STATE OF WISCONSIN, COURT OF APPEALS DISTRICT III

ALBERT D. MOUSTAKIS,

Plaintiff-Appellant,

-vs-

Case No.: 2014AP001853

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE,

Defendant-Respondent.

and

STEVEN M. LUCARELI,

Intervenor.

ON APPEAL FROM THE CIRCUIT COURT FOR LINCOLN COUNTY,

THE HONORABLE JAY R. TLUSTY, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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Signed this 10th day of November, 2014.

SWID LAW OFFICES, LLC
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STATEMENT OF THE CASE

Appellant Albert D. Moustakis (hereinafter referred to as "Moustakis") is the District Attorney for Vilas County. On or about July 18, 2013, Respondent State of Wisconsin Department of Justice (hereinafter referred to as "DOJ") received an open records request from The Lakeland Times – a regional newspaper for Northern Wisconsin – seeking records from any complaints against Appellant or investigations of Appellant. DOJ's Division of Criminal Investigations (DCI) routinely receives and investigates complaints against state and local public officials. DOJ did not produce any response to the open records request from July 2013 through January 2014.

By Mid-February 2014, DOJ had compiled eighty-five (85) pages of redacted documents to comply with The Lakeland Times' open records request. While the content of those eighty-five pages have not been publicly disclosed, Moustakis has indicated the DCI was not able to substantiate the allegations prompting the investigation of Moustakis; DOJ has conceded "the Department of Justice determined [the allegations against Moustakis] to be unfounded." R. 63 at 44: 2 – 14.[1]

On or about February 19, 2014, Moustakis received notice via a phone call from Kevin C. Potter, the Administrator of DOJ's Division of Legal Services –

[1] The eighty-five (85) pages of records are not themselves part of the record on review, as the circuit court disposed of the litigation before an *in camera* review of the records could take place. While Moustakis does have a duty to ensure that the record is sufficient to review the issues on appeal, the actual balancing test intended under the public records laws is not an issue on appeal, as that test did not take place in the circuit court. *See*, Local 2489, AFSCME, AFL-CIO v. Rock County, 277 Wis. 2d 208, ¶ 29 n.8, 689 N.W.2d 644 (Ct. App. 2004).

and DOJ's designated public records custodian – indicating that The Lakeland Times had issued a public records request to DOJ regarding Moustakis. R. 5 at ¶ 3-4, 17-18. A follow-up e-mail from Mr. Potter requested Moustakis provide an address where a pre-release copy of the redacted records could be sent. After being given the opportunity to review the redacted records, Moustakis filed for relief pursuant to Wis. Stat. § 19.356(4).

Moustakis's lawsuit was filed on March 10, 2014. During a status conference held on April 3, 2014, at which the circuit court expressed concern over the time limits established under Chapter 19.[2] Based on that concern, Moustakis waited to file the proof of service of the summons and complaint on June 6, 2014.[3] Prior to the commencement of the action, Intervenor Steven Lucareli (hereinafter referred to as "Lucareli") filed his Motion to Intervene; Lucareli is not the records requester, but had filed his own open records request for the same records sought by The Lakeland Times. R. 11.

DOJ filed its Motion to Dismiss on May 23, 2014. R. 9. DOJ's motion alleged lack of competency for the Court to proceed under Wis. Stat. § 19.356(2), in that DOJ did not consider Moustakis to be an "employee" as that term is defined in Chapter 19. *See*, Wis. Stat. § 19.32(1bg). The matter was extensively briefed by both parties, and oral arguments on the issue were held on June 27, 2014. R. 21-26, 63. On July 1, 2014, the circuit court granted DOJ's motion,

[2] The Circuit Court anticipated having a two (2) week homicide trial, followed by two (2) weeks of criminal intake, followed by another homicide trial. R. 4 at 25: 1-7, 37: 22 – 38: 10.
[3] The case was commenced by filing the proof of service within the ninety (90) day time period established under Wis. Stat. § 801.02(1).

adopting DOJ's arguments in its oral ruling. R. 54. Moustakis has appealed from the Order granting DOJ's Motion to Dismiss.[4]

QUESTIONS PRESENTED

1. Is Moustakis an "employee" as that term is defined in Wis. Stat. § 19.32(1bg), in order to have standing to bring an action under Wis. Stat. § 19.356(4)?

2. Did the Circuit Court utilize proper procedure when interpreting the statutes in Chapter 19?

BRIEF ANSWERS

1. Yes. Moustakis is employed by the State of Wisconsin to a state public office; the State of Wisconsin is neither the "authority" having custody of the records being sought, nor is the State itself an "authority" as defined in Wis. Stat. § 19.32(1).

2. No. In reviewing extrinsic evidence – the legislative history for 2003 Act 47 – despite DOJ's interpretation of the statutes failing to harmonize Wis. Stat. § 19.32(1bg) with Wis. Stat. § 19.356(9), the Circuit Court attempted to resolve an ambiguity without there being any actual ambiguity.

[4] Prior to the oral arguments on Respondent's motion, Appellant amended his complaint to add two (2) additional causes of action. The Court dismissed those causes of action on July 21, 2014 on Respondent's motion, before reinstating and staying those additional causes of action on August 6, 2014. R. 53, 61. Neither the additional causes of action, nor the dismissal and reinstatement of those causes of action are subjects of the current appeal.

STANDARDS OF REVIEW

Trial court's conclusions or interpretation of law are reviewed de novo, without deference to the trial court. City of Muskego v. Godec, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

ARGUMENT

The issues in this brief are complicated and intricate in scope and nature. Before diving in, Appellant would like to take a moment to explain why the issues matter. The Wisconsin Open Records laws have proceedings in place for judicial review prior to a release of records; judicial review exists because the subject of a records request may be best able to "present arguments in favor of nondisclosure that the records custodian did not consider in evaluating the disclosure request." Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors, 227 Wis. 2d 779, ¶ 24, 596 N.W.2d 403 (1999). Respondent never contacted Appellant about these records before making a decision to release them: not during the investigation which produced the records, and not before the purported "courtesy" notice that the records would be released if he failed to act. When he did act, Respondent has sought to usurp the Court's role in allowing Appellant to present arguments for nondisclosure, claiming that the judicial records review provisions in Wis. Stat. § 19.356 applied to all public and private

employees, except for state and local elected officials.[5] Appellant has argued for nondisclosure of these records because they are knowingly false, as there is no public benefit served by disseminating false information. R. 24 at 3. A release of these records serves no legitimate purpose, while allowing slanderous, false allegations against Appellant to be "laundered" through a credible organization. R. 63, at 12: line 11 – 13: 20. Before we can have that argument – which is not before the Court on appeal – the Court must decide whether Appellant qualifies under the open records laws, such that the trial court would have competency to proceed to hear those arguments.

I. THE CIRCUIT COURT MISAPPLIED STATUTORY INTERPRETATION BY LOOKING TO LEGISLATIVE HISTORY BEFORE LOOKING TO THE CONTEXT IN WHICH THE ALLEGED AMBIGUOUS DEFINITION IS ACTUALLY USED.

The Parties in the civil action reached distinctly different interpretations of the definition of the word "employee" as used in Chapter 19. Since Wis. Stat. § 19.356(2)(a)1 involves records of an "employee," DOJ's motion alleging lack of standing and lack of competency to proceed ultimately boil down to the question of whether Moustakis qualifies as an employee. In making a decision on DOJ's Motion to Dismiss, Judge Tlusty noted that the definition in Wis. Stat. § 19.32(1bg) is "poorly constructed," and "could have been worded more clearly." R. 54 at 11: lines 17-18; 15: 11 - 13. The Circuit Court's analysis attempts to

[5] The Constitutional challenges to Equal Protection raised by Respondent's interpretation of Wis. Stat. § 19.356 as violating Appellant's fundamental right to Court access has been stayed pending the results of this appeal. *See*, R. 57.

resolve this issue by looking into the legislative history provided by DOJ. Id. at 11: 22 – 16: 13. Moustakis believes that the Court skipped essential steps in its analysis, leading to the incorrect decision ultimately rendered by the Court on DOJ's motion and giving rise to this appeal.

Both Petitioner and DOJ believe that the procedures to be used by a Court when interpreting statutes are properly set forth in State ex rel. Kalal v. Circuit Court for Dane County. 271 Wis. 2d 633, ¶¶ 44-52, 681 N.W.2d 110 (2004). R. 24 at 2, 7; R. 8 at 9. The problem with the Circuit Court analysis of the issue, in the words of the Wisconsin Supreme Court in Kalal, is that the process of statutory interpretation is meant to "[prevent] courts from tapping legislative history to show that an unambiguous statute is ambiguous." Id. at ¶ 51. "It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." Id. at ¶ 52, *quoting* Antonin Scalia, A Matter of Interpretation, at 17 (Princeton University Press, 1997). With the essential framework established, we can now begin to discuss the definition of "employee" which is at issue in this case.

II. THE DEFINITION OF "EMPLOYEE" IN WIS. STAT. § 19.32(1bg) IS NOT AMBIGUOUS, SINCE DOJ'S PROFFERED INTERPRETATION OF THE TERM CANNOT BE RECONCILED WITH THE STATUTORY LANGUAGE IN FULL CONTEXT.

The definition of the word "employee" for purposes of the Wisconsin Open Records laws is found within Wis. Stat. § 19.32(1bg).

> "Employee" means any individual who is employed by an authority, other than an individual holding local public office or a state public office, or any individual who is employed by an employer other than an authority.

The Circuit Court was presented with two (2) distinct interpretations of the definition as applied to Moustakis. Moustakis's position is that the definition of "employee" in the statute itself contains two separate sub-definitions. Adding in the numbers to make the definition's construction more obvious, the statute definition splits as-follows:

> "Employee" means ***(1)*** any individual who is employed by an authority, other than an individual holding local public office or a state public office, ***or (2)*** any individual who is employed by an employer other than an authority.

Moustakis is the holder of a Constitutional office as District Attorney for Vilas County, Wisconsin. *See*, Wis. Constitution, Article VI, § 4. His salary is set in accordance with Wis. Stat. § 20.923(2)(e).

While Moustakis is an individual holding state public office – as would exclude him from the first sub-definition of "employee" – he never qualifies for the first sub-definition, because his employer is the State of Wisconsin, which is not an "authority" as that term is also defined in Chapter 19:

> "Authority" means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley Center sports and entertainment corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001 (3), and which provides services related to public health or safety to the county or municipality; a university police department under s. 175.42; or a formally constituted subunit of any of the foregoing.

Wis. Stat. § 19.32(1). The State itself is not one of the enumerated entities, mainly because the departments, agencies, and subdivisions of the State of Wisconsin retain the actual records, making those entities themselves the defined "authorities." Moustakis's elected office is an "authority," but Moustakis himself is not employed by that authority; his employment derives from the State Constitution, as well as the salary-fixing statutes which classify him as holding "state public office." *See*, Wis. Stat. § 19.32(4), 19.42(13)(c), 20.923(2)(j). Said another way, Moustakis is the holder of the state public office, but not employed *by* the office; the remaining, non-elected staff of the Vilas County District Attorney's office are the individuals employed by the office. While the Circuit Court recognized Moustakis's argument, it was rejected on the basis of the legislative history for 2003 Act 47, which is only appropriate once ambiguity has been found. R. 54 at 14: 22 – 15: 16.

The term "employee" cannot be found to be ambiguous based on the record before the Trial Court, however, because DOJ's suggested definition of

"employee" as being mutually exclusive from "state public official" does not reconcile with the statute as a whole. Wis. Stat. § 19.356 provides an entire subsection devoted to the necessary notice provisions when an employee of an authority is also the holder of a local or state public office:

> Except as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record containing information relating to a record subject who is an *officer or employee of the authority holding a local public office or a state public office*, the authority shall…

Wis. Stat. § 19.356(9)(a) (Emphasis added). While DOJ during oral arguments deflected review of subsection nine (9) as non-applicable to the current issue, they failed to address the use of the definitions and terminology in a manner wholly inconsistent with DOJ's interpretation of "employee." R. 63 at 35: 22 – 36: 16. That failure to address the issue is critical. The use of the word "employee" in subsection nine (9) is rooted in the same definition, meaning it would constitute error to apply the definition in Wis. Stat. § 19.32(1bg) only to the Wis. Stat. § 19.356(2)(a)1 use of the word.

When giving an example of how Wis. Stat. § 19.356(9) would apply to a fact pattern, DOJ invoked the name of J.B. Van Hollen – the Attorney General for the State of Wisconsin – as someone who would fall under Wis. Stat. § 19.356(9).

> For example, if the Department of Justice records custodian decided to release records pertaining to Attorney General Van Hollen. 9 is related to when an "authority" like the Department of Justice is releasing records regarding one of its own employees.

R. 63 at 36: 6 – 11. DOJ's interpretation of "employee" lives and dies with their capacity to reconcile their interpretation of Wis. Stat. § 19.32(1bg) not only with Wis. Stat. § 19.356(2)(a)1, but with Wis. Stat. § 19.356(9) as well[6].

If we accept DOJ's interpretation of the definition of "employee" under Wis. Stat. § 19.32(1bg):

> …the term "employee" does not include a person who holds a state or local office.

Then the Attorney General would be disqualified from Wis. Stat. § 19.356(9) as the holder of a state public office. R. 26, at 6.[7] Attorney General is also a Constitutionally created office. Wis. Constitution, Article VI, § 1. The Attorney General's salary is set under Wis. Stat. § 20.923(2)(e), meaning Attorney General is a "state public office." *See*, Wis. Stat. § 19.42(13)(c), § 19.32(4). As the definition of the word "employee" is interpreted by DOJ, there is no person for whom Wis. Stat. § 19.356(9) could apply, as DOJ does not believe that an individual can be both an "employee" and holder of a state or local office as those terms are defined within Chapter 19. R. 24 at 6-7. DOJ's interpretation of "employee," when viewed in the greater context of Chapter 19, yields an illogical and unreasonable result, and rendered Wis. Stat. § 19.356(9) as idle surplusage;

[6] DoJ's interpretation of "employee" in Wis. Stat. § 19.32(1bg) as denying Moustakis – and all similarly situated elected officials – any capacity to assert their privacy rights under Wis. Stat. § 19.356(4) or § 19.356(9) gives rise to the second and third causes of action in the Amended Complaint, the disposition of which are not final, and therefore not part of this appeal. See, R. 25, R. 57.

[7] Appellant notes that Respondent's stated basis for this interpretation comes from the legislative history, which gave the Circuit Court an invitation to wade into legislative history before making a determination of ambiguity.

this violates the rules of statutory interpretation established in Kalal and the cases cited therein. 271 Wis. 2d 633, at ¶ 46. Likewise, limiting the "officer or employee of the authority" language only to officers of the authority would improperly render the word "employee" as surplusage.[8]

This is not the first time that a Court has been faced with a statutory interpretation which appears in conflict with another statute. While the circuit court in this case decided to treat this conflict as grounds for ambiguity, the proper action would have been to view these apparently conflicting statutes as part of the whole, and attempt to reconcile them.

> When confronted with an apparent conflict between statutes, we construe sections on the same subject matter to harmonize the provisions and to give each full force and effect. We will not construe statutes so as to work unreasonable results.

State v. Fischer, 322 Wis. 2d 265, ¶ 24, 778 N.W.2d 629 (2010) (internal citations omitted). Moustakis's interpretation of this statute harmonizes simply: if the records subject can qualify under the second clause of the definition of "employee" – as Moustakis does – then that person is considered an "employee" for purposes of Wis. Stat. § 19.356(2)(a)1. If there is a direct relation between the records subject and the authority from which the record is being sought – which is not present in Moustakis's case – then Wis. Stat. § 19.356(9) applies.

[8] Respondent, without using so many words, rationalized this limited construction of the statute in oral arguments by suggesting the language could apply to Appellant as an "officer" of an authority. R. 63 at 38: 7-18.

It is not enough for DOJ to make a representation of ambiguity solely to present outside evidence alleging legislative intent. The Court is faced with two (2) competing interpretations of the definition in the statute, but only one (1) which is reasonable when reconciled with the statute as a whole. The statute cannot be said to "*reasonably* give rise to different meanings" without a second meaning being offered which comports to the rules of statutory interpretation. Since DOJ did not present the Court with a genuine explanation of how their proposed interpretation of the definition of "employee" meshes with the use of that word in Wis. Stat. § 19.356(9) – and the circuit court did not provide its own variation which in its analysis would give rise to a reasonable second meaning – then there is only one (1) reasonable meaning for the definition. Even if the circuit court believed DOJ's meaning to be proper upon consultation of the extrinsic evidence, it is error in the order of operations to consult legislative history in order to make an unreasonable interpretation of a statute appear reasonable. "Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." 271 Wis. 2d 633 at ¶ 47.

III. MOUSTAKIS IS AN "EMPLOYEE" UNDER THE SECOND SUB-DEFINITION OF WIS. STAT. § 19.32(1BG).

Bringing the issue full-circle, Wis. Stat. § 19.356(9) informs the Court as to how Wis. Stat. § 19.32(1bg)'s definition of "employee" must be interpreted. Since "employee" and "state public office" are not mutually exclusive – contrary to

DOJ's position for purposes of the Motion to Dismiss – the exclusionary clause in the middle of the definition for "employee" cannot apply to the full definition.

> "Employee" means any individual who is employed by an authority, *other than an individual holding local public office or a state public office*, or any individual who is employed by an employer other than an authority.

Wis. Stat. § 19.32(1bg) (emphasis added). If the italicized exclusionary clause above were meant to be an absolute bar, then as discussed above, Wis. Stat. § 19.356(9) would not apply to any "employee." Moustakis demonstrated in his Circuit Court brief that the statute's definition could have shifted the location of the italicized language as to apply to both clauses, had an absolute bar against treating local or state public office holders as "employees" been the intended meaning. R. 24 at 4-5.

Since the exclusionary language clearly prevents a state or local public official from falling under the definition of "employee," yet we know some public official(s) must be able to qualify for purposes of Wis. Stat. § 19.356(9), then a state or local public official must also be able to qualify as an "employee" for purposes of Wis. Stat. § 19.356(2)(a)1. The roadmap for any such qualification can only come from the language following after the exclusionary clause in Wis. Stat. § 19.32(1bg). As already stated, Moustakis and other similarly situated Constitutional officers – including Attorney General Van Hollen - are employees of the State of Wisconsin, which is not an "authority" under Chapter 19. These

Constitutional office holders qualify as "employees" under the second sub-definition of Wis. Stat. § 19.32(1bg), despite holding local or state elected office.

IV. LUCARELI'S ATTEMPT TO INTERPRET WIS. STAT. § 19.356(9) IS ALSO CRITICALLY FLAWED.

Lucareli, during the oral arguments, posed the idea that the Circuit Court should ignore the defined meaning of "employee" and thereby assign Moustakis the rights set forth in Wis. Stat. § 19.356(9).

> I'll try to be brief. From where I sit, it doesn't matter whether or not you consider Mr. Moustakis an employee. The bottom line is he holds local public office. He's elected by the citizens of Vilas County; that is not a statewide election, of course, it's a local election. It's confined to the county.
> Whether he's an employee doesn't matter, he's clearly an individual holding local public office under 19.32(1bg). He's, clearly, an individual holding public office under 19.356(9a) [*sic*] and I think that's the remedy and that's the only remedy under Sub 9.

R. 63 at 33: 16 – 34: 4. Leaving aside the incorrect assertion that Moustakis is a local public official rather than a state public official under Wis. Stat. § 19.32,[9] Lucareli provides a highly tempting approach as to how the statute should be interpreted.[10] If we were to simply throw out all the rules adopted by these Courts to give the statutes their actual meaning, we reach the same shorthand meaning that the prior Attorney General applied to the statute. OAG 1-06, at 1 ("Another

[9] *C.f.*, Wis. Stat. § 19.32(1dm), 19.32(4).

[10] This argument was not developed in Lucareli's brief, beyond a one-sentence footnote asserting that "Plaintiff has a remedy under § 19.356(9)(b) – i.e. augmentation of the records before they are released." R. 21 at 2, n. 1. Appellant discusses Lucareli's argument only to demonstrate the lack of an alternative interpretation under rules of statutory interpretation, thereby pre-empting any attempt to divine legislative intent beyond the printed words of the statutes themselves.

section of the law provides that an authority must provide notice before releasing records of public officials. Sec. 19.356(9), Wis. Stats."). Tempting as it may be, we do not throw out the rules of statutory interpretation whenever doing so would make our jobs easier; if a defined word is given a peculiar meaning, the statute must be read with the peculiar meaning of the word applied. 271 Wis. 2d 633, at ¶ 45; *see also*, Wis. Stat. § 990.01(1).

There is one other aspect of the Public Records laws which, fortunately, can fill in the interpretive gaps here. An authority is required to designate "each position of the authority that constitutes a local public office or a state public office." Wis. Stat. § 19.34(1). In making this designation, the authority identifies the individuals who may be considered an "officer or employee of the authority" for purposes of Wis. Stat. § 19.356(9). This establishes the narrow subset of individuals for whom Wis. Stat. § 19.356(9) would apply: individuals who qualify under the second sub-definition of "employee" under Wis. Stat. § 19.32(1bg) designated as an officer or employee "of the authority" under Wis. Stat. § 19.34(1). Using the common example, Attorney General J.B. Van Hollen has been designated by DOJ under Wis. Stat.§ 19.34(1)[11] as a state public official employed by DOJ, while DOJ is actually employed as the holder of a Constitutional Office by the State of Wisconsin.

[11] This information was not presented on the record, as the argument was not developed prior to oral arguments on June 27, 2014. As last revised July 2012, Respondent's Public Records Notice designates "Attorney General, Deputy Attorney General, the Division Administrators, and the Director of the Office of Crime Victim Services" as state public officers; a copy of that notice is available online at: http://www.doj.state.wi.us/sites/default/files/dls/files/public-records-notice.pdf

The designations provided by Wis. Stat. § 19.34(1) set the dividing line between when an "employee" must receive the Wis. Stat. § 19.356(9) notice versus a Wis. Stat. § 19.356(2) notice. Since Moustakis is an "employee" under the second sub-definition of Wis. Stat. § 19.32(1bg), but not an "employee of the authority" under Wis. Stat. § 19.356(9)(a), *via* Wis. Stat. § 19.34(1), the notice requirements of subsection nine (9) do not apply to Moustakis. This makes logical sense, as Moustakis lacks any power or clout to affect the release of these records.

V. A FINDING OF AMBIGUITY WOULD NOT RELEASE THE COURT FROM THE DUTY TO COMPLETE THE STATUTORY INTERPRETATION AND HARMONIZE THE RESULTS.

Even if the Court were to find that an ambiguity exists with respect to the definition of "employee," the analysis cannot stop with scrutinizing a single use of the word in Wis. Stat. § 19.356(2)(a)1. By Moustakis's informal count, the word "employee" appears twenty-eight (28) times in the text of Chapter 19 of the Wisconsin Statutes between Wis. Stat. § 19.32 through 19.39,[12] the intended scope of the definition of the word. *See*, Wis. Stat. § 19.32. While most of those uses are not useful or challenging in determining the construction of the word, the use of "employee" in Wis. Stat. § 19.356(9) is, as Moustakis has repeatedly stated, essential when coming to a complete understanding of the definition of "employee" and the larger system intended by the legislature. The rules of

[12] Appellant's count includes statute and subsection titles, but excludes the notes and case law printed alongside the statutes.

statutory interpretation require interpretation in context, regardless of whether a term is considered ambiguous.

> Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely related statutes; and reasonably, to avoid absurd or unreasonable results.

Kalal, 271 Wis. 2d 633, at ¶ 46. The need to understand the use of the word "employee" in Wis. Stat. § 19.356(9) does not fall away by the mere act of reviewing outside evidence of legislative history.

DOJ did provide extrinsic evidence of the legislative history, which the circuit court did consult in making its ruling. Buried in that evidence is the following language:

> Requires an authority to notify a record subject who holds a local public office or a state public office of the impending release of the record containing information relating to the employment of the record subject. The record subject, within five days of receipt of the notice, may augment the record to be released with written comments and documentation selected by the record subject. The authority must release the augmented record, except as otherwise authorized or required by statute.

R. 7, at 20-21. While the Wisconsin Legislative Council's report does not cross-reference Wis. Stat. § 19.356(9), this passage addresses the legislative intent of that provision. Any reference to the "employee of the authority" found in Wis. Stat. § 19.356(9) itself is stripped from the statement of purpose. If the exclusion in the middle of the definition of "employee" in Wis. Stat. § 19.32(1bg) is meant to carve out state and local public officials from having the right to Judicial Review of a records release under Wis. Stat. § 19.356(2), then the legislature also

created Wis. Stat. § 19.356(9) as a lesser replacement, codifying a limited right for public officials in open records cases, thereby preventing any "cover-up" of the information. *See, e.g.*, Hempel v. Baraboo, 284 Wis. 2d 162, ¶ 68, 699 N.W.2d 551 (2005).

To reiterate, Moustakis believes, for the reasons presented in section two (II) above, the enacted law in its proper context contains only one (1) reasonable meaning for the definition of "employee" as applied to Wis. Stat. § 19.356(2)(a)1 and Wis. Stat. § 19.356(9). With only a singular meaning, there can be no ambiguity, and no consultation of extrinsic evidence to discern legislative intent. For that same reason, as described in section four (IV) of this brief, the Court cannot simply shed the unfortunate words out of subsection nine (9) in an effort to reconcile it with Wis. Stat. § 19.356(2)(a)1 and Wis. Stat. § 19.32(1bg), as Lucareli has suggested previously. If, however, this Court does condone the finding of ambiguity by the circuit court, then the analysis of the extrinsic evidence must also attempt to harmonize the separate uses of the word "employee" within the statute as a whole.

VI. MOUSTAKIS WOULD ENCOURAGE THE LEGISLATURE TO BETTER HARMONIZE CHAPTER 19 OF THE WISCONSIN STATUTES WITH THE RULES OF CIVIL PROCEDURE.

Beyond the immediate issues which require this Court's attention, the system put in place by the open records laws (Chapter 19, Subchapter II, Wis. Stats.), as they now exist, are problematic. First and foremost, the plain meaning

of Wis. Stat. § 19.356(7) requires the circuit court to issue a decision on a request for judicial review under Wis. Stat. § 19.356(4) within thirty (30) days from the filing of the summons, complaint, and proof of service. Should the Court of Appeals remand this matter – or any future appeal of an action under Wis. Stat. § 19.356(4) – back to the circuit court, the remanded ruling will no longer fall within the timeframe required under Wis. Stat. § 19.356(7). DOJ, in a separate brief to the circuit court asserted its position that a failure to issue a ruling within 30 days robs the circuit court of competency to issue any ruling. R.17 at 2; *see also*, R. 39 at 3.

Going beyond the immediate, a number of problems which have arisen in the context of the current litigation seem to result from a mismatch between Wis. Stat. § 19.356 and the rules of civil procedure. Wis. Stat. § 19.356(4) specifies that the record subject seeking judicial review commences an "action" with the Court; this is significant, as it invokes the rules of civil procedure (as opposed to "special proceedings" which may have unique procedural rules). Wis. Stat. § 801.01(1). The rules of civil procedure require a summons containing the content and form requirements of Wis. Stat. § 801.09 and § 801.095, but the default ten (10) –day turnaround in a Chapter 19 open records request under Wis. Stat. § 19.356(7) is inconsistent with the twenty (20) or forty-five (45) –day answer deadlines found within Wis. Stat. § 801.09(2)(a).[13]

[13] The discrepancy between the expedited timetable of a Wis. Stat. § 19.356(4) action, as opposed to other civil actions, had been the basis for the circuit court's initial dismissal of the Appellant's

Similarly, DOJ prickled at the notion that Moustakis could amend his complaint, seeking to utilize laches and equitable estoppel to dismiss the second and third causes of action raised in Moustakis's Amended Complaint. R. 43 at 5-7. The rules of civil procedure, specifically Wis. Stat. § 802.09(1) allows a party to amend pleadings "once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10." There was no scheduling order, and DOJ has not provided any authority which would have prevented Moustakis from amending his complaint to join non-open records causes of action arising out of the same transaction. Wisconsin law allows a party asserting a claim to join "as many claims, legal or equitable, as the party has against an opposing party." Wis. Stat. § 803.02(1).

The potential for related causes of action being brought in conjunction with a Wis. Stat. § 19.356 action for judicial review gives rise to the unfortunate circumstances of an appeal having to be commenced while those additional causes of action are still ongoing. Given the limited timeframe for appeal put in place by Wis. Stat. § 19.356(8) and Wis. Stat. § 808.04(1m) – twenty (20) days from the entry of the judgment or order appealed from – a prospective appellant has at most fifty (50) days from filing of proof of service to initiate an appeal; it is rare that any other civil court proceedings avail themselves of that timetable so long as they survive a motion to dismiss. This appears to be one of the rare causes of action in

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second and third causes of action, though the circuit court did reconsider that decision on Appellant's motion. R. 53 at 52: 2 – 53: 9.

the Wisconsin Statutes which must be initiated before the entry of a "final" judgment. *C.f.*, Wis. Stat. § 808.04(1), § 808.04(1m). Presumably this muddied legal picture is acknowledged by DOJ, who filed a Motion to Dismiss the present appeal for lack of a final judgment.

Finally, for purposes of observation, Moustakis notes that the formulation of the open records laws do not appear to take into account issues of so-called "dotted-line" management and oversight. In the immediate case, the investigation and records kept by DOJ in which Moustakis is a records subject come not from a direct manager-subordinate relationship; the role of the employer to investigate and create the record sought for disclosure is a task delegated to DOJ by Moustakis' employer, the State of Wisconsin. Records of an ethics complaint made to the Office of Lawyer Regulation regarding the conduct of a State-employed attorney would raise similar concerns, particularly when the attorney involved is a state or local public official. While the Court is tasked with interpreting the statute as it currently exists, there are a variety of reasons why the Legislature should look at this case as a demonstration of the pitfalls of the open records statutes as they currently exist.

CONCLUSION

"…Poorly Constructed."[14]

"…could have been worded more clearly."[15]

[14] R. 54 at 11: 18.

"…a frustration to the Court…"[16]

"…somewhat of a procedural nightmare…" requiring "…some direction from the court of appeals or the supreme court on this case, not only in respect for this case but for a statewide perspective."[17]

The above is a sampling of the circuit court's expressed difficulties in applying Subchapter II of Chapter 19 of the Wisconsin Statutes to Moustakis's cause of action and DOJ's motion to dismiss, and to do so within the expedited timetable required under the statutes.

While Moustakis empathizes with the circuit court judge's quandary, Moustakis does take issue with the process used by the court in reaching its decision on DOJ's Motion to Dismiss. By jumping headfirst into the legislative history to attempt to discern what the legislature meant – without first determining whether there was any genuine ambiguity in terms of what the legislature had actually passed into law – the circuit court committed an error of law in its interpretation of the statutes. DOJ's proffered interpretation of Wis. Stat. § 19.32(1bg) fails to reconcile the use of the word "employee" with the word's placement in Wis. Stat. § 19.356(9); the failure of DOJ's interpretation in context of the statute as a whole renders that interpretation per se unreasonable. With only one reasonable interpretation, the circuit court judge should not have looked to the legislative history to find ambiguity where none actually exists. The Court should

[15] R. 54 at 15: 12-13.
[16] R. 61 at 17: 16-17.
[17] R. 61 at 25: 13-19.

have moved forward to make a determination on the Wis. Stat. § 19.356(4) cause of action, rather than granting DOJ's Motion to Dismiss.

The irony is not lost on Moustakis that DOJ seeks to remove from scrutiny and hide the role of a government agency in applying open records laws having the stated purpose of granting "the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. Moustakis asks this Court to reverse the circuit court's ruling on DOJ's Motion to Dismiss, so that the merits of Moustakis's request for judicial review can finally be heard.

STATEMENT ON ORAL ARGUMENT

As put forth in Moustakis' docketing statement, Appellant requests oral arguments to address any issues or concerns the Court may have regarding the record, or the issues on appeal.

STATEMENT ON PUBLICATION

There has not been a published decision (or unpublished decision) analyzing the definition of "employee" in Wis. Stat. § 19.32(1bg) within the context of how the term is used in Wis. Stat. § 19.356(2)(a)1 and § 19.356(9). As noted in the Conclusion above, the circuit court judge requested a decision by the Court to clarify the issues presented by this suit.

Additionally, given the politicization and polarization of State Government over the course of the past decade, the likelihood of future open records requests touching upon these same issues is more likely than not. Adequate basis for publication exists under either Wis. Stat. § 809.23(a)1 or 5.

Dated this 10th day of November, 2014.

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