STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2023AP36

WISCONSIN VOTER ALLIANCE and RON HEUER,
PETITIONERS-APPELLANTS

v.

KRISTINA SECORD,
RESPONDENT-RESPONDENT-PETITIONER

Appeal from the Circuit Court of Walworth County
Honorable David W. Paulson, Presiding
Case No. 22CV443

NON-PARTY BRIEF OF WISCONSIN FREEDOM OF INFORMATION COUNCIL, JOURNAL SENTINEL INC., AND WISCONSIN INSTITUTE FOR LAW & LIBERTY

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INTRODUCTION

A tension has developed in public records jurisprudence regarding the burden of proof. While most cases correctly state that the government authority has the burden to justify a denial, a court has occasionally suggested that the requester failed to meet its burden of establishing the four elements necessary for a writ of mandamus.

Amici take no position on the outcome of this case and support neither side. *Amici* neither support nor oppose the intended use of the records sought by the Petitioners-Appellants-Respondents.

Rather, *Amici* urge this Court to resolve this tension and clarify the interplay between the common-law mandamus elements and the long history of placing the burden on authorities in records cases. This Court should rule that the mandamus elements in an Open Records Law case are satisfied once requesters make a *prima facie* case that they made a written record request that was denied.[1] Once that minimal burden is met, the burden shifts to the authority to prove an exception to release exists.

ARGUMENT

I) COURTS HAVE OCCASIONALLY MUDDIED THE BURDEN OF PROOF IN RECORDS CASES BY SUGGESTING A REQUESTER FAILED TO ESTABLISH ALL FOUR ELEMENTS OF MANDAMUS

Well before the modern Open Records Law was adopted in 1982, it had long been established that mandamus was the proper method for challenging a denial of a record request. *See, e.g.*, *Beckon v. Emery*, 36 Wis. 2d 510, 519, 153 N.W.2d 501, 504 (1967). When enacting the modern Open Records Law, the Legislature maintained that process. *See* 1981 Wis. Act 335, § 14. Under Wis. Stat. § 19.37(1)(a) as it currently reads, "If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may . . . bring an action for mandamus asking a court to order release of the record."

[1] Because this is a denial case, and because whether a given length of time constitutes "delay" is a more nebulous question than whether a request was denied, this brief will only address the burden of proof in denial cases.

Mandamus was traditionally a common-law writ and required plaintiffs to prove four elements: "'(1) a clear legal right; (2) a positive and plain duty of a public officer, presently due to be performed; (3) substantial damages; and (4) no other adequate remedy at law.'" *Voces de la Frontera v. Clarke*, 2017 WI 16, ¶11, 373 Wis. 2d 348, 891 N.W.2d 803 (*quoting Pasko v. City of Milwaukee*, 2002 WI 33, ¶24, 252 Wis. 2d 1, 643 N.W.2d 72) (describing elements); *State* ex rel. *First Nat'l Bank v. M & I Peoples Bank*, 82 Wis. 2d 529, 540, 263 N.W.2d 196, 201 (describing the writ as a common law remedy). If a plaintiff failed to prove one or more of these elements, the writ would be denied. *See Watton v. Hegerty*, 2008 WI 74, ¶27, 311 Wis. 2d 52, 751 N.W.2d 369.

Contrary to how the burden in mandamus cases usually rests on the plaintiff, in the Open Records Law context, case after case establishes incontrovertibly that the burden is on the defendant – the government authority – to prove that its denial of a record request was lawful. "The party opposing disclosure carries the burden." *Milwaukee Deputy Sheriffs' Ass'n v. County of Milwaukee County Clerk*, 2021 WI App 80, ¶15, 399 Wis. 2d 769, 967 N.W.2d 185; *see also John K. MacIver Inst. v. Erpenbach*, 2014 WI App 49, ¶14, 354 Wis. 2d 61, 848 N.W.2d 862 (the burden is on "the party seeking nondisclosure"). Public records are "subject to a strong presumption favoring their disclosure," and the burden lies with the party seeking secrecy "to rebut the strong presumption to the contrary." *C.L. v. Edson*, 140 Wis. 2d 168, 182, 409 N.W.2d 417, 422 (Ct. App. 1987); *see also Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589, 595 (1989) (placing the "burden of proof of facts" and "producing evidence" on the authority). "[I]t is the custodian's burden to show that the public interest favoring denial of the requested record outweighs the public interest favoring disclosure.") *Madison Teachers, Inc. v. Scott*, 2018 WI 11, ¶16, 379 Wis. 2d 439, 906 N.W.2d 436; *see also Dem. Party of Wis. v. DOJ*, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584 (authority has the burden to show that "public interests favoring secrecy outweigh those favoring disclosure").

With barely an exception, this Court never mentions, much less analyzes, the common-law mandamus elements in records cases. *See Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, 403 Wis. 2d 1, 976 N.W.2d 263; *Madison Teachers*, 379 Wis. 2d 439; *Dem. Party*, 372 Wis. 2d 460; *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563; *Juneau County Star-Times v. Juneau County*, 2013 WI 4, 345 Wis. 2d 122, 824 N.W.2d 457; *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79,

319 Wis. 2d 439, 768 N.W.2d 700; *WIREdata, Inc. v. Vill. of Sussex*, 2008 WI 69, 310 Wis. 2d 397, 751 N.W.2d 736; *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W.2d 240; *Hempel v. City of Baraboo*, 2005 WI 120, 284 Wis. 2d 162, 699 N.W.2d 551; *Osborn v. Bd. of Regents*, 2002 WI 83, 254 Wis. 2d 266, 647 N.W.2d 158; *Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811; *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999); *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996); *Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan*, 199 Wis. 2d 768, 546 N.W.2d 143 (1996); *Nichols v. Bennett*, 199 Wis. 2d 268, 544 N.W.2d 428 (1996); *State* ex rel. *Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991); *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 469 N.W.2d 638 (1991); *Fox*, 149 Wis. 2d 403; *Hathaway v. Joint Sch. Dist. No. 1*, 116 Wis. 2d 388, 342 N.W.2d 682 (1984). In two cases, one or more of the elements were mentioned, but not analyzed. *See Voces*, 373 Wis. 2d 348, ¶11; *State* ex rel. *Morke v. Donnelly*, 155 Wis. 2d 521, 525, 455 N.W.2d 893, 895 (1990). In only a single case were the elements analyzed. *See Watton*, 311 Wis. 2d 52, ¶27.

The pattern is similar in the Court of Appeals. In the last 20 years, 24 cases never mentioned the common-law elements and one mentioned them without analysis. Only five cases have analyzed the elements. *See Wis. Voters Alliance v. Secord*, 2023AP36 (Wis. Ct. App. Dec. 27, 2023) (pet. for review granted); *Wis. Voters Alliance v. Reynolds*, 2023 WI App 66, __ Wis. 2d __, 1 N.W.3d 748; *State* ex rel. *Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894; *State* ex rel. *Leiser v. State*, 2011AP61 (Wis. Ct. App. Apr. 17, 2012) (unpublished); *State* ex rel. *Greer v. Stahowiak*, 2005 WI App 219, 287 Wis. 2d 795, 706 N.W.2d 161.

Nevertheless, those six cases analyzing the common-law elements – particularly where they suggest that the requester failed to prove one or more of them – represent a thread incongruent with the rest of the jurisprudential weave. In *Watton*, this Court concluded that because "the custodian has succeeded in showing that the [records] fit within a statutory exemption from disclosure . . . . Correspondingly, [the requester] has not succeeded in showing that he has a 'clear legal right' to [them]." 311 Wis. 2d 52, ¶27. In *Reynolds*, the Court of Appeals "conclude[d] that the [records] are not subject to release under § 54.75 [and a]s a result, [the requester] does not have a 'clear legal right' to obtain them, nor does [the authority] have a 'plain legal duty' to provide them." 1 N.W.3d 748, ¶20. In

Ardell, the Court of Appeals concluded after applying the balancing test that the requester "has no clear, specific legal right to the documents he requests, nor does the [authority] have a positive and plain duty to reveal those documents." 354 Wis. 2d 471, ¶14. In *Greer*, the Court of Appeals concluded that Wis. Stat. § 19.35(1)(am) provided the requester only with a clear legal right "to documents that do not fall within the exceptions enumerated in § 19.35(1)(am)2" and that he had "not presented any factual basis or legal theory" for applying that exception. 287 Wis. 2d 795, ¶15; *see also Leiser*, 2011AP61, ¶¶11-15 (unpublished) (concluding the request did not fall under a § 19.35(1)(am)2. exception and therefore the requester "has no clear legal right to the records sought"). The single case analyzing the mandamus elements and ruling in favor of the requester is this one. *Secord*, Slip op., ¶¶31-34.

These cases either expressly or implicitly suggest that the requester carries the burden to prove no exception applies, contrary to the overwhelming weight of other authority.[2] Only this Court can resolve that conflict. *See Cook v. Cook*, 208 Wis. 2d 166, ¶53, 560 N.W.2d 246. The conflict results in confusion and disagreements among litigants and judges.

Aside from confusion when addressing the merits of records cases, the conflict has led to confusion on the proper standard of review on appeal. Appellate courts usually review records cases *de novo*, without deference to the lower court. *See, e.g.*, *Zellner*, 300 Wis. 2d 290, ¶17. But when courts analyze the mandamus elements, they sometimes have applied an erroneous exercise of discretion standard, including in this case, *Secord*, Slip op., ¶¶11-12, and its sister case, *Reynolds*, 1 N.W.3d 748, ¶18; *see also Watton*, 311 Wis. 2d 52, ¶6.

The conflict has also led to contradictory approaches to deciding motions to dismiss for failure to state a claim. For example, in *Morke*, this Court denied a motion to quash[3] a writ of mandamus, ruling that defenses to production could only be raised after making a return to the writ. 155 Wis. 2d at 529, 533. In contrast, in *Greer*, the Court of Appeals reached the authority's defenses to production and upheld a motion to dismiss. 287 Wis. 2d 795, ¶¶12-16.

[2] Judge Robert D. Sundby identified this conflict in a dissent he wrote to an unpublished 1990 opinion.

[3] "A motion to quash a writ of mandamus 'shall be deemed a motion to dismiss the complaint under s. 802.06(2).'" *Morke*, 155 Wis. 2d at 526, *quoting* Wis. Stat. § 783.01.

II) THIS COURT SHOULD CLARIFY THAT A REQUESTER MAKES A *PRIMA FACIE* CLAIM FOR MANDAMUS BY PROVING A WRITTEN REQUEST WAS DENIED, SHIFTING THE BURDEN TO THE AUTHORITY TO PROVE AN EXCEPTION APPLIES

This Court should clarify that a requesters have an initial, but low, burden to prove they made a written request for records to an authority that was denied. At that point, the burden shifts to authorities to prove an exception applies.

This approach tracks the language of the Open Records Law and the bulk of existing case law. The requirements for pleading a mandamus action to compel the release of records are set forth expressly in the statute: "If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may . . . bring an action for mandamus asking a court to order release of the record." Wis. Stat. § 19.37(1)(a). An action for mandamus on a denial may therefore be brought when four elements are satisfied:

1) an authority
2) has withheld access to
3) a record or part of a record
4) after a written request for disclosure is made

Such a showing – in the absence of a proven exception – also satisfies the four common-law elements for mandamus: (1) a clear legal right; (2) a positive and plain duty of a public officer, presently due to be performed; (3) substantial damages; and (4) no other adequate remedy at law. *Voces*, 373 Wis. 2d 348, ¶11.

The first and second elements appear in the language of the Open Records Law. Wis. Stat. § 19.35(1)(a) and (b) provide that "any requester has a right to inspect any record" and "to make or receive a copy of a record." Wis. Stat. § 19.35(4) provides that "Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Under those two statutes, when a request is made, the authority has a positive and plain duty to act, and the requester has a clear legal right to the record. The two elements are the obverse and reverse of the same coin; if the authority has a positive and plain duty to produce a record, the requester has a clear legal right to it, and vice versa.

The third element will always be satisfied in record cases. The Open Records Law recognizes that "all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them," that there is a "presumption of complete public access," and that "[t]he denial of public access generally is contrary to the public interest." Wis. Stat. § 19.31. In recognition of that harm to the public interest, the Open Records Law sets the statutory amount of damages for violations at a minimum of $100. Wis. Stat. § 19.37(2)(a); *see State* ex rel. *Young v. Shaw*, 165 Wis. 2d 276, 294, 477 N.W.2d 340, 347 (Ct. App. 1991) (even in the absence of proven damages, prevailing requesters are entitled to statutory minimum).

The fourth element is also satisfied in every record case. Requesters have no adequate remedy at law for withheld records other than mandamus. *Capital Times v. Doyle*, 2011 WI App 137, ¶1, 337 Wis. 2d 544, 807 N.W.2d 666 ("Wisconsin Stat. § 19.37 exclusively lists mandamus as the vehicle by which open records law is enforced in our courts.") (citation omitted); *Beckon*, 36 Wis. 2d at 518-19 ("Mandamus is the proper remedy to test the reasons for withholding documents or records from inspection.").

Therefore, once they establish that they made a written request to an authority that was denied, requesters are entitled to a writ of mandamus, unless an authority proves an exception applies.

This approach has been suggested by at least two courts. In *Juneau County Star-Times*, the Court of Appeals concluded that the requester had "presented a prima facie case that the redactions were not privileged," continuing to analyze the defenses raised by the authority. 337 Wis. 2d 710, ¶¶31-48. In *Morke*, this Court similarly ruled that a petition stated a claim for mandamus upon which relief could be granted, remanding to permit the authority to raise defenses. 155 Wis. 2d at 529, 533. Both cases are consistent with the conclusion that a requester establishes a *prima facie* case for mandamus by proving a written request was denied, shifting the burden to the authority to establish an exception.

The Open Records Law's declaration of policy also supports this approach. The Law "shall be construed in every instance with a presumption of complete public access." Wis. Stat. § 19.31. Once it is established that a request for a record was made, the law presumes access to that record. *See ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d 510 ("[T]he

legislature's well-established public policy presumes accessibility to public records and mandates that open records law be liberally construed to favor disclosure . . ."). "[P]ublic records . . . are subject to a strong presumption favoring their disclosure," and the burden lies with the party seeking secrecy "to rebut the strong presumption to the contrary." *C.L.*, 140 Wis. 2d at 182 (Ct. App. 1987). "[T]here is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary." *Beckon*, 36 Wis. 2d at 518.

Finally, this approach is also consistent with the alternative writ of mandamus procedure used in some records cases. *See, e.g.*, *Journal Sentinel, Inc. v. Milwaukee County Sheriff's Office*, 2022 WI App 44, ¶5, 404 Wis. 2d 328, 979 N.W.2d 609 ("The circuit court issued an alternative writ of mandamus, instructing MCSO to either produce the video or show cause as to why production was not required or possible."); *Morke*, 155 Wis. 2d at 525 ("[T]he alternative writ of mandamus commanded that Donnelly either provide Morke with access to the requested public records or show cause for withholding the records."). "The usual practice, if a prima facie case is made out by the petition or application, is to issue an alternative writ of mandamus, directed to the person claimed to be under a duty to act, requiring the person, either to act or to show cause why the person should not be compelled to do so." 9 *Wis. Pleading & Practice Forms*, sec. 85.37 (5th Ed. 2017).

CONCLUSION

The common-law writ of mandamus is sometimes described as an "extraordinary" or "exceptional" remedy." *See, e.g.*, *Watton*, 311 Wis. 2d 52, ¶7; *Ardell*, 354 Wis. 2d 471, ¶6. But in the context of government records, mandamus is not extraordinary or exceptional. It is common, because it is the only method of enforcing the Open Records Law.

Regardless of the outcome in this case, *Amici* ask this Court to clarify the interplay between the common-law mandamus elements and the burden of proof in records cases. This Court should rule that the mandamus elements are satisfied when requesters prove (or sufficiently allege, when considering a motion to dismiss or quash) that they made a written request to an authority, which withheld records. Once that *prima facie* showing is made, the burden shifts to the authority to prove an exception applies.

Dated this May 22, 2024

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b), (bm), and (c) for a brief produced with proportional serif font. The length of this brief is 2,995 words, calculated using the Word Count function of Microsoft Word 365.

Dated this May 22, 2024

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