STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP0431

BILL LUEDERS,

Plaintiff-Respondent,

v.

SCOTT KRUG,

Defendant-Appellant.

ON APPEAL FROM A JANUARY 19, 2018, DECISION AND ORDER OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE RHONDA L. LANFORD, PRESIDING

BRIEF AND APPENDIX OF APPELLANT SCOTT KRUG

BRAD D. SCHIMEL
Attorney General of Wisconsin

JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Defendant-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7741
(608) 267-2223 (Fax)
vandermeusejl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

ISSUES PRESENTED

1. Under Wisconsin's public records law, an authority fulfills its duties by providing requesters with a copy of a record that is "substantially as readable" as the original. Here, Plaintiff-Respondent Bill Lueders requested copies of citizen correspondence from Defendant-Appellant Representative Scott Krug's office. Krug's office promptly provided Lueders with a paper copy of all responsive records Lueders requested. Lueders later clarified that he was asking for those same records in "electronic format." Krug declined to provide them in that format, on the ground that he had already fulfilled Lueders' request for the records. Did Krug comply with his duties under Wisconsin's public records law?

The circuit court answered no.

This Court should answer yes.

2. Under Wisconsin law, civil defendants are entitled to depose plaintiffs and other persons unless doing so would cause "annoyance, embarrassment, oppression, or undue burden or expense." Wis. Stat. § 804.01(3)(a). Here, the circuit court issued a protective order that prohibited Krug from taking Lueders' deposition. The circuit court did not make specific findings as to how the deposition would cause Krug annoyance, embarrassment, oppression, or undue burden or expense. Instead, the circuit court reasoned that a plaintiff's deposition may not be taken in public records actions. Was the protective order an erroneous exercise of discretion?

The circuit court did not address this question.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs, taken together, will adequately present the issues on appeal.

Publication of the Court's decision is warranted. While the relevant public records statutes are clear, the issue of whether an authority must provide documents in a format dictated by a requestor is an unsettled question of law, and the lower courts would benefit from a published decision. Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF THE CASE

In this mandamus action, Lueders claims that Krug violated Wisconsin's public records law, Wis. Stat. §§ 19.31–19.39, because Krug did not provide records in electronic format as Lueders requested. Krug contends that the paper copies he had previously provided Lueders fully complied with the law, as substantially readable copies are all that are required. There is no dispute that Krug promptly provided paper copies of all responsive records Lueders requested.

Lueders was granted a protective order that prevented Krug from taking Lueders' deposition. Krug contends that as a civil defendant, he had a right to depose the plaintiff in order to develop the record as to the relevant issues.

I. Legislative scheme.

The primary issue here is whether Lueders can show he has a clear legal right to dictate the format in which he receives public records. This question turns on an interpretation of Wis. Stat. § 19.35(1)(b), which states:

> Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record. If a requester appears

> personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.

Wis. Stat. § 19.35(1)(b). Lueders is a "requester" within the meaning of Wis. Stat. § 19.32(3). Krug is an "authority" within the meaning of Wis. Stat. § 19.32(1). To comply with Wis. Stat. § 19.35(1)(b), an authority must provide copies of records that are "substantially as readable" as the original. The law requires nothing more.

II. Factual background.

The material facts are not in dispute. On June 21, 2016, Krug's office received a public records request from Plaintiff Bill Lueders, a journalist. (R. 30:6 ¶ 8; 40:2 ¶ 8.) The request asked for:

> [A]ccess to review, under the state's Open Records Law §§ 19.31-39, Wisconsin Statutes) [*sic*] **any and all citizen correspondence**, including phone records, sent and/or received by Representative Krug or his/her staff, beginning January 1 through and including April 8, 2016 . . . .

(R. 1:10, A-App. 124.) This request was for the same documents that had been made by an organization called We the Irrelevant on April 29, 2016.[1] (R. 1:5 ¶ 10.)

There are 99 separate state representatives in the Wisconsin Assembly. (R. 36:4 ¶ 1.) Individual offices of the Assembly, particularly Krug's office, do not have their own technological support. (R. 36:11 ¶ 32.) They have a staff of

---

[1] We the Irrelevant noted in its request that it would "prefer" electronic copies of the documents, but that preference was not stated in Lueders' June 21 request. (R. 1:4 ¶ 7.)

one and one-half to two full-time positions, with occasional part-time, un-paid interns. (R. 36:4, 7 ¶¶ 2, 3, 15.) Thus, to consistently and efficiently address the Assembly's high volume of public records requests, the Assembly Chief Clerk's office generally acts as a clearinghouse and provides significant assistance to the representatives and their staff regarding public records requests. (R. 36:6 ¶¶ 12–13.) To that end, the Assembly Chief Clerk and the Assembly's legal counsel promulgated a Public Records Request Procedure Policy to be followed by the Assembly members to rectify problems the Assembly had tracking requests. (R. 17:10 ¶ 17–18.)

Krug's office follows the Chief Clerk's procedure for handling public records requests. That office instructs the legislative offices to print paper copies of the records and provide the copies to the Chief Clerk.[2] (R. 36:8–10 ¶¶ 20–26, 28–29.) This is done to ensure that the Chief Clerk can properly review the documents for responsiveness and treat all responses consistently. (R. 36:8–10 ¶¶ 20–26, 28–29.) Paper copies are easier to review than electronic records, easier to redact (if necessary), easier to track, and ensure that differences in computer software will not hinder the requester's ability to view the records. (R. 36:7 ¶ 18; 25:5 ¶ 20.) The requester can then review the responsive records in the Chief Clerk's office, and purchase copies if desired. (R. 36:9 ¶ 25.) If copies of the records are purchased, all payments are handled through the Chief Clerk's office. (R. 27:3 ¶ 11.) Individual representative offices are not equipped to handle payment. (R. 36:11 ¶ 36.)

---

[2] On occasion, the Chief Clerk has distributed a CD to a requester if a representative's staff gave him the records on CD. (R. 36:11 ¶ 31.)

After receiving Lueders' June 21 request, Krug's office performed a search and uncovered responsive records comprising over 2,000 responsive pages. (R. 27:3–4 ¶ 16.) Keeping with Assembly policy, Krug's office printed the emails and other records and gave them to the Chief Clerk. (R. 30:7–8 ¶ 13; 40:2 ¶ 13.) Krug's office also provided a list of constituent contacts. (R. 36:17 ¶ 60.)

On July 15, 2016, less than a month after receiving Lueders' request, the Chief Clerk contacted Lueders to inform him the records were available for inspection or purchase. (R. 1:6 ¶ 11; 4:3 ¶ 11.) Lueders chose to inspect most of the records rather than purchase them. (R. 30:8 ¶¶ 14, 17; 40:3 ¶¶ 14, 17.)

On July 21, 2016, Lueders emailed Krug's office and stated in relevant part:

> Dear Rep. Krug,
>
> Thank you for making the records available to me. I did get copies of the 143 pages of Contact Reports produced by your office. Obviously, trying to match these with more than 1,000 pages of paper is an impossible task. Which is why I am restating my request to receive the records in electronic form, a much simpler method of compliance that the law specifically requires. (See Attorney General's Compliance Guide, P. 52-59.)
>
> This is to request, under the state's open records law (19.31-19.39, state statutes), access to all emails received by your office is [*sic*] response to proposed changes to the state's water laws, from Jan. 1, 2016 to Feb. 29, 2016. This request is not for printed copies of these records; it is for the records in electronic form, as an email folder, or on a flash drive or CD.

(R. 1:11, A-App. 125.) Notably, Lueders did not state that the printed records he had inspected were not readable. His

stated reason for requesting the records in electronic form was so he could sort the information more easily. In addition, Lueders did not ask for the documents in electronic native format. Lueders' written request was for records "in electronic form, as an email folder, or on a flash drive or CD." (R. 1:11, A-App. 125.)

After receiving this letter, Krug consulted with the Chief Clerk, and then contacted Lueders. (R. 30:9 ¶ 20; 40:3 ¶ 20; 36:19–20 ¶ 66.) Having determined that paper copies fulfilled his public records obligations under Wis. Stat. § 19.35(1), Krug declined Lueders' request to provide the records in electronic form. (R. 36:19–20 ¶ 66.) Krug's office sent an email to Lueders on July 26, 2016, stating:

> As you know, "[t]he Public Records Law provides "[e]xcept as otherwise provided by law, any requester has the right to inspect any record." Wis. Stat. 19.35(1)(a). The law requires copies of written documents be "substantially as readable" as the originals. Wis. Stat. § 19.35(1)(b). Additionally, Wis. Stat. § 19.35(1)(b) provides the custodian has the option to choose how a record will be copied. *See Grebner v. Schiebel*, 240 Wis. 2d 551 (2000)."
>
> Our standard policy is to make responsive records available to requesters through the office of the Assembly Chief Clerk. The Chief Clerk makes arrangements for the requester to review the records, provides any copies that may be requested, and collects any location or reproduction costs associated with the request. This policy is the most efficient way for our office to comply with the records request, while continuing the day-to-day operation of our official duties without disruption. Individual offices are not set up to accept cash or check as payment for records requests.
>
> Accordingly, we have provided you with access to review the records you have requested and the

> ability to receive copies of those records that are substantially as readable as the original. Those records were provided for your review in the Assembly Chief Clerk's Office. We now consider your request closed.

(R. 1:12, A-App. 126 (alteration in original).)

Krug's office receives public records requests from groups representing Democrats and groups representing Republicans. (R. 27:5 ¶ 25.) His office responds to all of the requests consistently, following the policy set by the Assembly Chief Clerk's office. (R. 27:5 ¶ 25; 36:21 ¶ 73.) Krug's office did not treat Lueders differently than any other requester. (R. 27:5 ¶ 24.)

III. Litigation history.

In August 2016, Lueders commenced a mandamus action in circuit court pursuant to Wis. Stat. § 19.37(1)(a). (R. 1.) Among other things, Lueders requested "[a] mandamus order directing [Krug] to produce for the Plaintiff an electronic, native copy of the requested records without further delay." (R. 1:8 ¶ 2.) This was the first time Lueders had ever asserted he wanted the documents in electronic native format. Lueders also requested punitive damages. (R. 1:8 ¶ 3.)

Krug served various written discovery requests on Lueders. (R. 42.) Lueders provided limited responses. (R. 42.) Krug then served a deposition notice on Lueders. (R. 8:2 ¶ 4.) Lueders moved for a protective order, requesting that the circuit court prevent Krug from taking his deposition at all. (R. 8:8.) The court granted a protective order on the ground that deposing a plaintiff would "have a chilling effect" on future public records requests. (R. 12, A-App. 123; 61:10, A-App. 120.) Krug sought leave to appeal the protective order, but the court of appeals denied Krug's motion for leave. (*See* Wis. Ct. App. Case No. 2017AP0488.)

The mandamus action proceeded, and the parties filed cross motions for summary judgment. (R. 17; 30; 35; 36; 40; 46; 47.) Krug argued that paper copies of the records were all that the law required, while Lueders maintained he was entitled to electronic native records of all documents.

A hearing was held October 12, 2017. (R. 62.) On January 19, 2018, the circuit court entered a written decision granting Lueders' motion for summary judgment and denying Krug's motion for summary judgment. (R. 55, A-App. 101–10.) The circuit court held that an authority must provide a copy of an electronic record "substantially as good" as the original record. (R. 55:4, A-App. 104.) To fulfill this requirement, an authority must consider the needs of the requester, and what the requester intends to do with the documents. (R. 55:6–8, A-App. 106–08.) The circuit court ordered Krug "to produce electronic copies of the records that Plaintiff requested." (R. 55:10, A-App. 110.) The circuit court did not hold that Krug must provide the documents in electronic native format. (R. 55:10, A-App. 110.) Lueders did not cross appeal this issue. The circuit court denied Lueders' request for punitive damages. (R. 55:10, A-App. 110.) Lueders did not cross appeal this issue, either.

This appeal followed.

STANDARDS OF REVIEW

This Court reviews a grant of summary judgment independently. *Media Placement Servs., Inc. v. Wis. Dep't of Transp.*, No. 2017AP0791, 2018 WL 1956555, at *2 (Wis. Ct. App. Apr. 24, 2018) (recommended for publication). "Where a circuit court, determining a petition for writ of mandamas, has interpreted Wisconsin's open records law . . . and has applied that law to undisputed facts," de novo review applies. *State ex rel. Milwaukee Police Ass'n v. Jones*, 2000 WI App 146, ¶ 11, 237 Wis. 2d 840, 615 N.W.2d 190.

Courts review a circuit court's grant of a protective order under the abuse of discretion standard. *See Earl v. Gulf & W. Mfg. Co.*, 123 Wis. 2d 200, 208, 366 N.W.2d 160 (Ct. App. 1985).

ARGUMENT

The circuit court's grant of mandamus relief was improper. Lueders cannot show he has a clear legal right to records in electronic format rather than paper format. Wisconsin Stat. § 19.35(1)(b) requires only that a custodian provide a copy "substantially as readable" as the original. There is no dispute that the paper copies Krug provided—and Lueders inspected—were as readable as the original emails. Because Krug did not violate the public records law, the extraordinary remedy of mandamus relief was unwarranted. In addition, the circuit court erroneously exercised its discretion when it denied Krug the right to depose Lueders. This Court should reverse the circuit court.

I. Lueders' mandamus action fails because he cannot show he has a clear legal right to receive copies of records in electronic format.

Mandamus is an extraordinary writ that may be employed to compel public officers to perform a duty that they are legally obligated to perform. *Watton v. Hegerty*, 2008 WI 74, ¶ 7, 311 Wis. 2d 52, 751 N.W.2d 369; *see also* Wis. Stat. § 19.37(1). The person seeking to compel disclosure of records must establish that four criteria are satisfied: "(1) the petitioner has a clear legal right to the records sought; (2) the government entity has a plain legal duty to disclose the records; (3) substantial damages would result if the petition for mandamus was denied; and (4) the petitioner has no other adequate remedy at law." *Watton*, 311 Wis. 2d 52, ¶ 8 (footnote omitted). This case stops at the first two elements because neither are met.

Importantly, this is not a balancing test case. While Krug promptly provided access to printed copies of all records Lueders requested, he declined to fulfill Lueders' request for electronic copies based on the plain language of Wis. Stat. § 19.35(1)(b) and his conclusion that paper copies fully complied with the statute. Accordingly, this case is not analyzed under the traditional "balancing test" framework for a denial of records. *See State ex rel. Savinski v. Kimble*, 221 Wis. 2d 833, 839–40, 586 N.W.2d 36 (Ct. App. 1998); *see also Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427–28, 279 N.W.2d 179 (1979). Rather, the Court reviews whether Lueders established that he has a clear statutory right to the electronic copies; and whether Krug had a plain legal duty to disclose the records in electronic format. *Watton*, 311 Wis. 2d 52, ¶ 8.

Wisconsin's public records law requires authorities to provide copies of written documents in a format "substantially as readable" as the original. Wis. Stat. § 19.35(1)(b). Krug complied with this statute when he provided readable paper copies of the requested documents. By ordering that Krug produce electronic copies, the circuit court ignored the statute's plain language and created an unworkable standard. This Court should reverse the circuit court.

A. "Substantially as readable" is the operative standard.

This case turns on an analysis of Wisconsin's public records law. Statutory analysis must begin with the statutes' plain language. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Where "the meaning of

the statute is plain, [courts] ordinarily stop the inquiry." *Id.* (citations omitted). Generally, statutory meaning comes from examining the text, context, and structure of the statute. *Manitowoc Co., Inc. v. Lanning*, 2018 WI 6, ¶ 67, 379 Wis. 2d 189, 906 N.W.2d 130.

Whether Krug was required to provide Lueders with electronic copies turns on an interpretation of Wis. Stat. § 19.35(1)(b), which states:

> Except as otherwise provided by law, any requester has a right to inspect a record[3] and to make or receive a copy of a record. If a requester appears personally to request a copy of a record that permits copying, the authority having custody of the record may, at its option, permit the requester to copy the record or provide the requester with a copy substantially as readable as the original.

Wis. Stat. § 19.35(1)(b). Under this statute, a requester has the right to inspect, make, and receive copies of records, subject to the parameters in the second sentence. Two things are clear from the second sentence: (1) the requester does not control the format in which an authority provides a copy; and (2) an authority is required to do nothing more than provide the requester with a copy substantially as readable as the original.

Case law confirms that the authority, not the requester, decides the format in which copies of records are provided. In *Grebner v. Schiebel*, 2001 WI App 17, ¶ 3, 240 Wis. 2d 551, 624 N.W.2d 892, a requester appeared at a polling place and asked the clerk to make a copy of the polling data with his own equipment. The clerk declined the request, but offered to make the copies for a charge, and

---

[3] Emails are "records" within the meaning of Wis. Stat. § 19.32(2).

later offered to allow the requester to copy the poll lists with a digital camera, or transcribe the information into his laptop. *Id.* ¶¶ 6, 14. The requester sued for mandamus relief on the ground that he was entitled to make copies with his own equipment. *Id.* ¶ 1. The circuit court denied mandamus relief and dismissed the requester's complaint. *Id.*

Affirming the circuit court, the court of appeals held that "it is the custodian of public records, not the requester, who has the option of determining how these records are copied." *Id.* The court further noted that the statute "does not require the custodian to articulate or explain the reasons for his or her decision." *Id.* ¶ 13. In 2014, an Attorney General opinion confirmed that *Grebner* remains good law and opined that "the custodian of court records may choose whether to allow someone to make his or her own copies with personal technology." OAG-12-14, ¶ 15 (Dec. 30, 2014), https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/2014/2014.pdf.

While the custodian may choose the format in which the records are copied, the custodian must provide a copy that is "substantially as readable" as the original. Wis. Stat. § 19.35(1)(b). "Readable" is defined as "[e]asily read; legible: *a readable typeface*."[4] Therefore, if the authority chooses to provide the requester with a copy, all this statute requires is the copy to be as easily read or legible as the original. In other words, what could be plainly seen on the original should be plainly seen on the copy, unless some portion is not legally subject to disclosure.

Surrounding subsections of Wis. Stat. § 19.35 support this plain language reading. Subsection (1)(b) pertains to written documents and provides that the authority must

---

[4] *Readable*, The American Heritage Dictionary (5th ed. 2016).

give requesters a copy "substantially as readable as the original." Subsection (1)(c) pertains to audio recordings and requires the authority to provide requesters a copy "substantially as audible as the original." And subsection (1)(d), which pertains to video records, requires authorities to provide copies "substantially as good as the original." The use of the terms "substantially as readable," "substantially as audible," and "substantially as good," show that the Legislature's goal is to require the authority to provide copies of written, audio, and video records that are faithful representations of the original—namely, what could be plainly seen with the eye or heard with the ear in the original records.

The Wisconsin Supreme Court, albeit interpreting a different section of the public records law, has noted that an appropriate method of reproducing an electronic record is for the authority to print out a hard copy. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 31, 341 Wis. 2d 607, 815 N.W.2d 367. This statement reinforces the notion that substantially as readable means nothing more than what can be seen with the naked eye, even in the context of reproducing emails.

In this case, Lueders' public records request asked for "**any and all citizen correspondence**, including phone records." (R. 1:10, A-App. 124.) Krug promptly complied with this request by providing Lueders access to readable paper copies of those records. Lueders then clarified that he was asking for the email records "in electronic form." (R. 1:11, A-App. 125.) Lueders never complained that the paper copies of the emails were not readable or legible. Krug provided a speedy and thorough response to Lueders' request, as evidenced by the thousands of emails that were produced. He was within his rights to decline Lueders' request for those same records in electronic format. Krug

fully complied with the public records law, and Lueders is not entitled to mandamus relief.

Lueders may try to argue that the second sentence of Wis. Stat. § 19.35(1)(b) (giving an authority the option to choose the format) only applies when a requester "appears personally," and therefore does not apply to him because he did not appear in person to request the documents. A similar argument was made by the requester in *Grebner* and was squarely rejected by this Court.

The requester in *Grebner* argued that the statute did not apply to him because he did not request a copy of the record; rather, he asked to copy the records with his own equipment. *Grebner*, 240 Wis. 2d 551, ¶ 11. The requester argued that the second sentence of Wis. Stat. § 19.35(1)(b) therefore did not apply, and instead, only the broad right to make a copy of the record stated in the first sentence applied. *Id.* The *Grebner* court rejected that argument, explaining that the two sentences "comprising subsec. (b) must be read together and harmonized." *Id.* The court explained:

> [T]he only reasonable reading of the subsection is that a requester may make or receive a copy of the record subject to the terms and conditions set forth in the second sentence of the subsection. Under the second sentence, the custodian is given the option to either allow the requester to make a copy of the record or for the custodian to make a copy of the record. Importantly, the statute gives the custodian, not the requester, the option to choose how a record will be copied.

Id. ¶ 12. This explanation shows that *Grebner*'s interpretation of Wis. Stat. § 19.35(1)(b) was not limited to its facts.

Notably, the "[i]f a requester appears personally" language was added in 1991 to eliminate the authority's ability to *require* personal inspection when a requester asks for copies by mail. *See State ex rel. Borzych v. Paluszcyk*, 201 Wis. 2d 523, 526–27, 549 N.W.2d 253 (Ct. App. 1996) (citation omitted) (explaining the 1991 amendment and holding that under the new language, an authority did not have the ability to require a requester to appear in person). The problem that the amendment addressed is not present in this case.

An authority has no obligation to provide records in a format that is optimal for the requester. The undisputed facts show that Krug promptly provided Lueders with a readable copy of the records Lueders requested. That is all that Wis. Stat. § 19.35(1)(b) requires.

While the statutes are clear on this issue, no Wisconsin court has decided whether an authority satisfies the public records law by providing paper copies of emails that are substantially as readable as the originals if the requester asks for electronic copies. *See WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, ¶ 55 n.13, 310 Wis. 2d 397, 751 N.W.2d 736. This is an open question of law that Krug believes should be decided in his favor. However, mandamus relief is only available when the plaintiff has a *clear legal right* to relief and the defendant has a clear legal duty to take action. Because Krug cannot be found to have violated the law, mandamus relief is not warranted.

B. The circuit court improperly read "as good" into the statute, thereby creating an unworkable new standard for authorities.

The circuit court held that an authority must provide a copy of an electronic record "substantially as good" as the original. (R. 55:4, A-App. 104.) The circuit court further held that to produce a copy "substantially as good," the authority

must determine "whether the requester's needs would be best met by a hard copy or an electronic copy." (R. 55:6, A-App. 106.) The circuit court's decision creates a new legal standard that contradicts Wisconsin's public records law and places obligations on authorities that are not required by law. The circuit court should be reversed.

1. "As good" is not what the relevant statute requires.

To start, providing a copy of written records "substantially as good" is not what the relevant statute requires. The subsection of Wis. Stat. § 19.35 that applies here is subsection (1)(b) because it generally refers to a "record," while subsections (1)(c) and (d) specifically refer to an "audio recording" and "video recording," respectively, which are not at issue. Wisconsin Stat. § 19.35(1)(b) requires a copy "as readable" as the original, and nothing more. The phrase "as good" appears only in the subsection for video recordings. Wis. Stat. § 19.35(1)(d). If the Legislature had wanted the standard for records other than audio and video recordings to be "as good," it would have said so. But it did not.

The circuit court appears to have relied on the Attorney General's Compliance Guide when it created this new "as good" legal standard for written electronic records. (R. 55:4, A-App. 104 (citing Wisconsin Public Records Law Compliance Guide 56 ("Compliance Guide")).)[5] But the Compliance Guide does not state that the law *requires* written records (electronic or otherwise) to be produced in a format "substantially as

---

[5] (*See* R. 20.) A copy of the entire Compliance Guide is available at: https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf.

good." (Compliance Guide 56.) Rather, the Compliance Guide is merely pointing to a recommended practice for producing copies of electronic documents.

The Compliance Guide states that "Wisconsin Stat. § 19.35(1)(b), (c), and (d) require that copies of written documents be 'substantially as readable,' audiotapes be 'substantially as audible,' and copies of videotapes be 'substantially as good' as the originals." (*Id.*) The Compliance Guide reasons that "[b]y analogy, providing a copy of an electronic document that is 'substantially as good' as the original is a sufficient response where the requester does not specifically request access in the original format." (*Id.*) But a "sufficient" response is not the same as a legally required response.

The circuit court erroneously relied on the Compliance Guide when it ordered that electronic documents be produced in a format "substantially as good" as the originals. The Compliance Guide may be cited for persuasive authority. *See, e.g.*, *Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 60, 372 Wis. 2d 460, 888 N.W.2d 584 (Abrahamson, J., dissenting); *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 55, 362 Wis. 2d 577, 866 N.W.2d 563. However, when the Compliance Guide *recommends* a practice for authorities to follow with respect to electronic documents, the statutes themselves, not the Compliance Guide, ultimately govern what is legally required. Failure to follow the recommended practice is not a statutory violation.

2. The circuit court's interpretation of "as good" contradicts the public records law and creates an unworkable standard for authorities.

The circuit court held that to meet the "as good" standard, an authority is required to evaluate whether the

requester's needs would best be met by a hard copy or electronic copy. (R. 55:6, A-App. 106.) This includes evaluating the requester's purpose for obtaining the documents, and whether access to the "source material" may be better for the requester. (R. 55:6, A-App. 106.) This holding contradicts the general rule that authorities may not consider who the requester is or what the requester wants to do with the records when determining whether to release records subject to a public records request. *See Levin v. Bd. of Regents of Univ. of Wis. Sys.*, 2003 WI App 181, ¶ 14, 266 Wis. 2d 481, 668 N.W.2d 779.[6]

The circuit court improperly relied on *State ex rel. Milwaukee Police Ass'n v. Jones*, for the notion that the authority must take into account the requester's needs when providing copies of records, emphasizing that a requester has the right of "access to the source 'material'" of a document. (R. 55-6 (citations omitted).) But *Jones* does not stand for this proposition. *Jones* involved a completely different type of record (a digital audio tape) that was disclosable under a statute not at issue here. A close look at *Jones* shows that it is distinguishable and unhelpful to this case.

In *Jones*, the Milwaukee Police Association (MPA) asked the Milwaukee Police Department (MPD) for a copy of a 911 call "in its original [form—] unaltered, unmodified and otherwise uncensored in any fashion." *Jones*, 237 Wis. 2d 840, ¶ 3 (citation omitted). Responding to the request, MPD Chief Jones provided an analog tape recording

---

[6] There are some exceptions to the general rule not applicable here. *See, e.g., State ex rel. Ardell v. Milwaukee Bd. of Sch. Directors*, 2014 WI App 66, ¶ 17, 354 Wis. 2d 471, 849 N.W.2d 894 (requester's identity relevant in determining whether a safety concern outweighs presumption of disclosure).

which "was as understandable to the naked adult human ear as the original." *Id.* ¶ 4. After receiving the analog copy, the MPA requested that the MPD "allow [his] expert access to the . . . 911 tape for the purpose of non-destructive analysis and/or the making of a [digital audio tape (DAT)] and/or analog copy." *Id.* (alteration in original) (citation omitted). Chief Jones declined. *Id.* ¶ 6.

The circuit court held that Chief Jones complied with the original request when it provided the analog copy, which was found to be substantially as audible to the human ear as the original. *Id.* ¶ 9. But the court also held that the second request for the DAT was actually a separate request for a separate record, and that the DAT should have been produced in response to that request pursuant to Wis. Stat. § 19.36(4).[7] *Id.* The court found that the police department's computer system "includes both mechanical and computer components and that the machinery runs computer programs within the . . . machinery itself" and, further, 'that the material produced as a result of the computer program is the DAT tape.'" *Id.* (citation omitted).

The court of appeals affirmed. *Id.* ¶ 2. Given the unique attributes of a DAT copy, the court found that MPA's subsequently enhanced request for the DAT copy was actually a new request for a separate record that was disclosable under Wis. Stat. § 19.36(4). *Id.* ¶¶ 2, 9, 17–19.

The *Jones* case is distinguishable from this case in very important ways. Due to the unique attributes of a DAT copy, which the MPA specifically requested, this Court found that MPA's request for the DAT copy was actually a new

---

[7] The statute provides that "the material used as input for a computer program or the material produced as a product of the computer program is subject to the right of examination and copying." Wis. Stat. § 19.36(4).

request for an entirely separate record, not for the same record in a different format. *Id.* Access to the DAT was allowable under Wis. Stat. § 19.36(4), a different statute from the statute at issue here. *Id.* Lueders' July 21, 2016, request was not for a separate record; it was clarification that Lueders wanted the exact same records but in a different format. (R. 1:11, A-App. 125 ("This request is not for printed copies of these records; it is for the records in electronic form, as an email folder, or on a flash drive or CD.").) *Jones* does not control here.

Not only is the circuit court's decision wrong as a matter of law, it creates a legal standard that is impossible for authorities to comply with. First, it may not be clear what the requester's preferences are, or what the requester is actually asking for. An authority should not bear the burden of trying to guess at what the requester is truly asking for, and then risk being found to violate the law if the authority guessed incorrectly.

In addition, records originate in many forms and are maintained by authorities in various ways. They are readily reproduced based on an authority's technical capability and human capability. "Authorities" in Wisconsin range from large entities like the Wisconsin Department of Justice to small entities like local police stations. Records custodians and their staff may not have the resources, technical knowledge, capability, or expertise to produce records in electronic format, no matter what the requester's preference is.

Particular to this case, while there are 99 separate state representatives in the Wisconsin Assembly (R. 36:4 ¶ 1), each acts as its own "authority" when it comes to producing records. Individual offices of the Assembly do not have their own technological support. (R. 36:11 ¶ 32.) Common sense dictates that many other public offices—from small town school boards, county planning commissions, and

even some state agencies—do not, either. To require an authority to produce a record in electronic format when it does not have the infrastructure or expertise to do so (and to have to demonstrate such a hardship) places an improper burden on the authority that the statutes do not require. *Cf. Schopper v. Gehring*, 210 Wis. 2d 208, 213, 565 N.W.2d 187 (Ct. App. 1997) ("While this state favors the opening of public records to public scrutiny, we may not in furtherance of this policy create a system that would so burden the records custodian that the normal functioning of the office would be severely impaired.").

In addition, to require a copy to be "as good" as the original written record creates an unclear legal standard that is impossible to consistently apply. "As good" can mean many things to different people in the context of written documents, which is likely why the Legislature did not choose that word. An authority's opinion of what is "as good" in the context of electronic records may differ from another authority's opinion, or from the requester's opinion. To require a written document to be copied in a form that is "as good" opens the door to endless litigation over what that phrase means and who gets to decide. This is not what the Legislature intended. The Legislature got it right be creating an understandable "substantially as readable" standard for written records.

This Court should reverse the circuit court and confine an authority's duties to the plain language of Wis. Stat. § 19.35(1)(b).

***

Mandamus is an "extraordinary" writ, and should only be granted when the proponent shows he has a clear legal right to relief. Lueders cannot make that showing here. The public records statutes clearly support Krug's position. For all the reasons discussed above, the circuit court erred by

ordering Krug to provide Lueders with documents in electronic form. The circuit court's Decision and Order should be reversed.

II. The circuit court erroneously exercised its discretion when it denied Krug the right to depose Lueders.

The circuit court declared that a defendant should never be allowed to depose a plaintiff in a public records mandamus action, as doing so would "have a chilling effect on other requesters under the open records law" and this "isn't a typical type of civil litigation where a deposition of the plaintiff would reasonably be calculated to lead to the discovery of admissible evidence." (R. 61:10–11, A-App. 120–21.) The circuit court erroneously exercised its discretion when it granted Lueders a protective order based on the reasoning that a public records plaintiff could not be deposed.

To start, Wisconsin law does not prohibit deposing a plaintiff in a public records action. Lueders brought this action under Wis. Stat. § 19.37(1)(a). This statute does not limit triable issues or discovery in any manner. Public records mandamus actions are civil actions, and litigants are responsible for participating in civil discovery. Wis. Stat. §§ 783.01, 804.01. Further, the statute governing depositions in civil actions makes no exception for public records cases. *See* Wis. Stat. § 804.05(1) ("After commencement of the action . . . *any party* may take the testimony of *any person including a party* by deposition upon oral examination."). The scope of civil discovery is broad: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Wis. Stat. § 804.01(2)(a).

A litigant's broad right to discovery is not absolute. "If the moving party is able to show good cause, [Wis. Stat.] § 804.01(3) permits the circuit court to make any order 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999) (citation omitted). The party seeking a protective order has the burden of proving the relief requested is warranted. *State ex rel. Block v. Circuit Court for Dane Cty.*, 2000 WI App 72, ¶ 18, 234 Wis. 2d 183, 610 N.W.2d 213.

The issue in this case is whether a requester may dictate the format in which an authority provides a public record. Krug sought to depose Lueders for numerous legitimate reasons, which included asking him about the facts and circumstances alleged in the complaint; seeking clarity with respect to the relief he sought (including the factual basis for punitive damages); following up on written discovery responses that his counsel objected to; discovering whether Lueders intended to provide any expert testimony on the public records law; and inquiring into any other matter that could lead to the discovery of admissible evidence, including but not limited to all matters alleged in the complaint, all of the relief requested, and the factual basis for the requested relief. (R. 10:4–5.)

In his motion for a protective order, Lueders did not specifically explain why deposing him would cause him annoyance, embarrassment, oppression, or undue expense. (R. 8.) His main argument was that the only possible reasons Krug could have to depose him (namely, his identity and his purpose for using the documents (R. 8:8)), are never relevant in a public records case (R. 8:4). This argument was incorrect.

While the public records law generally does not allow an authority to factor who the requester is or

what the requester wants to do with the records, *see* Wis. Stat. § 19.35(1)(i), this is not always the case. *See, e.g., State ex rel. Ardell*, 354 Wis. 2d 471, ¶ 17. (requester's identity relevant in determining whether a safety concern outweighs presumption of disclosure); *see also Democratic Party of Wis.*, 372 Wis. 2d 460, ¶¶ 20, 23. Defendants have a right to build a record on the relevant issues through reasonable discovery, public records mandamus action or not.

This case is an example of why a blanket prohibition of depositions in public records actions is improper. As a basis for denying Krug the opportunity to depose Lueders, the circuit court stated that a requester should not be required "to testify regarding one's motivations, *regarding what one intends to do with open records.*" (R. 61:10, A-App. 120 (emphasis added).) Yet disconcertingly, in denying Krug the opportunity to depose Lueders, Krug was prevented from developing the record on legal issues the circuit court found relevant in its Decision and Order:

> [A] custodian is obligated to produce a copy of a record "substantially as good" as the original. When determining whether the copy is "substantially as good," *the custodian must take into account the needs of the requester, including any indications given as to preferred format.* In the case at hand, Plaintiff clearly communicated that printed copies would not serve his needs, and he specified several electronic formats that would facilitate *his ability to work with the records.*

(R. 55:8, A-App. 108 (emphasis added).) Krug does not agree with the standard the circuit court created. But if the requester's "needs," "preferred format," and "ability to work with the records" were relevant to the circuit court's ultimate decision, then it was certainly relevant information that Krug had a right to inquire about in a deposition.

The circuit court denied Krug a discovery right available to all civil defendants, and it provided no legal basis for holding that it is not permissible to depose a plaintiff in a public records action. The circuit court made no specific findings supported by the record as to why deposing Lueders would be oppressive or unduly burdensome. And the information the circuit court stated was irrelevant for the purpose of the deposition is precisely what the circuit court found relevant in its Decision and Order. For all of these reasons, the circuit court's protective order prohibiting Krug from deposing Lueders was an erroneous exercise of discretion.

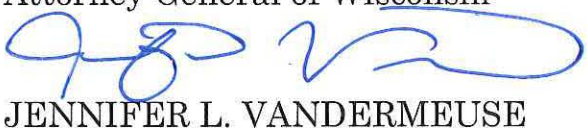
CONCLUSION

For these reasons, Krug respectfully requests that this Court reverse the circuit court's January 19, 2018, Decision and Order, as well as the circuit court's March 2, 2017, Order Granting Protective Order to the extent it denies defendants the right to depose plaintiffs in a public records case.

Dated this 21st day of May, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin



JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Defendant-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7741
(608) 267-2223 (Fax)
vandermeusejl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7144 words.

Dated this 21st day of May, 2018.

JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of May, 2018.

JENNIFER L. VANDERMEUSE
Assistant Attorney General