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Testimony in Favor of Senate Bill 117

Senate Committee on Government Operations, Elections, and Consumer Protection
March 16, 2023

Chairman Stroebel and members of the Senate Committee on Government Operations, Elections, and Consumer Protection:

Thank you for the opportunity to testify today in favor of Senate Bill 117. My name is Cory Brewer and I am an attorney at the Wisconsin Institute for Law & Liberty. To start, I'd like to thank Senator Stroebel and Representative Novak for your leadership in authoring this important bi-partisan legislation. I'd also like to thank Senator Roys for co-sponsoring this bill. It's fitting that today's hearing is being held on National Freedom of Information Day and during Sunshine Week, a week that celebrates and promotes access to information and open government nationwide.

Many citizens and organizations have expressed interest—especially since the pandemic—in how the government is functioning, how taxpayer dollars are being spent, and what is being taught in the classroom. Citizen access to public documents is important for government accountability and transparency. SB 117 would restore a key mechanism for holding government accountable.

Wisconsin's open records law is designed to ensure the greatest transparency for the workings of state and local government entities. 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, Wisconsin law provides for a specific enforcement mechanism: a mandamus action. In a nutshell, a writ of mandamus is an order to a government official to comply with a clear legal duty. WILL has seen its fair share of open records requests unfulfilled or simply ignored by government actors. In fact, WILL recently sued the Madison Metropolitan School District after it refused for almost one year to produce a policy and related records.

When an open records lawsuit is filed, and a requester prevails in whole or in part, the requester is entitled to recover attorney 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, even if records were voluntarily turned over in this way, a requester was still permitted to recover the attorney 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.

In a recent Wisconsin Supreme Court opinion, *Friends of Frame Park v. Waukesha*, the Court held that the statutory interpretation of “prevail” in open records law required a final decision on the merits before attorney fees could be recouped. Since the *Friends of Frame Park* ruling, it has become difficult to envision a scenario in which a requester can recover attorney fees if records are voluntarily turned over after a mandamus action was filed, but before a final decision on the merits.

Why is this important? While the hope is that government entities comply with open records law, there have been numerous examples showing that is not always the case. In practice, government actors could now refuse to release records until a citizen has undergone the time and expense of filing a lawsuit, to only then release those records, and potentially avoid having to pay any attorney fees.

Inability to obtain attorney fees upon prevailing in an open records lawsuit can make it prohibitively expensive for Wisconsinites to challenge denial of requests or excessive delay of responses. As a result, fewer attorneys will be willing to bring open records cases on a contingent fee basis, and the transparency and accountability that our open records law is meant to secure will be at risk.

In response to the *Friends of Frame Park* decision, WILL released a policy brief calling for legislative reforms that could restore the status quo, and make certain that everyday citizens do not lose this tool for holding government accountable. SB 117 would accomplish just this by altering the statutory definition of “prevail” to allow courts to award attorney fees in instances where the voluntary production of a record was substantially related to a record requestor filing a lawsuit. The standard in SB 117 is also substantially similar to the standard that applies under the federal Freedom of Information Act. Effectively, this legislation would return the practice back to what it was understood to be before the *Friends of Frame Park* decision.

I respectfully ask that you support Senate Bill 117. Thank you for your time today. I would be happy to answer any questions.

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