

CO-SPONSORSHIP MEMORANDUM

DATE: February 14, 2023

TO: Legislative Colleagues

FROM: Rep. Todd Novak and Rep. Rob Swearingen
Sen. Duey Stroebel

RE: **Co-sponsorship of LRB-1777/1 & LRB-1199/1; obtaining attorney fees and costs under the state's public records law when an authority voluntarily releases a contested record after an action has been filed in court.**

DEADLINE: February 28, 2023 at 5:00pm

Wisconsin's Public Records Law facilitates openness and transparency in the affairs of government for the benefit of taxpayers and citizens. This important law gives media, watchdog groups, and the public access to government records to keep a watchful eye on governmental operations. This transparency is an important check to combat taxpayer waste, fraud, and other forms of governmental corruption.

Unfortunately, there are instances when there are unwarranted delays in the production of records or access is denied altogether. In those situations, current law outlines a process where a records requestor may file a lawsuit to compel the government entity to furnish the requested information. In some cases, the mere filing of a lawsuit leads to the requested information being turned over – likely because the government knew a judge would order the information to be given to a requester. Before a recent court decision, a judge could still order the government agency that withheld records to reimburse the legal costs incurred by a requester if the judge felt that was warranted despite the fact that the lawsuit was moot because the records request had been met. This practice provided an important incentive for governmental entities to produce records “as soon as practicable, without delay.”

However, a recent Wisconsin Supreme Court (*Friends of Frame Park, U.A. v. City of Waukesha*) opinion upended long-established precedent by requiring a lawsuit to go to trial before legal fees can be recovered by a requester. The decision allows a government to hold on to public records until a suit is filed, then simply turn over the requested information and face no fear of having to pay costs incurred by the requester because the suit will never advance to a final decision. If a "court-ordered change in the legal relationship between the plaintiff and the defendant" is required to recover attorney fees moving forward, a dangerous trend could arise where government entities withhold records with little to no recourse.

The bill alters the statutory definition of “prevail” to allow courts to award attorney fees in instances where the voluntary release of a record was substantially related to a record requestor filing a lawsuit, effectively returning to the methodology used prior to the *Friends of Frame Park, U.A. v City of Waukesha* decision. This standard is also substantially similar to the standard that applies for a requester to obtain attorney fees and costs under the federal Freedom of Information Act.

This proposal is supported by the Wisconsin Newspapers Association, Wisconsin Broadcasters Association, Wisconsin Freedom of Information Council, Wisconsin Institute for Law and Liberty, Wisconsin Transparency Project and Americans for Prosperity – WI.

If you have questions or would like to co-sponsor this bill, please reply to this email or contact Representative Novak's office at 6-7502 or Senator Stroebel's office at 6-7513 **before 5:00 PM on February 28, 2023**. Your name will be added to the Assembly and Senate version unless otherwise specified.

Analysis by the Legislative Reference Bureau

Currently, if a person requests access to a public record and the agency or officer in state or local government having custody of the record, known as an "authority" under the public records law, withholds or delays granting access to the record or a part of the record, the requester may bring a mandamus action asking a court to order release of the record or part of the record. Current law requires the court to 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 such action.

The Wisconsin Supreme Court decided in 2022 that a requester prevails in whole or in substantial part only if the requester obtains a judicially sanctioned change in the parties' legal relationship, for example, a court order requiring disclosure of a record. See, Friends of Frame Park, U.A. v. City of Waukesha, 2022 WI 57. Under the supreme court's decision, a requester generally is not entitled to attorney fees and costs if the authority voluntarily or unilaterally without a court order provides contested records after the requester files an action in court.

This bill supersedes the supreme court's decision in Friends of Frame Park. Under the bill, a requester has prevailed in whole or in substantial part if the requester has obtained relief through any of the following means:

- 1. A judicial order or an enforceable written agreement or consent decree.*
- 2. The authority's voluntary or unilateral release of a record if the court determines that the filing of the mandamus action was a substantial factor contributing to that voluntary or unilateral release.*

This standard is substantially the same as the standard that applies for a requester to obtain attorney fees and costs under the federal Freedom of Information Act.