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POLICY BRIEF

Broken Records

A Call for Legislative Reform in Wisconsin Public Records Law

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Executive Summary

Wisconsin's public records laws are meant to ensure transparency and accountability in our government institutions at the local and state level. A recent Wisconsin Supreme Court opinion, however, unveiled a potential flaw in the way these laws are crafted.

When an individual requests records, and a government entity wrongfully refuses to turn them over, the individual may file a lawsuit to obtain the records. Historically, once that suit was filed, the requester could recover the attorney's fees they incurred from bringing the suit, even if the government agency promptly backed down and turned the records over before the judge ruled on the case. This served as an important check in favor of transparency and accountability. However, a recent Supreme Court decision made clear that the statutory language might *not* allow fee recovery in such instances—as a result, government actors potentially now have a reason not to turn records over promptly.

This policy brief explains the issue in greater detail, and proposes a very simple legislative fix to ensure that our public records law continues to be an effective tool for transparency and accountability.

Introduction: The Public Records Law

Wisconsin's public records law is designed to ensure the greatest transparency for the workings of government. Wisconsin's public records law operates similarly to its more popularized federal counterpart, the Freedom of Information Act. Under Wisconsin Statute § 19.35, an individual may request to review written records maintained by a public entity and in most cases the entity either provides copies of the requested records or makes them available for inspection.

When a government entity does not turn over records, however, Wisconsin law provides for a specific enforcement mechanism: a mandamus action. In a nutshell, a writ of mandamus is an order to a public official to comply with a clear legal duty. When such an action is filed, and a requester ultimately prevails in whole or in part, the requester is entitled to recover their attorney's fees from the government entity.

In some cases, once a mandamus action has been filed, the government entity simply turns over the records, in which case the need for litigation is mooted and the case dismissed. Historically, in such a case, a requester was still permitted to recover the attorney's fees incurred by the legal action. The requester was considered to have "prevailed" in the suit when the government entity voluntarily changed its behavior after the mandamus action was filed, and the requester could show that the lawsuit was at least a "cause" of the records being released. However, a recent Wisconsin Supreme Court opinion ordered that the statutory interpretation of "prevail" in public records law required a final decision on the merits before awards could be recouped, calling into doubt whether a requestor can recover fees in such instances.

Friends of Frame Park, U.A. v. City of Waukesha

In *Friends of Frame Park, U.A. v. City of Waukesha*, the court determined that "to 'prevail[ ] in whole or in substantial part' means the party must obtain a judicially sanctioned change in the parties' legal relationship." 2022 WI 57, ¶ 3, 976 N.W.2d 263. In concurring opinions, various Justices explained that this means that a party can only "prevail" under Wisconsin law when a court makes "a final decision on the merits" and "grants a judgement for one party over the other." Id. ¶ 22. (plurality op., Hagedorn, J., joined by Ziegler, C.J and Roggensack, J., quoting *DeGroff v. Schmude*, 71 Wis. 2d 554, 568, 238 N.W.2d 730 (1976)).

In the underlying case, the plaintiffs sought information from the defendant about the City's plans to install an amateur baseball field. They sent a public records request for the City's potential contracts and letters of intent with various baseball leagues. The defendant responded two weeks later with all documents except a draft contract with one of the league teams. The defendant stated that it could not yet disclose the contract for competitive bidding purposes, even though it had already been presented to the party with whom the City was negotiating. Approximately three months later, the plaintiffs filed a mandamus action under Wis. Stat. § 19.37 seeking the draft

contract, attorney's fees, and other expenses. However, the day after the suit was filed, the City's Common Council finished their negotiations on the contract and released the records to the plaintiffs.

On the issue of attorney's fees, the circuit court ruled in favor of the defendants, declining to award the fees, stating that it was the ending of negotiations that "caused" the release of the records, not the initial lawsuit. Accordingly, the plaintiffs appealed. Historically, the Wisconsin courts have followed a causal-nexus test (i.e., whether the filing of lawsuit itself was a cause of the release of the records) for determining when a party "prevailed" under the public records law. In *Friends*, the Court of Appeals applied that test, and went further to conclude that the City was acting contrary to the law. It ruled that the plaintiffs may be awarded some fees and costs under the law, and remanded the case. The City then petitioned the Supreme Court for review.

The Supreme Court rejected the appellate court's interpretation of "prevails" under Wis. Stat. § 19.37 and, instead, declared that "to 'prevail[ ] in whole or in substantial part' means the party must obtain a judicially sanctioned change in the parties' legal relationship." *Id*. ¶ 3. This is the only part of the opinion that had a clear majority on the Court, so it leaves some uncertainty as to the reasoning of the Court and how this will be applied going forward.

Nonetheless, this interpretation of "prevail" could significantly impact enforcement of Wisconsin's public records law. The Wisconsin Supreme Court's interpretation may not allow parties to recoup attorney's fees if the governmental entity eventually releases the records between the time a suit is filed and the time the circuit court makes a decision (this is because, in almost all cases, releasing the records first could moot the mandamus action and thus may lead to the dismissal of the case).

As a result, under the Wisconsin public records statute, individuals would be forced to bear their own costs. Many of the enforcement actions brought under the public records law are done on a "contingency fee" basis, since attorneys would be able to recover their costs at the end. If that is no longer a clear option, there will necessarily be less enforcement. Since government entities may not be responsible for paying those legal fees any longer, they would have no incentive to release legitimately requested records quickly to avoid mounting costs. In turn, this will make it prohibitively expensive for Wisconsinites to enforce open records requests that government actors refuse to comply with. Citizens' fear of bearing upfront costs and the scarcity of contingency fee options thwart the transparency and accountability that open records laws are meant to secure.

Future Implications

Failure to amend this statute could result in significant burdens on any individual seeking to request the public documents they are entitled to view. For example, parents who have requested teaching materials from their school district risk thousands of dollars in legal expenses if the district initially refuses to comply. The local taxpayer requesting details on a new park building may hesitate to file a suit even if the city refuses or severely delays the release of documents, due to the uncertainty of being able to recover expenses. Non-profit groups or government watchdogs may be financially

barred from conducting their necessary research into government actions if the cost to litigate a public records issue is too burdensome.

These examples are only a very few of the possible scenarios in which the current law may well erode community engagement with public institutions. People will be forced to choose between self-preservation and civic involvement, and the desired goals of open and accountable government will be lost.

Proposed Reforms

Below we propose simple reforms that would effectively return the law to the previous understanding of "prevail" prior to the *Friends* decision. That way, in situations where a record holder releases records after a suit has been filed even but before a final judicial ruling, a party still would clearly be allowed to seek fees and costs. We propose three options for reforms, which are not necessarily mutually exclusive in all cases, but would help accomplish these goals.

Option 1

One option is to write the causal-nexus test into the statute to award attorney's fees. This test would simply require the court to find that the litigation itself caused the records to be released in order to award fees. This one change would shift the balance of power back to the public, rather than the government entity.

19.37(2)(a) is amended to read:

> 19.37(2)(a): Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official. A requester "prevails" under this section where an authority releases records which were the subject of an action filed under sub. (1) and where the court determines there was a causal nexus between the requester bringing the action and the authority providing those records.

Option 2

Another way of reaching a similar outcome could be to simply adopt the same definition of "prevail" that exists under Federal law (see 5 USC § 552):

19.37(2)(am) is created to read:

> (am) A party "prevails in whole or in substantial part" under this section where the complainant has obtained relief through either:
>
> 1. A judicial order, or an enforceable written agreement or consent decree; or
> 2. A voluntary or unilateral change in position by the authority, if the complainant's claim is not insubstantial.

Option 3

In addition to those, another proposal would be to allow other forms of relief in public records suits beyond simply a mandamus action, the only option for relief currently allowed under state law. For example, in the context of open meetings, the law may be enforced by seeking "legal or equitable relief, including but not limited to mandamus, injunction or declaratory judgment, as may be appropriate under the circumstances." Wis. Stat. § 19.97(2). While tools like these can overlap with mandamus in terms of result achieved, they also differ in important ways. For example, obtaining an injunction (an order to do or refrain from doing something) can be easier than obtaining a writ of mandamus because the government defendant's duty need not be perfectly clear. And declaratory relief is focused on clarifying the meaning of the law even if it does not result in a coercive order. A similar "toolbox" could be incorporated into the public records law, thus giving more avenues for the law to be enforced.

Conclusion

This policy report highlights the rising tension between historical expectations of Wisconsin public records law and the Wisconsin Supreme Court's interpretation of "prevailing" in a mandamus action. The opinion in *Friends* reveals that our current laws may no longer adequately protect public record requesters—and their pocketbooks—from government entities arbitrarily withholding and releasing documents.

It is now time for the legislature to ensure the law does not impede citizens' access to public documents. By amending § 19.37 and essentially restoring the prior status quo, it will be clear that "prevailing" in a public records request means release of records after a mandamus action is filed. Such a change will not only incentivize government entities to release public records immediately upon request but also punish them when they force and moot litigation by releasing the records after a claim is filed.

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