STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 9

INSTITUTE FOR REFORMING GOVERNMENT INC., a domestic non-stock corporation,

Petitioner,

v.

SARAH GODLEWSKI, in her official capacity as Wisconsin Secretary of State,

Respondent.

Case No. 23-CV-1330

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

When an authority delays responding to a public records request but then voluntarily discloses responsive records after an action is commenced, the requester is entitled to summary judgment if the delay was unlawful. *Wis. State J. v. Blazel*, 2023 WI App 18, ¶¶3, 43–44, 407 Wis. 2d 472, 991 N.W.2d 450.

Under this rule, the Institute for Reforming Government Inc. ("IRG"), a non-profit entity that promotes government accountability and transparency, is entitled to summary judgment. Secretary of State Sarah Godlewski unlawfully delayed responding to a public records request by IRG. In mid-March 2023, IRG made the request, which sought, among other things, all "correspondence" between Secretary Godlewski and her predecessor in office over a yearlong period. Months passed, and

Secretary Godlewski neither denied the request nor produced responsive records. To no avail, IRG's Chief Legal Counsel and Director of Oversight repeatedly asked for status updates. Then, in mid-August 2023, IRG commenced this action, seeking a writ of mandamus to compel Secretary Godlewski to produce responsive records. About one month later, Secretary Godlewski, via her chief of staff, produced emails between Secretary Godlewski and her predecessor in which the two discussed official state business, including the state budget. Even though the emails were responsive, the chief of staff argued on Secretary Godlewski's behalf that they were not, emphasizing that they were produced only as a "courtesy." He seemed to believe that because these records were created on personal email accounts, they were not, in fact, public records—which is wrong. Furthermore, the chief of staff argued that Secretary Godlewski did not even need to inform IRG that she believed she did not have responsive records because "[w]hen an authority has no responsive records, a response is not required."

This Court should award IRG statutory damages of not less than $100 under Wis. Stat. § 19.37(2)(a), punitive damages under § 19.37(3), and attorney's fees and costs under § 19.37(2)(a) and (2)(b). In so awarding, this Court should declare that emails created on personal email accounts are public records when they have a connection to a government function, and Secretary Godlewski must maintain such emails like any other public records. This Court should also declare that the "no-response-needed" policy is unlawful to ensure that members of the public are not faced with the same indefinite delay that IRG had to endure. Lastly, this Court should

issue a writ of mandamus compelling Secretary Godlewski to produce all responsive records and to end the policy.[1]

MATERIAL FACTS IN SUPPORT OF SUMMARY JUDGMENT

The public records request at issue in this action stemmed from efforts to shed light on the circumstances surrounding Secretary Godlewski's appointment by Governor Tony Evers. For context, Secretary Godlewski's predecessor, Secretary Doug La Follette, was the secretary of state from 1983 to 2023. Statement Proposed Material Facts Supp. Pet'r's Mot. Summ. J., ¶¶1–2. Secretary Godlewski, Governor Evers, and Secretary La Follette are members of the same political party. *Id.*, ¶3. In fall 2022, Secretary La Follette narrowly defeated a challenger by a 0.3% margin. *Id.*, ¶4. Then, on March 17, 2023, Governor Evers announced that Secretary La Follette had retired—a mere two months into Secretary La Follette's new term. *Id.*, ¶5. That same day, Governor Evers announced that, effective the next day, he was appointing Secretary Godlewski to fill the vacancy. *Id.*, ¶6.

IRG sought to obtain more information regarding the timing of Secretary La Follette's retirement and Secretary Godlewski's subsequent appointment. *Id.*, ¶7. IRG operates out of a virtual office with employees throughout Wisconsin, including Waukesha County. *Id.*, ¶8. IRG's then-Chief Legal Counsel and Director of Oversight, Anthony LoCoco, explained in an affidavit that he "live[s] and work[s] in Waukesha County." *Id.*, ¶9. He also explained that on March 17, 2023, while "located in

[1] IRG advises this Court that settlement negotiations are ongoing. The parties might reach an agreement, rendering a decision by this Court unnecessary.

Waukesha County," he sent an email to Secretary Godlewski's office. *Id.*, ¶10. In this email, he requested "[a]ll correspondence" from March 17, 2022, to March 17, 2023, between:

- "Douglas La Follette and Governor Tony Evers,"
- "Douglas La Follette and Sarah Godlewski," and
- "Douglas La Follette and any Wisconsin Deputy Secretary of State."

Id., ¶11. Mr. LoCoco then sent the same public records request by United States mail to Secretary Godlewski's office. *Id.*, ¶12.

Over the next several months, Mr. LoCoco heard little from Secretary Godlewski's office, despite his repeated requests for status updates. On March 23, 2023, Mr. LoCoco sent a first follow-up email, stating: "I am emailing to ensure that this [public records] request, which was also sent by mail, has been received. Could someone in your office please confirm receipt?" *Id.*, ¶13. No one from Secretary Godlewski's office responded. *Id.*, ¶14.

On or about March 27, 2023, and March 29, 2023, Mr. LoCoco called Secretary Godlewski's office, hoping for a status update. *Id.*, ¶15. In one call, Mr. LoCoco reached a member of Secretary Godlewski's staff and informed him of the public records request. *Id.*, ¶16.

On April 27, 2023, Mr. LoCoco sent a second follow-up email, stating, "I am writing to ask for an update on the status of my [public records] request, which was submitted over one month ago." *Id.*, ¶17. As with the first follow-up email, no one from Secretary Godlewski's office responded. *Id.*, ¶18.

On May 9, 2023, Mr. LoCoco sent a third follow-up email, stating: "I am writing to ask for an update on the status of my [public records] request, which was submitted almost two months ago. I have not received a response to my initial request for an update." *Id.*, ¶19. More than two weeks later, on May 25, 2023, Mr. LoCoco finally received written confirmation, by email, that the request had been received and was being fulfilled. *Id.*, ¶20. The confirmation email explained, "[w]e are in the process of gathering records and will be in touch soon." *Id.*, ¶21.

Months passed, however, while Secretary Godlewski's office was supposedly gathering records, and no one provided any additional status updates to IRG, despite the promise that someone from her office would "be in touch soon." *Id.*, ¶22. IRG commenced this action on August 22, 2023, seeing no other options to enforce its rights under the public records statutes. IRG sought a writ of mandamus to compel Secretary Godlewski to produce the requested records.

Secretary Godlewski communicated with the media almost as soon as this action was commenced. *Id.*, ¶23. She said that "my office does not have any responsive records . . . . Despite this conspiracy fishing expedition from partisan groups, my office will continue to work diligently to modernize and best serve Wisconsinites." *Id.*, ¶24. Notably, neither Secretary Godlewski nor anyone from her office had ever communicated to anyone at IRG that Secretary Godlewski believed she did not have responsive records. *Id.*, ¶25.

On September 22, 2023, Secretary Godlewski's chief of staff, Nate Schwantes, sent an email to Mr. LoCoco purporting that no one in Secretary Godlewski's office

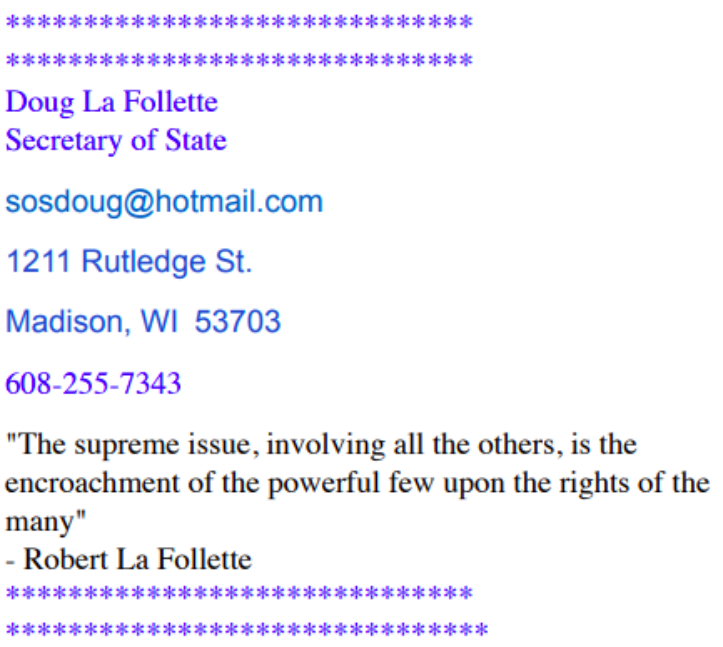
had "locate[d] any responsive records . . . ." *Id.*, ¶26. According to Mr. Schwantes, Secretary Godlewski did not let anyone at IRG know sooner because "[w]hen an authority has no responsive records, a response is not required." *Id.*, ¶27.

Despite these statements, Mr. Schwantes attached to his email six responsive records. He described these records as "communications between Douglas La Follette on his sosdoug@hotmail.com address and Sarah Godlewski on her home email address . . . ." *Id.*, ¶28. In the communications, Secretary La Follette and Secretary Godlewski discussed matters related to official state business, including, among other things, the state budget. *Id.*, ¶29.

For example, Secretary Godlewski asked Secretary La Follette whether he had spoken with someone at the Legislative Fiscal Bureau or his financial analyst "about any potential joint appropriations between your office and Guv. . . . [Limited term employees (LTEs)] through Guv: You can ask if the Gov's team has any LTEs." *Id.*, ¶30. Notably, when some communications occurred, Secretary Godlewski was the state treasurer—an elective office she held before becoming the secretary of state. *Id.*, ¶31. Even still, Mr. Schwantes emphasized on behalf of Secretary Godlewski that she believed she was a "private citizen" when other communications were created, and the communications were not "responsive" records required to be turned over by law. *Id.*, ¶¶32–33.

In several of these communications, Secretary La Follette used an official signature block, as shown in Figure 1.

Figure 1: Secretary La Follette's Signature Block


****
****
Doug La Follette
Secretary of State

sosdoug@hotmail.com

1211 Rutledge St.

Madison, WI 53703

608-255-7343

"The supreme issue, involving all the others, is the encroachment of the powerful few upon the rights of the many"
- Robert La Follette
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Id., ¶34. As can be seen, Secretary La Follette signed these emails as the "Secretary of State." *Id.*

The communications are "correspondence" between "Douglas La Follette and Sarah Godlewski" and have a connection to a government function (i.e., they are responsive records), yet Mr. Schwantes maintained that they were not responsive records. *Id.*, ¶33. He said that the communications were produced "only as a courtesy" in "the spirit of openness and transparency." *Id.*, ¶35.

Subsequently, IRG filed an amended petition for a writ of mandamus and declaratory judgment. In the amended petition, IRG explained that some responsive records had been produced but that the delay was unlawful and that IRG was entitled to relief.

Secretary Godlewski's answer largely admitted the material facts and made three defenses: (1) she claimed that this action might not be in the proper venue, purporting that where the claim arose is unclear; (2) she claimed IRG lacks standing because the public records request was not, in her view, denied; and (3) she claimed that IRG failed to state a claim because she believes that no responsive records exist.

LEGAL STANDARD

IRG seeks summary judgment. Under Wis. Stat. § 802.08(2), summary judgment "shall be rendered" if "there is no genuine issue as to any material fact[,] and . . . the moving party is entitled to judgment as a matter of law." When affidavits have been submitted and statements therein are not contravened by anything in the record, this Court must accept the truth of the statements. *Physicians Plus Ins. v. Midwest Mut. Ins.*, 2002 WI 80, ¶18, 254 Wis. 2d 77, 646 N.W.2d 777 (citing *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (1991)) ("To defeat summary judgment, the nonmoving party must demonstrate more than a mere existence of some alleged factual dispute; there must be a genuine issue of material fact."); *Augustine v. Anti-Defamation League of B'Nai B'Rith*, 75 Wis. 2d 207, 221–22, 249 N.W.2d 547 (1977) (explaining statements in an affidavit that are "not contravened" must be accepted as true). IRG has submitted affidavits, and Secretary Godlewski has not; unless she does, this Court must accept the statements in IRG's as true.

This Court must independently review the legal conclusions stated in Mr. Schwantes's September 22 email. *John F. MacIver Inst. for Pub. Pol'y, Inc. v. Erpenbach*, 2014 WI App 49, ¶¶13–14, 354 Wis. 2d 61, 848 N.W.2d 862. Also, a legal

custodian cannot tell a requester one reason for a delay and then give another in court. Peter J. Block, *The Wisconsin Public Records and Open Meetings Handbook* § 2.59 (7th ed. 2024) ("Generally, a court will consider only those reasons for denial specifically mentioned in the custodian's written denial letter."); *see Portage Daily Reg. v. Columbia Cnty. Sheriff's Dep't*, 2008 WI App 30, ¶12, 308 Wis. 2d 357, 746 N.W.2d 525 (citing *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 157, 469 N.W.2d 638 (1991)) (explaining a circuit court must examine "the stated reasons for withholding the [public] records"); *see also Beckon v. Emery*, 36 Wis. 2d 510, 518, 153 N.W.2d 501 (1967) ("[W]here . . . no specific reason was given for withholding a . . . record from inspection, the writ of mandamus compelling its production should issue as a matter of course."). Accordingly, Secretary Godlewski is bound by the reasoning in Mr. Schwantes's email—she cannot supplement it—and any doubt about that reasoning should be resolved in favor of IRG. *John F. MacIver Inst. for Pub. Pol'y, Inc.*, 354 Wis. 2d 61, ¶14.

Notably, the public records statutes must be construed and interpreted in light of Wis. Stat. § 19.31. Section 19.31 provides that "it is declared to be the public policy of this state 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" and that "providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees . . . ." Therefore, § 19.31 instructs that "[t]he denial of public access [to public records] generally is contrary to the public

interest[] and only in an exceptional case may access be denied." The court of appeals has explained that the public records statutes, *"including enforcement provisions*," must "be construed 'in every instance with a presumption of complete public access.' " *Meinecke v. Thyes*, 2021 WI App 58, ¶14, 399 Wis. 2d 1, 963 N.W.2d 816 (quoting *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶15, 259 Wis. 2d 276, 655 N.W.2d 510).

ARGUMENT

IRG is entitled to summary judgment. The material facts in this action are not in dispute—IRG sent a public records request, did not hear back for months, repeatedly asked for status updates to no avail, and then filed this action. Thereafter, Secretary Godlewski produced some responsive records while also telling IRG—for the first time—that she did not have any responsive records. At best, she did not produce these records "as soon as practicable and without delay," as required by Wis. Stat. § 19.35(4)(a).

I. As a preliminary matter, this Court is the proper venue for this action.

As a preliminary matter, this Court is the proper venue for this action—Secretary Godlewski's first defense lacks any factual basis. An action seeking a writ of mandamus and declaratory judgment, like this one, is a "civil action." *See* Wis. Stat. § 783.01. Under Wis. Stat. § 801.50(2)(a), "venue in civil actions . . . shall be . . . [i]n the county where the claim arose." Additionally, under § 801.50(2)(c), venue can be where the respondent—in this action, Secretary Godlewski—"does substantial business." Mr. LoCoco submitted an affidavit that he "live[s] and work[s] in Waukesha County." Statement Proposed Material Facts Supp. Pet'r's Mot. Summ.

J., ¶9. He also explained that he sent the public records request while "located in Waukesha County." *Id.*, ¶10. Accordingly, this action arose in Waukesha County. Secretary Godlewski has not submitted any evidence to the contrary. She cannot create an issue of material fact by merely alleging the existence of a factual dispute. *See Physicians Plus Ins.*, 254 Wis. 2d 77, ¶18. Secretary Godlewski is also an elective official—she holds a statewide office. As a part of her official duties, she necessarily provides services to the public in every county, including Waukesha County. Therefore, venue is also proper in Waukesha County because it is where Secretary Godlewski does substantial business.

II. As another preliminary matter, this action presents a live controversy, and IRG has standing; even if this action is moot, multiple mootness exceptions apply.

As another preliminary matter, this action presents a live controversy and IRG has standing, even though Secretary Godlewski produced some responsive records. Generally, courts decline to reach "moot" issues—i.e., issues the resolution of which "will have no practical effect" on the parties. *Waukesha County v. E.J.W.*, 2021 WI 85, ¶16, 399 Wis. 2d 471, 966 N.W.2d 590 (quoting *PRN Assocs. LLC v. DOA*, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559). The Wisconsin Supreme Court, however, has recognized various mootness exceptions. *Id.*, ¶19 (citing *Portage County v. J.W.K.*, 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509; *Winnebago County v. Christopher S.*, 2016 WI 1, ¶32, 366 Wis. 2d 1, 878 N.W.2d 109). This action presents a live controversy because a decision on the merits will determine whether IRG is entitled to damages, attorney's fees, and costs. For the same reason, IRG has standing—i.e., a "personal stake" in this action's "outcome" sufficient to ensure that this action is

well argued. *McConkey v. Van Hollen*, 2010 WI 57, ¶16, 326 Wis. 2d 1, 783 N.W.2d 855 (quoting *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1064, 236 N.W.2d 240 (1975)). Even if this action is moot, multiple mootness exceptions apply; accordingly, "judicial policy" provides IRG with standing. *See id.*, ¶¶17–18.

In *Wisconsin State Journal v. Blazel*, the court of appeals recently clarified that "voluntary disclosure" of responsive record "does not render. . . [an] action moot" when "a ruling on the merits 'will have the practical effect of determining the [requester's] right to recover damages[,] . . . [attorney's] fees[, and costs] . . . .' " 407 Wis. 2d 472, ¶43 ([requester's] alteration in original) (quoting *Portage Daily Reg.*, 308 Wis. 2d 357, ¶8). Specifically, the court held that a live controversy existed when the Assembly initially denied a public records request but then later produced records after an action was commenced because if the initial denial were ruled unlawful, the requester would be a "prevailing" party, entitled to an award of damages, attorney's fees, and costs. *Id.*

In this action, IRG seeks statutory damages under Wis. Stat. § 19.37(2)(a), punitive damages under § 19.37(3), and attorney's fees and costs under § 19.37(2)(a) and (2)(b). After this action was commenced, some responsive records were produced, so this action's procedural history is analogous to the procedural history in *Wisconsin State Journal*. Therefore, this action, like *Wisconsin State Journal*, presents a live controversy, and IRG has standing. Accordingly, this Court needs to determine whether the 189-day delay on Secretary Godlewski's part was unlawful so that it can decide whether IRG is entitled to damages, attorney's fees, and costs.

Alternatively, the court of appeals also held in *Wisconsin State Journal* that multiple mootness exceptions applied. *Id.*,¶45. In particular, the court explained that "voluntary cessation" is a mootness exception unless "it is 'absolutely clear' " that the unlawful conduct will not recur. *Id.*, ¶49 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 609 (2001)); *see also E.J.W.*, 399 Wis. 2d 471, ¶19 (citing *J.W.K.*, 386 Wis. 2d 672, ¶12; *Christopher S.*, 366 Wis. 2d 1, ¶32) ("This [C]ourt may decide to address an otherwise moot issue if . . . [it] is likely to arise again and a decision of the court will alleviate uncertainty[,] or . . . [it] will likely be repeated[] but evade[] appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties."). Additionally, the Wisconsin Supreme Court has consistently recognized that an "issue" can be "of great public importance," such that a ruling is justified even when the issue is moot. *E.J.W.*, 399 Wis. 2d 471, ¶19 (citing *J.W.K.*, 386 Wis. 2d 672, ¶12; *Christopher S.*, 366 Wis. 2d 1, ¶32).

This action is not moot, but even if it is, these exceptions apply. Secretary Godlewski maintains that she produced some responsive records only as a courtesy; accordingly, voluntary cessation applies—she has not promised to end her "no-response-needed" policy. Stated differently, absent a decision from this Court, going forward, Secretary Godlewski will continue to believe that she does not need to respond to any public records request when she has determined (perhaps incorrectly) that no responsive records exist—the result will almost certainly be increased litigation. Additionally, this action presents multiple issues of great public

importance. Besides the policy, elective officials need to know that they cannot use personal email accounts to avoid creating public records. Elective officials should know better, but even a cursory review of recent news articles indicates that they do not. *See generally* Tom Kamenick, Opinion, *Wisconsin Should Prohibit the Use of Personal Email to Conduct the Public's Business*, Milwaukee J. Sentinel (July 6, 2021), https://www.jsonline.com/story/opinion/2021/07/06/wisconsin-should-prohibit-use-personal-email-public-business/7876669002/ (arguing the problem is so troubling that the state should ban the use of personal email accounts for public business altogether rather than trust public officials to comply with the public records statutes).

III. Secretary Godlewski unlawfully withheld responsive records for so long as to effectively deny IRG's public records request, thereby entitling IRG to statutory damages, attorney's fees, and costs.

Turning to the merits, IRG waited over six months to receive six communications—a delay that needs to be declared inexcusable. The communications were responsive records and should have been produced "as soon as practicable and without delay" under Wis. Stat. § 19.35(4)(a). The unlawful delay entitles IRG to "damages of not less than $100," "attorney['s] fees," and "costs" under Wis. Stat. § 19.37(2)(a). *See State ex rel. Young v. Shaw*, 165 Wis. 2d 276, 294, 477 N.W.2d 340 (Ct. App. 1991) (explaining even when no "compensatory damages" have been proven, a requester is entitled to $100 in statutory damages).

A. The communications that Secretary Godlewski eventually produced were responsive to IRG's public records request.

Despite claims otherwise, the communications that Secretary Godlewski eventually produced were responsive records. Wisconsin Stat. § 19.32(2) defines a public "record" as "any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority." The definition includes "handwritten, typed, or printed pages, maps, charts, photographs, films, recordings, tapes, optical discs, and any other medium on which electronically generated or stored data is recorded or preserved." § 19.32(2). It excludes "materials that are purely the personal property of the custodian and have no relation to his or her office." *Id.*

The communications are emails, which fit within this broad definition. Block, *The Wisconsin Public Records and Open Meetings Handbook*, § 1.16 ("Records custodians should be aware that email messages should be treated as records under this definition, subject to all the requirements of the public records law, including the record-retention requirements found in Wis. Stat. § 19.21(4)."). Courts have consistently so held. *E.g.*, *John F. MacIver Inst. for Pub. Pol'y, Inc.*, 354 Wis. 2d 61, ¶18 ("[The legal custodian] does not dispute that the e-mails themselves are public records, nor could he successfully do so.").

The communications have a "relation to" the office of the secretary of state; accordingly, they are not excluded. *See* Wis. Stat. § 19.32(2). Precedent makes clear that communications are public records, regardless of how they were transmitted,

when they have a "connection to a government function." *John F. MacIver Inst. for Pub. Pol'y, Inc.*, 354 Wis. 2d 61, ¶18 (citing Wis. Stat. § 19.31; *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶¶22, 80–81, 327 Wis. 2d 572, 786 N.W.2d 177 (lead opinion)). In this action, the communications include emails discussing, among other things, the state budget, including whether to ask Governor Evers if his team had any LTEs to staff government offices. Several of the communications even included an official signature block, which noted that the communications were from the "Secretary of State."

The communications are responsive records because IRG sought "[a]ll correspondence between Douglas La Follette and Sarah Godlewski" between March 17, 2022, and March 17, 2023. The communications are "correspondence" between the two from the relevant time period. Correspondence, *Merriam-Webster* (last accessed June 2, 2024) ("communication by letters or email *also* : the letters or emails exchanged"), https://www.merriam-webster.com/dictionary/correspondence. Accordingly, they should have been produced "as soon and practicable and without delay" under Wis. Stat.§ 19.35(4).

Secretary Godlewski's office seemed to suggest that the emails were not public records because they were created on a personal email account; however, this novel theory is frivolous. The court of appeals has explained, "the term 'private' is 'oxymoronic with sending an e-mail to a public official concerning a public matter.' " *John F. MacIver Inst. for Pub. Pol'y, Inc.*, 354 Wis. 2d 61, ¶29. As Judge Paul Reilly stated in a concurring opinion, "[a]pplication of the public records law" has nothing

to do with "who owned the computer from which the public record was transmitted"—or the email account, for that matter. *Id.*, ¶44 (Reilly, J., concurring). He continued, "[t]he ownership of the computer upon which the communication was transmitted is not relevant under the law." *Id.*; *see also* Letter from J.B. Van Hollen, Wis. Att'y Gen., to Gail A. Peckler-Dziki 2 (Dec. 23, 2009) (explaining "[i]t is the content of a record, not its format or location" that matters), https://www.doj.state.wi.us/sites/default/files/informal/20091223-peckler-dziki.pdf.

Indeed, the Department of Justice has issued multiple guidance documents rejecting this theory. Wis. DOJ, *Wisconsin Public Records Law Compliance Guide* 3 (2019) ("Email conducting government business sent or received on the personal email account of an authority's officer or employee also constitutes a [public] record."), https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf; *see also I Work in Government. Are Emails on My Personal Email Account Subject to Disclosure Under Public Records Law?*, Wis. DOJ (last accessed June 2, 2024) (explaining "if an employee uses his or her personal email account for government business," the resulting emails are public records and the employee "must ensure" that he or she "conduct[s] a careful search of any such personal accounts when the authority receives a public records request"), https://www.doj.state.wi.us/office-open-government/ask-the-oog/i-work-government-are-emails-my-personal-email-account-subject.

If Secretary Godlewski's office instead meant that the content of the communications was personal—as opposed to the mode of transmission—that is also

wrong. In a Wisconsin Supreme Court lead opinion, some justices reasoned that "purely personal" emails, with "no connection to a government function," are not public records; however, that bar is high and the communications do not come close to clearing it. *Schill*, 327 Wis. 2d 572, ¶104; *see also* Memorandum from J.B. Van Hollen, Wis. Att'y Gen., to Interested Parties 1 (July 28, 2010) ("[T]he 'purely personal e-mail' exception to disclosure should be narrowly applied. If there is *any* aspect of the e-mail that may shed light on governmental functions and responsibilities, the relevant content must be released as any other record would be released . . . ."), https://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf. The communications discuss hiring public employees to perform public work—that alone means that they have a "connection to a government function." *Schill*, 327 Wis. 2d 572, ¶104.

Lastly, while Secretary Godlewski's office emphasized that, when some of the communications were created, Secretary Godlewski was a "private citizen," this point is irrelevant. Under Wis. Stat. § 19.33(1), "[a]n elective official is the legal custodian of his or her records and the records of his or her office . . . ." Secretary Godlewski is an "elective official" (even though she was never elected to her current office) under Wis. Stat. § 19.32(1bd) because she "holds an office that is regularly filled by vote of the people." The communications were "records of . . . her office"—if not simply "her records"—and she had custody of them.

Even if the communications are viewed as Secretary La Follette's records, not records of the office, Wis. Stat. § 19.35(6) explains that "[n]o elective official is

responsible for the record of any other elective official unless he or she has possession of the record of that other official." By negative implication, an elective official is responsible for records of other elective officials when the elective official has possession of them. *See A.M.B. v. Cir. Ct. for Ashland Cnty.*, 2024 WI 18, ¶3, 411 Wis. 2d 389, 5 N.W.2d 238 (inferring a negative implication from a statute). Secretary Godlewski had "possession" of the communications; accordingly, she was "responsible" for them.

Secretary Godlewski also disregards Wis. Stat. § 19.21(1), which provides that "[e]ach and every officer of the state" has a duty to "keep and preserve" their predecessor's "property and things," at least when the officer is "in the lawful possession" of said property and things or "may be lawfully entitled" to "the possession or control" of said property and things. Additionally, under § 19.21(2), Secretary La Follette had a duty to give Secretary Godlewski any public records in his possession. The public records statutes cannot be defeated by a custodian-two step.

B. At best, Secretary Godlewski failed to produce responsive records "as soon as practicable and without delay."

At best, Secretary Godlewski failed to produce responsive records "as soon as practicable and without delay," as required by Wis. Stat. § 19.35(4). Indeed, the Department of Justice recommends that legal custodians respond to "simple" public records requests within "10 working days." Wis. DOJ, *Wisconsin Public Records Law Compliance Guide*, at 15. Secretary Godlewski took 189 days to produce a few communications—six total—and by her own admission, but for this action, would

never have responded at all, despite telling IRG that the records were being gathered and that her office would "be in touch soon." *See* Statement Proposed Material Facts Supp. Pet'r's Mot. Summ. J., ¶21.

Secretary Godlewski cannot argue that she needed 6 months to search for responsive records given her position that Secretary La Follette effectively took everything with him. Assuming she is being truthful, Secretary Godlewski must have known that she did not have responsive records, other than those in her personal email account, much sooner—or at least she should have known.

In fact, Secretary Godlewski even told the media almost as soon as this action was commenced that "my office does not have any responsive records . . . . Despite this conspiracy fishing expedition from partisan groups, my office will continue to work diligently to modernize and best serve Wisconsinites." *Id.*, ¶24. So, at the latest, Secretary Godlewski formed her mistaken belief that she lacked responsive records by mid-August—yet she took about an additional month to inform IRG. This delay is unlawful.

Secretary Godlewski's office gave only one reason for the delay, and that reason lacks a factual and legal basis. Specifically, her office suggested that the "no-response-needed" policy applied because no responsive records were located. Her office then contradicted itself by simultaneously producing such records. Accordingly, this reason lacks any factual basis.

The "no-response-needed" policy is also unlawful for at least three reasons. First, it is inconsistent with the plain text of Wis. Stat. § 19.35(4)(a). Section

19.35(4)(a) provided Secretary Godlewski with two options—and only two options—when she received the public records request. As § 19.35(4)(a) states, "[e]ach 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." *See* Wis. DOJ, *Wisconsin Public Records Law Compliance Guide*, at 15, 17 ("The records custodian has two choices: comply or deny. . . . If no responsive records exist, the authority should say so in its response."). Secretary Godlewski received a request but then chose a third—extra-statutory—option: to tell the requester the records were being gathered and then to completely ignore the request. Such action is arbitrary and capricious.

Second, the statutory scheme created by Wis. Stat. § 19.35(4)(b), the very next subparagraph, would be defeated if the "no-response-needed" policy were lawful. Section 19.35(4)(b) provides, in relevant part, "[i]f an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request." It then explains that "[e]very written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37 (1) or upon application to the attorney general or a district attorney." § 19.35(4)(b). This point of § 19.35(4)(b) is obvious: authorities need to tell requesters that they have legal rights. According to Secretary Godlewski, however, at least sometimes, requesters need never be informed. Such a peculiar rule

does not appear and should not be read into the public records statutes, especially in light of the public policy declaration of Wis. Stat. § 19.31.

Third, and relatedly, the "no-response-needed" theory is bad as a matter of public policy because it forces requesters to file unnecessary litigation, and if upheld will certainly result in additional actions being filed as unknowing requesters seek non-existent records. The requesters then potentially incur damages—attorney's fees, etc. (as do taxpayers). This concern is especially worrisome when, like in this action, the legal custodian first indicated that responsive records existed and were being gathered, only to reverse course once litigation commenced. The public records statutes recognize—for example, in the fee-shifting provisions—that requesters often have limited resources. Public policy, in addition to plain text, favors IRG in this action.

IV. This Court should award punitive damages because Secretary Godlewski's delay was arbitrary and capricious.

Additionally, this Court should award IRG punitive damages because Secretary Godlewski's delay was arbitrary and capricious under Wis. Stat. 19.37(3). A decision is "arbitrary and capricious" if "it lacks a rational basis or results from an unconsidered, willful and irrational choice of conduct." *Scheffler v. County of Dunn*, 2009 WL 3241876, at *5 (W.D. Wis. Sept. 29, 2009) (quoting *Eau Claire Press Co. v. Gordon*, 176 Wis. 2d 154, 163, 499 N.W.2d 918, 921 (Ct. App. 1993)). In contrast, an "inadvertent" act—i.e., an honest mistake—is not "arbitrary and capricious." *Id.* (quoting *State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252 n.4, 536 N.W.2d 130 (Ct. App. 1995)). Applying these standards, the Western District of Wisconsin has

explained that a legal custodian acts irrationally if he or she stands "idly by" because he or she does not "know" if certain records are responsive—such inaction is not "inadvertent" but rather an intentional choice. *Id.*, at *5–6. The only other state with an analogous statutory scheme similarly interprets its law. *See* Kate Ferguson, Note, *Compliance Conundrum: The Use of Punitive Damage Provisions in State Freedom of Information Statutes*, 46 Colum. Hum. Rts. L. Rev. 371 (2014) (explaining only three states have punitive damage provisions in their public records statutes—Michigan, Minnesota, and Wisconsin—and also noting that Minnesota's uses materially different language than Wisconsin's); *see also Krug v. Ingham Cnty. Sheriff's Off.*, 691 N.W.2d 50, 54 (Mich. Ct. App. 2004) (holding a requester was entitled to punitive damages under an analogous Michigan statute because the legal custodian "falsely indicated" that responsive records were "exempt from disclosure"); *Meredith Corp. v. City of Flint*, 671 N.W.2d 101, 109 (Mich. Ct. App. 2003) (holding a requester was entitled to punitive damages under an analogous Michigan statute because the custodian "pursued a strategy that delayed release of . . . [a public record] for weeks").

Secretary Godlewski lacked a rational basis for her decision to withhold responsive records until a month after this action was commenced. Even assuming the "no-response-needed" policy is lawful (it is not), it had no application to the public records request at issue because Secretary Godlewski had responsive records in her possession.

Additionally, Secretary Godlewski's conduct is especially egregious in light of Mr. LoCoco's repeated attempts to work with her. IRG did not run to court right

away—only after several months of requesting status updates and waiting on Secretary Godlewski. Yet, after IRG filed this action, Secretary Godlewski blasted IRG in the media for requesting supposedly non-existent records—a point she never communicated to IRG in the several months prior. About a month later, she produced responsive records, contradicting her statement to the media. Such conduct is worthy of strong rebuke by this Court.

CONCLUSION

Accordingly, this Court should grant IRG's motion for summary judgment and enter the relief requested.

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