or any State agencies under the Governor's control.

In addition to Ms. Benway's written denials of the BGA's requests, the Office of the Governor has made public statements indicating that its basis for refusing to release copies of subpoenas may relate to the secrecy requirements surrounding Federal grand jury proceedings. In considering this argument, we analyzed Federal Rule of Criminal Procedure 6(e)(2), which codifies the traditional rule of secrecy of Federal grand jury proceedings. Our review of the law has failed to find support for the position that the Federal grand jury secrecy rules preclude the Office of the Governor or state agencies under the Governor's control from releasing subpoenas under the Act.

Rule 6(e)(2) generally prohibits a specified group of persons – grand jurors, interpreters, stenographers, operators of recording devices, typists, government attorneys, and government personnel who assist government attorneys in the enforcement of Federal criminal law – from disclosing "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). The group of persons covered by the rule's obligation of secrecy does not include witnesses called upon to testify or provide documents to the grand jury. The rule also clearly provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." Fed. R. Crim. P. 6(e)(2).

Courts interpreting Rule 6(e)(2) have held repeatedly that the prohibition against disclosure does not extend to grand jury witnesses or other persons who are not directly engaged in the operations of the grand jury. *Butterworth v. Smith*, 494 U.S. 624, 634-35 (1990); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *Halperin v. Berlandi*, 114 F.R.D. 8,

15 (D. Mass. 1986); *In re Langswager*, 392 F. Supp. 783, 788 (N.D. Ill. 1975); Fed. R. Crim. P. 6(e)(2) advisory committee's note. Thus, grand jury witnesses are not precluded from disclosing any knowledge they may have concerning the subject or scope of inquiry of a Federal grand jury. *In re Caremark International, Inc. Securities Litigation*, 94 C 4751 (N.D. Ill. July 24, 1997). Likewise, a recipient of a Federal grand jury subpoena is not precluded from disclosing the subpoena to others. *See In re Grand Jury Subpoena Duces Tecum, Dated December 9, 1983*, 575 F. Supp. 1219, 1221 (E.D. Pa., 1983); *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979). Thus, the rules governing grand jury secrecy do not prohibit the Governor's Office or agencies under the Governor's control from disclosing Federal subpoenas in response to a request under the Act.

The responses of the Office of the Governor to the BGA's requests for disclosure of copies of Federal grand jury subpoenas clearly do not satisfy the requirements of the Act. The Office of the Governor has failed to establish that the Federal grand jury subpoenas fall within the exemptions in subsections 7(1)(a), 7(1)(f), or 7(1)(n) of the Act or that the United States Attorney has taken steps to mandate secrecy of the grand jury subpoenas. Without legal support, the Office of the Governor and the agencies under his control cannot withhold Federal grand jury subpoenas in their possession and must release these documents pursuant to a FOIA request.

Respectfully,

Terry Mutchler
Public Access Counselor
Assistant Attorney General

cc: Dan Sprehe, Better Government Association

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS
October 19, 2006

Lisa Madigan
ATTORNEY GENERAL

Via Facsimile & U.S. Mail

Mr. William Quinlan
General Counsel
Office of the Governor
100 West Randolph Street
16th Floor
Chicago, Illinois 60601

Mr. Paul Campbell
Director
Department of Central Management Services
720 Stratton Office Building
401 South Spring Street
Springfield, Illinois 62706

Dear Mr. Quinlan and Director Campbell:

I am writing regarding a request for assistance that our office has received related to Freedom of Information Act requests, (5 ILCS 140/1 *et seq.* (West 2004) (the Act)), made to the Office of the Governor and the Department of Central Management Services (CMS).

On three occasions, Mr. John O'Connor of The Associated Press has requested lists of persons eligible for hiring for certain positions in agencies under the control of the Governor. Specifically, Mr. O'Connor contacted the Governor's Office in writing on June 20, 2006 seeking a copy of an eligibility list pursuant to the Act. Rebecca Rausch responded via email on June 23, 2006. In her response, she stated, "On the eligibility list, our counsel is of the opinion that it is exempt from FOIA. So, we will not be able to release it to you as it is private, personnel information."

On June 19, 2006, Mr. O'Connor made a written request under the Act to CMS for several documents relating to "the job filled by Brian Keen in October 2003 at the Illinois Department of Transportation." The requested documents included the "list of eligibles for the job." On July 10, 2006, CMS denied the request for the eligible list based on the exemption in subsection 7(1)(w) of the Act (5 ILCS 140/7(1)(w)) (excepting from disclosure information relating solely to the internal personnel rules and practices of a public body). Mr. O'Connor appealed this decision, and Director Campbell denied this appeal on July 21, 2006.

On June 26, 2006, Mr. O'Connor made a separate written request under the Act to CMS, seeking, among other documents, the listing of eligibles "related to the hiring of a public service administrator in the business or administrative offices of Department of

Corrections facilities in St. Clair County, from December 2002 through April 2003." CMS denied this request on July 17, 2006, asserting that the eligible list is exempt from disclosure under subsections 7(1)(b)(ii) (excepting personnel files and personal information relating to employees and applicants) and 7(1)(w) of the Act. 5 ILCS 140/7(1)(b)(ii) and 7(w). Mr. O'Connor appealed this decision. Mr. O'Connor has stated that CMS, as of the date of this letter, has not responded to this appeal, as required by the Act.

80 Ill. Adm. Code § 304.10 provides, with respect to the confidentiality of CMS records; "Except as otherwise provided in this Part, all records of the Department of Central Management Services, ***including eligible lists***, shall be public records and shall be available for inspection on request to the director." While other sections of Part 304 provide that CMS is to consider certain personal information as confidential, these sections clearly do not apply to eligible lists.

The Administrative Code has the force and effect of law. *People v. Bonutti*, 212 Ill. 2d 182, 188 (2004). If another statute or the rules of a particular agency permit disclosure, such provisions prevail over any arguably applicable exception in the Act. *See, e.g., Etten v. Lane*, 138 Ill. App. 3d 439, 442, (5th Dist. 1985) (holding that records must be disclosed under the clear language of an administrative rule; parole board rule granting an inmate access to all documents considered in making a parole decision prevailed over any arguable exception in the Act.). Moreover, a state agency must adhere to its own rules. *Albazzaz v. IDFPR*, 314 Ill.App.3d 97, 106 (1st Dist. 2000).

Based on the clear language of section 304.10 of the Administrative Code, the eligible lists requested by Mr. O'Connor are public records and should be provided in response to a FOIA request. Moreover, CMS is obligated by its own rules to provide public access to such lists. CMS has recognized this requirement by providing an eligible list for a position with the Department of Employment Security in response to an earlier FOIA request from Mr. O'Connor.

We request that you reconsider your previous responses to Mr. O'Connor's requests for eligible lists and respond in accordance with the Administrative Code and the Act. If you have questions or if I could be of further assistance, please contact me at 217.524.1503.

Respectfully,

Terry Mutchler
Public Access Counselor
Assistant Attorney General

cc: John O'Connor
Associated Press

OFFICE OF THE GOVERNOR
JRTC, 100 W. RANDOLPH, SUITE 16
CHICAGO, ILLINOIS, 60601

ROD R. BLAGOJEVICH
GOVERNOR

October 23, 2006

Ms. Terry Mutchler
Public Access Counselor
Assistant Attorney General
Office of the Attorney General
State of Illinois
100 West Randolph Street
Chicago, Illinois 60601

Dear Ms. Mutchler:

I received your letter of October 19, 2006, regarding the response of the Department of Central Management Services to certain requests for information made under the Freedom of Information Act. Since these requests were addressed to CMS, I expect that CMS will respond to your letter. Nonetheless, I do not understand why you sent me the letter. The Office of the Governor did not request an opinion on this issue and, in any event, it is my understanding that this is not an official opinion of your office. Moreover, this letter was not sent in your capacity as an attorney of your office on any particular litigation matter.

Sincerely,

William J. Quinlan
General Counsel

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CMS
ILLINOIS Rod R. Blagojevich, Governor
DEPARTMENT OF CENTRAL MANAGEMENT SERVICES
Paul J. Campbell, Director

October 23, 2006

Ms. Terry Mutchler
Public Access Counselor
Assistant Attorney General
Office of the Attorney General
State of Illinois
100 West Randolph Street
Chicago, Illinois 60601

Dear Ms. Mutchler:

We write in response to your letter of October 19, 2006 regarding the response of the Department of Central Management Services ("CMS") to certain requests for information made under the Freedom of Information Act (5 ILCS 140/1 *et seq.*)(the "Act").

As an initial matter, it appears that you are offering your views on behalf of the individual requestor, Mr. O'Connor, rather than issuing an official opinion. It is my understanding that this letter is not an official opinion of the Attorney General. As you know, CMS requested an opinion on an issue related to the Procurement Code and rebates, necessary for the operations of state government, an opinion that has been pending with your Opinions Bureau for over a year. Nevertheless, despite the unofficial nature of your letter, presumably your office has an interest in understanding and responding to CMS's position on the issue, so this letter addresses both points.

As you note in your letter, CMS denied the requests for eligibility lists on the grounds, among others, that the lists were exempt from disclosure under Subsection 7(1)(b)(ii) of the Act, which protects "personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions." For all the discussion in your letter about CMS regulations, your letter never addresses whether the subject matter of eligibility lists does or does not fall within the scope of this statutory language.[1] We all share a desire for transparency, but that desire cannot trump and trample upon the privacy rights of those who were unsuccessful applicants for state employment. In fact, the only relevant case law on the subject strongly suggests that this language would provide privacy protection to unsuccessful applicants whose names appear on eligibility lists. We are surprised you did not cite or discuss this case law in your letter.

On this subject matter, the courts have protected individual privacy rights. The United States Court of Appeals for the Fourth Circuit held that the names of unsuccessful, eligible applicants for federal job positions constituted personal information under the federal

[1] Whatever the meaning of CMS regulations, the law is clear that statutory language trumps the regulations. *Hawthorne Race Course, Inc. v. Illinois Racing Board,* 366 Ill.App.3d 435, 443, 851 N.E.2d 214, 220 (1st Dist. 2006).

statutory analogue to Section 7(1)(b)(ii). *Core v. United States Postal Service*, 730 F.2d 946 (4th Cir. 1984).[2] As the Court noted, "disclosure may embarrass or harm applicants who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive appointment." *Core*, 730 F. 2d at 949. These considerations would apply with equal force to unsuccessful applicants whose names appear on the eligibility lists requested by Mr. O'Connor.

Under the *Core* decision, therefore, unsuccessful, eligible applicants may reasonably expect that their identities on eligibility lists will be treated as protected personal information, absent some forewarning at the time they are applying for state positions that their identities will be disclosed. CMS has addressed this issue on a going forward basis by including an express acknowledgment on employment applications that requires an applicant to affirm his or her understanding that completion of an application may result in the applicant's name being placed on an eligibility list that may be released to the public. Thus, new job applicants will be on notice that applying for a state position may involve public disclosure of that fact, and they can choose to act accordingly. With respect to applications completed before the inclusion of this explicit acknowledgment, however, the personal privacy protections of Section 7(1)(b)(ii) and the rationale of the *Core* decision preclude the disclosure of eligibility lists.

If you are aware of case law construing Section 7(1)(b)(ii) in a manner contrary to the *Core* holding, we would be happy to review and consider it. Similarly, if you are aware of any other information that supports the views expressed in your letter, please forward it to us.

Sincerely,

Paul Campbell
Director

cc: William Quinlan

[2] As you know, Illinois courts rely on decisions interpreting analogous provisions of the federal FOIA to interpret the Act. *See, e.g., Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill.3d 188, 202, 808 N.E.2d 56, 67 (1st Dist. 2004).

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 3, 2006

Via Facsimile & U.S. Mail

Mr. Paul Campbell
Director
Department of Central Management Services
720 Stratton Office Building
401 South Spring Street
Springfield, Illinois 62706

Dear Director Campbell:

I am writing in response to your October 23, 2006 letter regarding the Freedom of Information Act, 5 ILCS 140, and its application to eligible lists created and maintained by state agencies under the control of the Office of the Governor.

As you know, it is the policy of the State of Illinois, as enunciated in the Freedom of Information Act (the Act), "that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them." 5 ILCS 140/1. The Illinois Supreme Court has repeatedly embraced the philosophy that public records are presumed to be open and accessible. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456 (2003); *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401 (1997); *Bowie v. Evanston Community Consolidated School District*, 128 Ill. 2d 373 (1989). The Illinois Supreme Court has held that "[f]reedom of information fosters government accountability and an informed citizenry." *Bowie*, 128 Ill. 2d at 378.

The Office of the Governor and CMS, however, have refused to release lists of persons eligible for hiring for certain positions in agencies under the control of the Governor. To support this decision, you state that the release of these public records would constitute an unwarranted invasion of personal privacy as outlined in subsection 7(1)(b)(ii) of the Act and you rely on *Core v. United States Postal Service*, 730 F.3d 946 (4th Cir. 1984), a non-binding interpretation of the *Federal* Freedom of Information Act. CMS' analysis of this issue continues to ignore Illinois law and, in particular, entirely disregards the applicable Illinois Administrative Rule which governs the conduct of CMS.

As an initial matter, the assertion that the release of the eligible lists would "trample upon the privacy rights of those who were unsuccessful applicants for state employment" is undermined by the fact that the Administration released an eligible list for a position within the Department of Employment Security in response to an earlier FOIA request from *The Associated Press*.

Moreover, the reliance on the exemption in subsection 7(1)(b)(ii) of the Act is misplaced. Illinois courts have repeatedly held that under the Act, "public records are presumed to be open and accessible" and the exceptions to disclosure "are to be read narrowly." *Lieber*, 176 Ill.2d at 406. Additionally, the exemptions in the Act are not mandatory and do not prohibit the release of information. *Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 186 (1st Dist. 1995) ("The exemptions cannot be read to prohibit dissemination of such information, but rather are simply cases where disclosure is not required."), *appeal denied*, 166 Ill. 2d 554. If another statute or the rules of a particular agency permits disclosure, such provisions prevail over any arguably applicable exception in the Act. *See, e.g., Etten v. Lane*, 138 Ill. App. 3d 439, 442 (5th Dist. 1985) (holding that records must be disclosed under the clear language of a parole board administrative rule granting an inmate access to all documents considered in making a parole decision).

Here, section 304.10 of the Illinois Administrative Code clearly provides that eligible lists "shall be public records and shall be available for inspection on request to the director." 80 Ill. Adm. Code §304.10. Thus, even if we assume that the eligible lists fall within the exemption in subsection 7(1)(b)(ii) of the Act, the mandate in section 304.10 of the Administrative Code, which has the force and effect of law (*People v. Bonutti*, 212 Ill. 2d 182, 188 (2004) and which CMS must follow (*Albazzaz v. IDFPR*, 314 Ill.App.3d 97, 106 (1st Dist. 2000)), controls and requires that CMS release the eligible lists to the public.

The reliance on the *Core* case to support the assertion of the exemption in subsection 7(1)(b)(ii) is also flawed. While Federal court decisions can be instructive in interpreting the Act, these cases unquestionably cannot be used to avoid Illinois court decisions interpreting an Illinois statute. In *Core*, the plaintiff filed a Federal Freedom of Information Act request seeking detailed information concerning the employment histories of applicants for Federal employment. Here, in contrast, the eligible lists contain the names, but not the employment histories, of the applicants for particular State positions. The Illinois Supreme Court, whose decisions are, of course, binding in this State, has rejected the argument that names constitute "personal information" within the meaning of subsection 7(1)(b). Specifically, the Court concluded that "taken in context and considering the statute as a whole, the phrase 'personal information' [in subsection 7(1)(b) of FOIA] must have been intended by the legislature to be understood not in the sense of basic identification, but in the sense of information that is "confidential" or "private." The very purpose of section 7(1)(b), after all, is to protect 'personal privacy.'" *Lieber*, 176 Ill. 2d at 412. Accordingly, the Court held that the names and addresses of incoming SIU freshmen did not constitute "personal information" that could be withheld

from disclosure. The names of persons who have applied for and been determined to be eligible for hiring for State employment are entitled to no greater exemption. In short, Illinois law is clear with respect to the records at issue and, as such, there is no need to look to Federal decisions for assistance in its interpretation.

I would further note that in analogous circumstances, courts of other jurisdictions have declined to follow the reasoning of *Core*. For example, in *Capital City Press v. East Baton Rouge Parish Metropolitan Council*, 696 So. 2d 562 (1997), the Supreme Court of Louisiana ruled that the disclosure of employment applications and resumes did not rise to the level of an unwarranted invasion of personal privacy and ordered release of the documents at issue. *See, e.g., Physicians Committee for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1, 6 (D. D.C. 2000) (distinguishing *Core* and holding that the curricula vitae of rejected applicants for appointment to a federal advisory committee were not exempt from disclosure and stating that "[k]nowing who was selected and who was not, and learning their qualifications and affiliations, would advance the public interest.")

Finally, CMS supports the refusal to release the eligible lists by arguing that "[u]nder the *Core* decision, ... unsuccessful, eligible applicants may reasonably expect that their identities on eligibility lists will be treated as protected personal information, absent some forewarning at the time they are applying for state positions that their identities will be disclosed." It is untenable to argue that applicants have relied on the *Core* case, when the Illinois Administrative Code provides that "all records of the Department of Central Management Services, ***including eligible lists***, shall be public records and shall be available for inspection on request to the director." 80 Ill. Adm. Code § 304.10 (emphasis added). To the extent that applicants for employment within state agencies may have considered whether their identities would remain confidential, this administrative rule clearly placed them on notice that lists of eligible applicants would be disclosed to the public.

On behalf of Attorney General Madigan, I am once again advising the Office of the Governor and Central Management Services that eligible lists sought by *The Associated Press* are in fact public records available for inspection and copying and should be made available in accordance with Illinois law.

Respectfully,

Terry Mutchler
Public Access Counselor
Assistant Attorney General

cc: William Quinlan, Office of the Governor
John O'Connor

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 31, 2007

Mr. John Hosteny
Interim Chief Legal Counsel
Illinois State Police
801 South 7th St., Suite 1000-S
P. O. Box 19461
Springfield, IL 62794-9461

RE: *Freedom of Information Assistance Request*
2007ASSIST128

Dear Mr. Hosteny:

I am writing regarding a request for assistance that our office received related to obtaining a July 7, 2007 police report from Illinois State Police regarding an investigation into the death of Samuel Bruning, a 19-year-old man killed in a single-car accident. Mr. Greg Cima, a reporter with *The Pantagraph* of Bloomington, indicated that he filed a request with State Police on October 18, 2007. Ms. Bridget DePriest denied the report on November 8, 2007, citing an unwarranted invasion of personal privacy, according to the denial which was submitted to our office. The denial of this request did not provide further details as to why release of this report could constitute an unwarranted invasion of personal privacy, as required by law.

The purpose of my letter is to ask that you review his request further, as it is our view that this document would be public record. Accidents reports of a police department are public records, under the Act. 5 ILCS 140/2(c). Moreover, 625 ILCS 408(a), regarding police to report motor vehicle accidents, states that the information contained in those reports "shall not be held confidential by a reporting law enforcement officer or agency."

Because police reports are public record, the reports, or information contained therein, only may be withheld from disclosure to the extent that exemptions are permissible under the Freedom of Information Act. The Act exempts from disclosure information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. (5 ILCS 140/7(1)(b)). This portion expressly includes, but is not limited to, the types of information listed in the six subcategories (b)(i) through (vi) of the Act. Information falling within any of theses subcategories is considered to be "per se" exempt

from disclosure. Therefore, if information falls into one of those categories, a public body can automatically withhold that information from release.

However, if the information does not fall into one of the "per se" exempt categories, as with the information sought by Mr. Cima, the Court states that a public body should apply a balancing test to determine the availability of these documents. In making this determination, public bodies are, according to the courts of Illinois, to consider: (1) the plaintiff's (requestor's) interest in disclosure; (2) the public interest in disclosure; (3) the degree of invasion of privacy; and (4) the availability of alternative means of obtaining the records. *See, e.g., Schessler v. Department of Conservation*, 256 Ill. App. 3d 198 (4th Dist.1994).

Lastly, the Act requires that if a public body withholds information pursuant to a request, the public body has the burden of demonstrating that the information is in fact exempt, which State Police failed to do in its November 8, 2007 response to Mr. Cima. Under the Act, public records are presumed to be open and accessible. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456 (2003). If a public body denies a request for information the public body has the burden of proving that the records in question fall within the exemption that it has claimed. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188 (1st Dist. 2004).

In *IEA*, the Illinois Supreme Court addressed whether a public body could summarily withhold records merely by stating that the records constituted attorney-client privilege pursuant to subsection 7(n) of the Act and without explaining why that exemption applied. The Court held that "[t]he public body may not simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue. *Rather, the public body must provide some objective indicia that the exemption is applicable under the circumstances.*" *IEA*, 204 Ill. 2d at 466 (2003) (*emphasis added*). The same reasoning applies here. Under the law, State Police must provide some objective indicia as to why the release of these specific names would constitute an unwarranted invasion of personal privacy. The November 8, 2007 response merely states that the release would constitute an unwarranted invasion of personal privacy but does not, as *IEA* requires, state the reason for the withholding.

If you have questions or would like to discuss this matter, please contact me at 217-558-0486.

Respectfully,

Terry Mutchler
Public Access Counselor
Assistant Attorney General

TM:dh

cc: Ms. Bridget DePriest

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 31, 2007

Mr. Greg Cima
Reporter, *The Pantagraph*
301 W. Washington St.
P.O. Box 2907
Bloomington, IL 61702

RE: *Freedom of Information Assistance Request*
2007ASSIST128

Dear Mr. Cima:

I am writing to inform you that I have contacted Illinois State Police asking their General Counsel to re-review your request for documents pursuant to the Illinois Freedom of Information Act, 5 ILCS 140, regarding the death of Mr. Samuel Bruning. It is our view that these records are public records and should be made available to you. Alternatively, if State Police maintains the position that the information would constitute a clearly unwarranted invasion of personal privacy, we have asked that they provide some objective indicia, as required by law, to support this position, pursuant to *Illinois Education Association v. Illinois State Board of Education,* 204 Ill. 2d 456 (2003).

To answer you question, as a general rule, accidents reports of a police department are public records, under the Act. 5 ILCS 140/2(c). Moreover, 625 ILCS 408(a), regarding police to report motor vehicle accidents, states that the information contained in those reports "shall not be held confidential by a reporting law enforcement officer or agency." Because police reports are public record, the reports, or information contained therein, only may be withheld from disclosure to the extent that exemptions are permissible under the Freedom of Information Act. The Act exempts from disclosure information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. (5 ILCS 140/7(1)(b)). This portion expressly includes, but is not limited to, the types of information listed in the six subcategories (b)(i) through (vi) of the Act. Information falling within any of theses subcategories is considered to be "per se" exempt from disclosure. Therefore, if information falls into one of those categories, a public body can automatically withhold that information from release. Alternatively, if the information does not fall into one of the "per se" exempt categories public bodies are, according to the courts of Illinois, to consider: (1) the plaintiff's (requestor's) interest in disclosure; (2) the public interest in disclosure; (3) the degree of invasion of privacy; and

(4) the availability of alternative means of obtaining the records. *See, e.g., Schessler v. Department of Conservation*, 256 Ill. App. 3d 198 (4th Dist.1994).

Lastly, under the Act, public records are presumed to be open and accessible. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456 (2003). If a public body denies a request for information, the public body has the burden of proving that the records in question fall within the exemption that it has claimed. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188 (1st Dist. 2004).

If State Police disagrees with our position and does not release the records, I am unable to assist you further, but you have a right under the Act to file for injunctive relief in the Circuit Court pursuant to subsection 11(a) of the Act.

Respectfully,

Terry Mutchler
Public Access Counselor
Assistant Attorney General

TM:dh

FOIA MEETING ATTENDEES
& SUPPORTERS OF FOIA AMENDMENT

Majority Leader Barbara Flynn Currie

Chicago Tribune

The Southtown Star – Phil Kadner, Michelle Holmes

Illinois Press Association

Common Cause

Better Government Association

Illinois Campaign for Political Reform

ACLU

AARP

Chicago Coalition for the Homeless

Citizen Action

Citizen Advocacy Center

Illinois Equal Justice Foundation

Illinois PIRG

Illinois Library Association

League of Women Voters

MALDEF

Protestants for the Common Good

The Paul Simon Public Policy Institute – SIU

Don Craven

Bruce Sagan

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 18, 2008

Barry Maram, Director
Kyong Lee, General Counsel
Illinois Department of Healthcare and Family Services
201 S. Grand Avenue East
Springfield, IL 62763-0002

RE: Freedom of Information Act Request for Assistance
2008 ASSIST 260

Dear Mr. Maram and Mr. Lee:

I am contacting you on behalf of Mr. John O'Connor of the Associated Press, who has submitted a Freedom of Information request and appeal to your office. The Department responded to Mr. O'Connor's October 22nd appeal by letter dated October 31, 2008, which Mr.O'Connor has provided to this office. It is my understanding that the following items of information requested are still being withheld from Mr. O'Connor: *"[C]opies of documents related to the expansion of the Family Care program, [including] 1. The number of enrollees; 2. The number of enrollees by county; 3. The number of enrollees by month; 4. The number of enrollees after Judge Epstein's original injunction on or about April 15, 2008;...7. The amount of premium payment collected since the program's inception; 10. How much has been spent on the FamilyCare expansion; 11. A breakdown from where that money has come to pay expenses."* While Mr. O'Connor understands that, having at this point exhausted his administrative remedies, he may bring suit for injunctive or declaratory relief, it is his request that I contact you to encourage the Department to release the records which Mr. O'Connor has requested.

Under the Act, public records are presumed to be open and accessible. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill.2d 456, 462-63 (2003). The public body asserting that certain information is exempt from the Act's presumption of openness bears the burden of proving that the records in question fall within the exemption it has claimed. *Id.* at 464. To meet this burden and to assist a court in making a determination, the public body must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner

"allowing for adequate adversary testing." *Id* at 464, quoting *Baudin v. City of Crystal Lake*, 192 Ill. App.3d 530, 537 (1989).

The Department has cited Sections 7(1)(a), 7(1)(b)(i), 7 (1)(c)(iii) and 7(1)(n) in support of its contention that the above-noted portions of Mr. O'Connor's request are exempt from release under the Act. Section 7(1)(a) exempts: "information specifically prohibited from disclosure by federal or State law or rules or regulations adopted under State law." 5 ILCS 140/7(1)(a). The Department cites a string of state and federal statutes and regulations in support of its refusal to release the information sought. However, none of the authority cited specifically prohibits the release of the information sought by Mr. O'Connor. No individually-identifiable information is sought. Furthermore, it is clear under the Public Aid Code, as cited by the Department, that the general protections granted to public aid records exist to protect the identity of public aid applicants and recipients. The requestor does not seek case files, names, addresses or any information personal or identifiable to aid applicants or recipients; to the contrary, only aggregate numbers and enrollment figures are sought. In *Bowie v. Evanston Community Consolidated School District*, 128 Ill.2d 373, 380-81 (1989), the Illinois Supreme Court held that the provisions of the Illinois School Student Records Act, which generally limits access to records concerning a student(s) by which the student(s) may be individually identified, did not prohibit the release of masked and scrambled test results which deleted individual identifying data. Likewise, the Court later held that the Illinois Health and Hazardous Substances Registry Act, which precludes disclosure of information which reveals the identity, or any group of facts which tends to lead to the identity, of any person whose condition was reported to the Illinois Cancer Registry, did not prohibit the release of documents relating to the instances of neuroblastoma in Illinois from 1985 to 1997, broken down by type of cancer, zip code and date of diagnosis. *Southern Illinoisan v. Illinois Department of Public* Health, 218 Ill.2d 390 (2006). It is entirely possible for the Department to comply with Mr. O'Connor's request without releasing any information which could or might lead to the identification of any FamilyCare enrollees.

The Department next seeks to exempt the information sought under Section 7(1)(b)(i) of the Act, which permits the withholding of "(b) [i]nformation that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to: (i) files and personal information with respect to clients, patients, resident, students, or other individuals receiving social, medical, educational, vocational, supervisory or custodial care or services directly or indirectly from federal; agencies or public bodies." 5 ILCS 140/7(1)(b)(i). The requestor does not seek files or personal information on aid applicants or recipients. He seeks numbers, the release of which would not in any way invade any individual applicant or recipient's personal privacy. The information sought bears on the public duties of public

employees and officials who have been administering the Illinois FamilyCare program, and thus expressly cannot fall within the Section 7(1)(b) exemption. Accordingly, it should be released.

The Department further attempts to exempt the information sought under Sections 7(1)(c)(iii) and 7(1)(n). Section 7(1)(c)(iii) allows the withholding of "[r]ecords compiled by any public body...for internal matters of a public body, but only to the extent that disclosure would: ...(iii) deprive a person of a fair trial or an impartial hearing." 5 ILCS 140/7(1)(c)(1). It is the Department's contention that release of the information sought would deprive it of a fair trial or impartial hearing, but it fails to specify how this would be so. The Act's purpose is to provide the public with easy access to government information, and the Illinois Supreme Court has consistently held that the Act is to be given liberal construction to achieve that goal. *Bowie*, 128 Ill.2d 373 at 378, *Southern Illinoisan*, 218 Ill.2d 390 at 416. Accordingly, the Court has held on several occasions that the exceptions to disclosure set forth in the Act are to be read narrowly so as not to defeat its intended purpose. See, e.g., *Illinois Education Association*, 204 Ill.2d 456 at 463; *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401 at 407 (1997); *AFSCME v. County of Cook*,136 Ill.2d 334 at 341 (1990).

Finally, the Department seeks to protect the information sought under the Act's Section 7(1)(n), stating that that the materials requested were prepared and compiled in anticipation of the pending lawsuit, and thus exempt. With all due respect to the Department, it seems the information sought is not the type which would reasonably be expected to be compiled only in anticipation of litigation; rather, this information appears to be precisely the sort which the public would expect the Department to keep and report on a regular basis, and to be readily available in the normal course of business. Accordingly, it should not be kept from the public.

Section 2(c) of the Act defines "public records," in pertinent part, as follows: "(c) **Public records includes**, but is expressly not limited to...(vii) all information an any account, voucher, or contract **dealing with the receipt or expenditure of public or other funds of public bodies,**" 5 ILCS 140/2(c) (emphasis added). The information which Mr. O'Connor seeks regarding the dollar amounts spent on the FamilyCare expansion and expenses very clearly falls within this category, and should be accessible to the public upon request.

We respectfully request that you reconsider the denial of the information which Mr. O'Connor is seeking pursuant to his Freedom of Information Act request and corresponding appeal. Please keep in mind as you do so that the exemptions contained in the Freedom of Information Act do not function to prohibit the dissemination of public information; rather, they merely authorize the withholding of certain types of information. *Roehrborn v. Lambert*, 277 Ill.App.3d 181, 186 (1st Dist. 1995), *appeal*

denied, 166 Ill.2d 554. You may contact me if you should have any questions, or wish to discuss this matter further.

Respectfully,

Heather V. Kimmons

Heather V. Kimmons
Assistant Public Access Counselor
Assistant Attorney General

HVK:dh

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 29, 2009

Via Hand Delivery
Patrick J. Quinn
Governor
State of Illinois
100 W. Randolph Street
Chicago, Illinois 60601

Re: Transparency, Openness and Accountability in Illinois Government

Dear Governor Quinn:

I know that we share a commitment to transparency, accountability and openness in government. As you begin your tenure as Governor, it is critical that you take immediate, strong action to undo the culture of secrecy that was imposed on our State government during former Governor Blagojevich's terms.

In December 2004, I created the position of Public Access Counselor within my office. Through the work of the Public Access Counselor, we have received and responded to thousands of requests from people all over Illinois seeking our assistance to obtain access to government information. Unfortunately, over the last six years, agencies under the control of former Governor Blagojevich have routinely delayed in responding to Freedom of Information Act requests and violated the law by denying access to public information.

By working together to reopen Illinois government and ensure that every State agency, board and commission takes quick action to honor both the spirit and the letter of the Freedom of Information Act, we can begin to restore the faith of Illinois residents.

In order to move our government from a culture of secrecy to a culture of transparency, I urge you to issue an executive order taking the following actions to ensure compliance with our most important sunshine laws, the Freedom of Information Act and the Open Meetings Act:

1. Designate a high-level attorney within your office to serve as a Senior Public Information Officer, responsible for ensuring State agency, board and commission compliance with Freedom of Information Act requests and Open Meeting Act issues and to act as a liaison with the Public Access Counselor team in my office.

2. Designate an attorney or manager within each State agency, board and commission to serve as a Public Information Officer and require that each entity make the name and direct contact information for this officer accessible to the public, including by posting it on the entity's website home page.
3. Require that the Senior Public Information Officer in your office and the Public Information Officers of each agency, board and commission promptly undergo training by my Public Access Counselor team on the requirements of the sunshine laws.
4. Require that each Public Information Officer provide your office with an inventory of every Freedom of Information Act denial issued by the agency, board or commission since January 13, 2003..
5. Require that the Senior Public Information Officer commence an immediate review of these FOIA request denials to determine whether the information should be released to the public and make the results of this review available to the public.

Along with these important steps, and in light of what we have experienced during former Governor Blagojevich's tenure, I am already working with a coalition of open government advocates to strengthen the Freedom of Information Act and codify the Public Access Counselor position to ensure the public has access to its government. I hope that you will support me in this effort.

I am willing to assist you in any way necessary to begin restoring people's faith in our State government. I look forward to working with you on these critical issues.

Very truly yours,

Lisa Madigan

Lisa Madigan

cc: Jay Stewart

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 29, 2009

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500 South Second Street, Springfield, Illinois 62706 • (217) 782-1090 • TTY: (217) 785-2771 • Fax: (217) 782-7046
100 West Randolph Street, Chicago, Illinois 60601 • (312) 814-3000 • TTY: (312) 814-3374 • Fax: (312) 814-3806
1001 East Main, Carbondale, Illinois 62901 • (618) 529-6400 • TTY: (618) 529-6403 • Fax: (618) 529-6416

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cc: Jay Stewart