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

REPLY BRIEF OF PLAINTIFF-APPELLANT

Name: Benjamin J. Krautkramer
State Bar No.: 1047184
Address: 415 Orbiting Drive, Mosinee, WI 54455
Telephone No.: 715-692-7943

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QUESTION PRESENTED

Which notice(s) should Moustakis receive prior to a public release of the records in this case?

BRIEF ANSWER

Moustakis should receive full notice and judicial review rights, as he and his fellow District Attorneys re-qualify as "employees" under the second clause of Wis. Stat. § 19.32(1bg).

ARGUMENT

I. MOUSTAKIS IS A STATE EMPLOYEE, TO WHOM THE PROTECTIONS IN WIS. STAT. § 19.356(2)-(3) APPLY.

Moustakis has argued he is an "employee" of the State of Wisconsin, such that the Circuit Court has capacity to undertake judicial review of the proposed disclosure, pursuant to Wis. Stat. § 19.356. The terms "employee" and "authority" are both defined in Wis. Stat. § 19.32. The State of Wisconsin Department of Justice (hereinafter "DOJ") has not challenged Moustakis' assertion the State of Wisconsin – as a direct employer – does not fit the definition of "authority" provided under Wis. Stat. § 19.32(1). DOJ has challenged whether Moustakis can be classified as an "employee" under the second part of the definition of the word in Wis. Stat. § 19.32(1bg), since – as the holder of a "state public office" (Wis. Stat. § 19.32(4)) he is excluded from the first part of the definition of "employee."

A. Not Every State Employee can Re-qualify under Wis. Stat. § 19.32(1bg)'s second clause.

Moustakis has repeatedly noted there are two (2) subsections of the definition of "employee" under Wis. Stat. § 19.32(1bg). DOJ has argued the second clause of the definition – which appear in the words following the exclusion for state and local public office – should not apply to Moustakis, because he is excluded by the language of the first clause. Moustakis agrees he is excluded from qualification under the first clause, as he *holds* the office of Vilas County District Attorney. The DOJ seeks to stop interpreting the statute after the first clause, under the presumption that continuing to interpret the definition would render the first clause meaningless. *See,* State ex rel. Kalal v. Circuit Court for Dane County, 271 Wis. 2d 633, ¶ 46, 681 N.W.2d 110 (2004).

There is nothing inherently absurd or unreasonable in finding that an individual or entity only qualifies under one (1) part of a multi-part definition. Nor does it render the first clause to surplusage. District attorneys like Moustakis are a bit of a special case, because they are employed by the State of Wisconsin to *hold* their state public office. As noted in the prior briefs, district attorneys' salaries are paid by the State of Wisconsin; district attorneys likewise participate in the Wisconsin state employee retirement system and insurance benefits. Wis. Stat. § 978.13(2)(b). Because of this direct line-of-employment to a non-authority (the State of Wisconsin), Moustakis and his fellow district attorneys qualify under

the second clause of Wis. Stat. § 19.32(1bg), as their *employer* is not an authority (as defined in Wis. Stat. § 19.32(1)).

DOJ is incorrect to presume this re-qualification for district attorneys renders the exclusionary language of the first clause of the "employee" definition superfluous and surplusage. Most other holders of "state public office" as defined in Wis. Stat. § 19.42(13)[1] could not so qualify, because their offices are separated from the State of Wisconsin (the non-authority) by additional levels of abstraction or bureaucracy. Said slightly differently, those other state public office holders could not qualify as "any individual who is employed by an employer other than an authority," since their employer is itself a separate "authority" under the statute.

To use a tangible example, the Chancellor of the University of Wisconsin – Madison, holds a "state public office," since that position is one identified in Wis. Stat. § 20.923(4g)(e).[2] As the hierarchy in Wis. Stat. § 20.923(4g) demonstrates, there is a separate hierarchy in place within the University of Wisconsin System – a separate "authority" – under which the UW-Madison Chancellor is *employed*. The Chancellor's *employer* is an "authority," meaning the Chancellor and similarly situated state public office-holders cannot re-qualify for judicial review as "employees" under Wis. Stat. § 19.32(1bg) in the same manner Moustakis and his fellow district attorneys can. "Local public office" holders, being employed by

[1] via Wis. Stat. § 19.32(4).
[2] Wis. Stat. § 20.923(4g) is to be repealed effective July 1, 2015. To avoid any confusion caused by this change in the Statute, Moustakis notes that the position will still be considered a "state public office" under the newly-formed Wis. Stat. § 19.42(13)(cm), effective as of the same date.

a political subdivision (typically a county or municipality), are likewise excluded from re-qualifying as "employees," since their *employer* is itself an "authority."

Unlike the interpretation proposed by DOJ, an interpretation which estopps this Court and the Circuit Court from making a full reading of both clauses, the plain meaning espoused by Moustakis actually ascribes meaning to all parts of the definition of "employee." DOJ would like to create ambiguity by cutting the definition of "employee" off after the first clause, because it asks this Court to rule not on the words they drafted, but on evidence of legislative intent. By creating ambiguity, DOJ seeks to access extrinsic evidence in the Legislative Council's note, language which constructs the definition of "employee" differently than how the text of the final statute reads. It does not matter whether the legislature intended Moustakis' construction of Wis. Stat § 19.32(1bg), so long as the plain meaning of the statute is unambiguous; statutory interpretation is the search for meaning, not the search for ambiguity. Kalal, 271 Wis. 2d 633, at ¶ 51-52.

Similarly, in a separate attempt to read ambiguity into the plain meaning of Wis. Stat. § 19.32(1bg), DOJ notes a narrow exclusion in the definition of "State public office:"

> …but does not include a position identified in s. 20.923(6) (f) to (gm).

Wis. Stat. § 19.32(4). DOJ neglects to mention which positions are excluded by this language. Excluded from "state public office" by the language in Wis. Stat. § 19.32(4) are the following:

(f) Legislative council staff: clerical and expert assistants.
(g) Legislative fiscal bureau: assistants, analysts and clerical employees.
(gm) Legislative reference bureau: all positions other than the chief.

Wis. Stat. § 20.923(6)(f) – (gm). The employees who researched (Legislative Council staff), and drafted (Legislative Reference Bureau) this legislation, along with the agency which reviews bills for fiscal impact (Legislative Fiscal Bureau) granted themselves this exclusion. While this may prove a valuable, if slightly cynical, civics lesson, it falls far short of the declaration of legislative intent suggested by DOJ.

As a final argument in search of ambiguity, DOJ argues the second clause in Wis. Stat. § 19.32(1bg) should not be read to expand the rights of judicial review to private sector employees. DOJ fails to acknowledge the Circuit Court interpreted the second clause as applying only to the private sector, *after* reviewing the legislative history. R. 54 at 14: 8 – 16: 20. The Circuit Court refused to re-qualify Moustakis under the second clause because Moustakis was employed in the public sector, and granted DOJ's motion to dismiss on that basis, prompting this appeal. To the extent DOJ now disagrees with the Circuit Court's interpretation of the second clause in the definition of "employee," it begs the question as to whom that clause would apply, if neither private sector employees nor re-qualifying state public officials make the cut.

B. The Records, and the Manner of Judicial Review Sought by Moustakis, are Consistent with the Protections Intended by Wis. Stat. § 19.356.

Moustakis is a "records subject" with respect to the DOJ records at issue in this case; the records are up for production because they reference Moustakis directly.[3] *See,* Wis. Stat. § 19.32(2g). Above and beyond the plain meaning of the terms referenced above, Moustakis believes that a right to judicial review over this potential release of records is within the competence of the Circuit Court because the underlying right is precisely the same as the right granted by the Milwaukee Teachers decision. Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

The records at issue suggest – even if they do not substantiate – in-office misconduct by Moustakis. Some portion of the Vilas County electorate may believe or draw a negative conclusion that Moustakis committed the acts described in the records, even though the investigation described in the records could not substantiate any of the allegations being investigated. Not only are the records similar in nature to the Milwaukee Teachers decision, but the potential for harm to Moustakis' privacy and reputation is magnified in this case as his office is elected

[3] In Respondents' brief, DOJ suggests for the first time that the records at issue here do not fall under Wis. Stat. § 19.356(2)(a)1, because Moustakis has reviewed the records and validated the records do not document employment-related violations of law. The records do not document any wrongdoing by Moustakis, as the allegations investigated by DOJ were found to be unsubstantiated. R. 29at ¶ 6-8. Wis. Stat. § 19.356(2)(a)1 does not require actual employment misconduct to generate records, only an investigation into employment-related misconduct. At the Circuit Court level, DOJ insinuated that Moustakis should want the documents released, since they "vindicated" him of the underlying allegations. R.63 at 44: 2-20. It is the false allegations themselves, and the potential harm caused by the generation of these records, which Moustakis seeks to have the Circuit Court review. On appeal, this Court cannot make a finding of fact as to the applicability of Wis. Stat. § 19.356(2)(a)1 to the records, since neither this Court, nor the Circuit Court has been allowed to conduct an *in camera* review of the records.

by the same local population. Id. at ¶ 23. Moustakis is the person best positioned to present arguments in favor of nondisclosure of these records. Id. at ¶ 24. As neither the records custodian nor the investigators actually spoke with Moustakis prior to making a decision to release these records, it is highly likely Moustakis has arguments in favor of nondisclosure which the custodian has failed to consider. Id. *See also,* R. 29 at ¶ 9.

As suggested by the title, the State of Wisconsin Department of Justice is an arm of Moustakis' employer (the State of Wisconsin). In that role as the investigative arm of the State of Wisconsin, DOJ investigates complaints and allegations against state public officials such as Moustakis. The records in question were generated by DOJ investigating complaints about Moustakis. This is the "dotted-line" management problem Moustakis referenced in the Appellants' brief: the records are generated due to Moustakis' employment for the State of Wisconsin, even though the agency creating the records (DOJ) is not Moustakis' direct employer. To adapt DOJ's narrow view of Wis. Stat. § 19.356 and Wis. Stat. § 19.32(1bg) is to ignore that there is no comparable structure to investigate allegations – or generate records of such an investigation – within the Vilas County District Attorney's office, or most other authorities for that matter. Since the employment-related investigation at issue here occurs within the DOJ, on behalf of the State, the protections set forth in § 19.356 are illusory if they do not apply to the authority which actually creates the records.

II. IF THE LEGISLATIVE HISTORY IS TO BE CONSULTED TO RESOLVE AMBIGUITY, MOUSTAKIS SHOULD ABSOLUTELY HAVE RECEIVED A WIS. STAT. § 19.356(9) – COMPLIANT NOTICE.

DOJ has argued Wis. Stat. § 19.356(9) and its use of the word "employee" is irrelevant for determining the plain meaning of the word in its context. While Moustakis disagrees, it is interesting to observe the methodology employed by DOJ, which is an attempt to go outside the statute. As evidence of legislative intent, DOJ quotes from the following passage to the notes to 2003 Act 47:

> Creates s. 19.365 (9) [sic.], stats., to provide that an **authority must notify a record subject who holds a local public office or a state public office of the impending release of a record** containing information relating to the employment of the record subject. The record subject, within 5 days of the receipt of the notice, may augment the record to be released with written comments and documentation selected by the record subject. The authority shall release the augmented record, except as otherwise authorized or required by statute.

2003 Act 47, § 5 note 6 (emphasis added by Moustakis).

Conspicuously absent from the quoted language designating legislative history and intent is any reference to a direct employment nexus between the public office holder and the authority disclosing the record. DOJ uses the quoted language to assert the use of "employee" in Wis. Stat. § 19.356(9)(a) is surplusage and should be disregarded. If the quoted language demonstrates anything, it is that DOJ's surplusage argument should be applied against the entire clause requiring the record subject be "an officer or employee of the authority," since the legislative history suggests Moustakis should have at least received a Wis. Stat. § 19.356(9) notice with respect to the records at issue in this case. With the

qualifying clause removed as contrary to the legislative history, the authority's duty is simple to define:

> 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 … holding a local public office a state public office**, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on the record subject, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under par. (b).

Wis. Stat. § 19.356(9)(a) (Emphasis added).

Moustakis still asserts he qualifies as an "employee" for purposes of Wis. Stat. § 19.32(1bg), due to the ability for a district attorney to re-qualify under the second clause, for the reasons stated here and in Appellant's prior brief. Whether the second clause was intended to provide a basis for requalification or not, many state public officials, and all local public officials, cannot re-qualify as an "employee" under the second clause in the definition. It is for these state and local employees who are not "employees" for purposes of Wis. Stat. § 19.32 that the protections intended by Wis. Stat. § 19.356(9) come into play.

Wis. Stat. § 19.356(9) is the necessary byproduct of the exclusionary language within the definition of "employee" in Wis. Stat. § 19.32(1bg). The exclusion for state public officials and local public officials in the definition of "employee" denies that narrow group of employees a right to judicial review. The flaw in DOJ's interpretation of the statute is that the rights described in subsection nine (9) cannot be applied to anyone, as DOJ interpretation of the statutes prohibits a state public official or local public official from being the "employee"

of an authority. Wis. Stat. § 19.356(9) should function as a replacement for the rights given to "employees" in the remainder of the statute. Under this construction, a local public official would be unable to pursue judicial review of a records request involving the official, but would be given the right to review the records and supplement the records release with written comments and documentation to correct any portions of the record which the official believes to be false, partially false, slanderous, discrepancy, or otherwise misleading. DOJ's interpretation of the statute would deny that official any recourse as the records subject.[4]

Using their interpretation of this statute, DOJ declined to provide Moustakis with a notice letter which complies with either Wis. Stat. § 19.356(2) or (9).[5] The burden set forth by Wis. Stat. § 19.356(9) is not so heavy or onerous as to prohibit its application to these facts. To come into compliance with the statute, DOJ would only have to replace its "courtesy" notices with a form letter describing the record subjects' rights under Wis. Stat. § 19.356(9), and then provide the records requester the final version of the requested records "as augmented by the record subject." Wis. Stat. § 19.356(9)(b). The process adds five (5) days time to the handling of the records request. To the extent the records

[4] It is important to note, in this context, Wis. Stat. § 19.356(9) does not provide the records subject any recourse if the authority fails to give notice and the opportunity to append. Given the argument DOJ has set forward that Wis. Stat. § 19.356(1) limits Judicial Review to the remedies set forth in the statute, it is not difficult to see the lack-of-competency-to-proceed argument being applied to attempts to seek injunctive relief whenever a "courtesy" notification is given in lieu of a § 19.356(9) notice. This is another shortcoming in the statute which the Legislature should address.

[5] DOJ's interpretation of Wis. Stat. § 19.356(9) – denying any right to comment on or oppose an open records request, a right provided to all other public and private employees - forms the basis for the still-pending equal protection claim between Moustakis and DOJ in the Circuit Court.

require copying of additional pages, the cost is ultimately borne by the records requester. *See*, Wis. Stat. § 19.35(3). DOJ – and other authorities to which the law applies – should have little difficulty conforming to the statute when properly interpreted.

CONCLUSION

For the reasons presented above, and in the Appellants' brief, the Court should reverse the ruling of the Circuit Court on the DOJ's Motion to Dismiss for lack of competency to proceed, and order further proceedings consistent with the Court's reversal.

Dated this 22nd day of December, 2014.

SWID LAW OFFICES, LLC
Attorneys for the Plaintiff-Appellant

By: _____
Attorney Scott A. Swid
WBN 1026907

By: _____
Attorney Benjamin J. Krautkramer
WBN 1047184

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,986 words.

Signed this 22nd day of December, 2014.

By: _____
Attorney Benjamin J. Krautkramer
WBN 1047184

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on December 22, 2014, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief was correctly addressed.

Signed this 22nd Day of December, 2014.

By: _____
Attorney Benjamin J. Krautkramer
WBN 1047184

ELECTRONIC BRIEF CERTIFICATION

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of § 809.19 (12).

I further certify that this electronic brief is identical in content and format to the printed (paper) form of the brief in transit for delivery and filing as of this date.

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By: _____
Attorney Benjamin J. Krautkramer
WBN 1047184