STATE OF WISCONSIN, SUPREME COURT

ALBERT D. MOUSTAKIS,

Plaintiff-Appellant-Petitioner,

-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

LINCOLN COUNTY CASE NO.: 14 CV 41

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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STATEMENT OF THE CASE

On February 19, 2014, Albert D. Moustakis (hereinafter referred to as "Moustakis") received a phone call from Attorney Kevin C. Potter, acting on behalf of the State of Wisconsin Department of Justice (an entity hereinafter referred to as "DoJ"). R. 23 at 1; R. 5 at 3. Moustakis holds the office of District Attorney for Vilas County. R. 23 at 1. Attorney Potter is the designated records custodian for DoJ.

During the February 19, 2014 phone call, Attorney Potter informed Moustakis about a pending open records request regarding Moustakis. R. 23 at 1-2. Included in the request, Joe VanDeLaarshot, a reporter for regional newspaper "The Lakeland Times", sought the following:

> Copies of any complaints or investigations regarding Vilas County District Attorney Al Moustakis that the Wisconsin Department of Justice and the Wisconsin Department of Criminal Investigation has. We also want copies of any information regarding complaints regarding Moustakis or reports or documents regarding any investigation of his conduct or handling of cases while district attorney. That includes information related to complaints and investigations regarding Mr. Moustakis that were completed or ended without any action taken against him or if there was action take [sic].
> …
> I understand that because Wisconsin district attorneys are technically state employees that your office could provide this information.

R. 5 at 7. DoJ received the open records request on July 18, 2013, and had yet to provide documents in response seven (7) months later. R. 5 at 2. Between the phone call, and subsequent e-mail exchange between the parties, Moustakis

received a redacted, pre-release copy of the records identified in response to the request.[1] R. 5

The Division of Criminal Investigations (hereafter referred to as "DCI"), had received complaints relevant to the scope of the discovery request. DoJ compiled eighty-five (85) pages of documents in response to the request. R. 6 at 10. The complaints were investigated and the underlying allegations were found to have been unsubstantiated. R. 23 at 2. Moustakis was not contacted by DCI or its agents during the investigation of the complaints. He was, likewise, not contacted about the records of these investigations prior to February 19, 2014, at which point the decision to release the records had already been made by DoJ. R. 23 at 2; R. 5 at 3.

Moustakis received the redacted records on or about March 5, 2014. R. 23 at 2. Upon receipt and review of the redacted records, Moustakis knows the allegations which prompted the DCI investigation to be false. R. 23 at 2. On March 6, 2014, Moustakis, through legal counsel, gave notice of his intent to seek judicial review of the DoJ decision to release the records. R. 10 at 4. The Summons and Complaint seeking review under Wis. Stat. § 19.356 were filed in Lincoln County on March 10, 2014. R. 1 at 1, 3.

A status conference in the case was held on April 3, 2014, following a Notice of Appearance having been filed by DoJ. R. 2. The trial court noted the

[1] The Court's record does not include a copy – redacted or unredacted – of the documents compiled by DoJ in response to the open records request. DoJ refused to provide a copy of the documents for an *in camera* review by the trial court until such time as the trial court had resolved the question of standing. R. 4 at 47-50.

proof of service on Defendant had not yet been filed. R. 4 at 26, 57-58. DoJ filed a Motion to Dismiss for Lack of Competency to Proceed on May 23, 2014, alongside its Answer to the Complaint R. 9; R. 10. On May 29, 2014, Steven D. Lucareli (hereinafter referred to as "Lucareli") filed a Motion and Complaint seeking to intervene in the action. R. 11. On June 6, 2014, Judge Jay R. Tlusty sent a letter to the parties noting the filing of the proof of service on DoJ earlier that same day and putting the parties on notice it would not be possible for the Court to issue a decision on the Complaint within the ten (10) day timeframe set forth in Wis. Stat. § 19.356(7). R. 14. The parties moved the trial court to extend the deadline to thirty (30) days, a motion which the Court granted on June 18, 2014. R. 19.

Before deciding the Motion to Dismiss Plaintiff's Complaint, Plaintiff filed an Amended Complaint on June 25, 2014. R. 25. The Amended Complaint added causes of action seeking a common law Writ of Mandamus, as well as a declaration the Wisconsin Open Records laws, as interpreted by DoJ, are unconstitutional. On July 1, 2014, following extensive briefing and oral argument[2] on the DoJ's motion, the circuit court dismissed Moustakis' Wis. Stat. § 19.356 action for lack of standing. R. 8; R. 24; R. 26; R. 54 at 15-17. DoJ sought, and initially received , a dismissal of the second and third causes of action from the Amended Complaint; the circuit court reversed the dismissals on

[2] During oral argument, DoJ acknowledged the unsubstantiated nature of the allegations in the DCI investigations, indicating a release of the records "vindicated" Moustakis. R. 63 at 44. Since the false allegations are not public, there is nothing to vindicate Moustakis against unless the DoJ is allowed to release the vindicating records.

reconsideration, but stayed the two (2) causes of action, based upon Moustakis' intent to appeal the dismissal of the Wis. Stat. § 19.356 claim. R. 53 at 49-50; R. 61 at 34, 47-48.

Following an unsatisfactory ruling in the Court of Appeals, Moustakis successfully petitioned this Court for review of the lower court decisions.

QUESTIONS PRESENTED

1. Whether Moustakis, a District Attorney in the State of Wisconsin, is an "employee" as that term is defined in Wis. Stat. § 19.32(1bg) and as that term is used in Wis. Stat. § 19.356?

2. Whether the modifications to the open records laws made by 2003 Wis. Act 47 are constitutional?

BRIEF ANSWERS

1. Moustakis' employer is the State of Wisconsin, which is not an "authority" under Wis. Stat. § 19.32(1). As such, he is "employed by an employer other than an authority," thereby an "employee" with standing to seek judicial review of a records release.

2. Because the modifications to the Wisconsin Open Records law deny public officials the fundamental right of access to the Courts, where a less-restrictive means for doing so is present within the Act, the 2003 modifications to the open records laws cannot withstand strict scrutiny.

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

I. VIEWING THE DEFINITIONS FROM THE PERSPECTIVE OF A RECORDS REQUEST, RATHER THAN IN THE ABSTRACT, MAKES THE QUESTION OF STANDING EASIER TO COMPREHEND.

Before the technical parsing of Chapter Nineteen (19), Subchapter Two (2) of the Wisconsin Statutes begins in earnest, it is helpful to understand, at a conceptual level, why problems arise in the application of the open records laws. The definition of "authority" in Wis. Stat. § 19.32(1) is drafted as broadly as possible. Moustakis, for instance, is considered an authority for holding the elective office of the Vilas County District Attorney, a state office which is itself a separate authority. This definition cannot be considered overbroad, since it is meant to cover as many persons and agencies as can be fit within the umbrellas of state and local government. However, with so many varying entities to shoehorn into the definition, the second part of the definition, "having custody of a record", tends to get lost in the analysis.

Moustakis has repeatedly argued the drafting of the open records laws is ill prepared to account for varying levels of government involvement in creating and

maintaining records. *See,* Moustakis' Ct. App. Brief at 25. When that broadly-defined "authority" is referenced in the definition of "employee," we start to see tension between the terms general and specific usages. Open records requests are not made to the breadth of the term "authority," but are instead targeted at specific authorities, selected because the records requester believes the targeted authorities have custody of the records being sought. While the question is irrelevant in the context of the definition of "authority," in context of what it means to be an "employee," does it matter whether the employ*er* has custody of the records being requested?

If having custody of "a record" means only that an entity which retains documents, memoranda, etc. is to be considered an authority, then our analysis of the issues will mirror the analyses presented to the lower courts, shaped heavily by the prior interpretations of the DoJ. *See,* Wis. Stat. § 19.39; *see also,* Schill v. Wisconsin Rapids Sch. Dist., 2010 WI 86, ¶ ¶ 35-36, 327 Wis. 2d 572, 786 N.W.2d 177. On the other hand, if the question of whether an individual is an "employee" turns on whether the individual's employer is still an "authority" when it lacks custody of the records being sought, the analysis is decidedly different. Wis. Stat. § 19.356 is concerned not with records in the abstract, but with specific records, identifying the records subject and created or obtained in limited ways. Wis. Stat. § 19.356(2)(a)1-3.

Moustakis is an authority under Wis. Stat. § 19.32(1), as is the state public office he holds, since the entities do retain records. The request did not come to

Moustakis or to the Vilas County District Attorney's office. The request was made to the authority with sole custody of the unredacted records: DoJ. While DOJ has repeatedly argued Moustakis is not employed by the State of Wisconsin, an entity which falls outside the broad definition of "authority" found in the statutes, the only entity with custody of the specific record is the DoJ, which is not Moustakis' employer. If custody of the relevant records is a determining factor, Moustakis would be "employed by an employer other than" the authority with custody of the records, and thereby an employee for purposes of Wis. Stat. § 19.32(1bg). The Statute's problem with "dotted-line" management, government oversight by agencies without a direct employment or hierarchical relationship, when viewed with fresh eyes may be less a problem with the statutes and more a problem with the manner in which we have attempted to interpret those statutes.

II. STATUTORY INTERPRETATION REQUIRES FINDING MOUSTAKIS IS AN "EMPLOYEE," ABSENT A REASONABLE IN-CONTEXT INTERPRETATION TO THE CONTRARY.

Statutory interpretation assumes "that the legislature's intent is expressed in the statutory language." State ex. rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." Id. at ¶ 45. Statutory language is interpreted as part of a whole, in relation to closely-related statutes. Id. at ¶ 46. Statutory language is interpreted

reasonably, to avoid absurd or unreasonable results, as well as to give reasonable effect to every word in order to avoid surplusage. Id. After applying these rules of construction, if the analysis leads to a singular statutory meaning, there is no ambiguity, and no need to consult extrinsic authority. Id.

The question of standing, which has been dispositive of the litigation thus far, pivots on the question of whether Moustakis is an "employee" under the definition provided in 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.

(Emphasis added). Literally at the heart of this definition is the italicized exclusionary clause. The exclusion splits the definition into two (2) subsections, with a conjunctive "or." As drafted, an individual who would not be considered an "employee" under the first subsection may still be treated as an "employee" for purposes of the open records statutes if he or she qualifies under the second subsection. "Any individual employed by an employer other than an authority" is an "employee," even if that individual holds local public office or a state public office.

A. The Rules of Statutory Interpretation Confirm Moustakis' Interpretation of "Employee" in Relation to Wis. Stat. § 19.356.

There are two (2) relevant uses of the term "employee" within Wis. Stat. § 19.356. The first use providing standing for judicial review of a release of records

pursuant to the request, with standing being conditioned on the nature of the record.

> Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, 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 subs. (3) and (4). This paragraph applies only to the following records:
>
> 1. A record containing information relating to an employee that is created or kept by the authority and that is the *result of an investigation into a disciplinary matter involving the employee or possible employment−related violation by the employee of a statute, ordinance, rule, regulation, or policy* of the employee's employer.
>
> 2. A record obtained by the authority through a subpoena or search warrant.
>
> 3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

Wis. Stat. § 19.356(2)(a) (Emphasis added). There does not appear to be a bona fide dispute between the parties over whether the records at issue in this case fall into Wis. Stat. § 19.356(2)(a)1, aside from the question over whether Moustakis can be considered an "employee." R. 63 at 26-28; Moustakis Ct. App. Reply Brief at 8 n.3.

The second relevant use of "employee" comes in the form of an ancillary notice for pre-release review of requested records.

> (a) 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, 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).

> (b) Within 5 days after receipt of a notice under par. (a), a record subject may augment the record to be released with written comments and documentation selected by the record subject. Except as otherwise authorized or required by statute, the authority under par. (a) shall release the record as augmented by the record subject.

Wis. Stat. § 19.356(9). Under the principles established for statutory interpretation, Moustakis has maintained throughout the litigation his belief the Court must harmonize its application of "employee" as defined in Wis. Stat. § 19.32(1bg) across these closely-related uses of the defined term in Wis. Stat. § 19.356. Kalal, 2004 WI 58, ¶ 46.

When the two (2) subsections are reviewed in harmony, the DoJ's preferred interpretation of "employee" is transparently untenable. If the Legislature had intended for the term "employee" to absolutely exclude state and local public officials, there would be no reason for the word "employee" to show up in Wis. Stat. § 19.356(9)(a); it would not be possible for any person to be an "employee" and hold "local public office or state public office," as those office holders are expressly excluded from the definition of "employee" under the DoJ's interpretation of the statute. *See, e.g.*, DoJ Ct. App. Brief, at 8. Since the legislature has given "employee" a specific, defined meaning, we cannot – as the Court of Appeals did – ignore the special definitional meaning of the word when interpreting Wis. Stat. § 19.356(9)(a). *C.f.*, Ct. App. Decision, ¶ 23; Kalal, 2004 WI 58, ¶ 45.

With doubt cast upon the DoJ interpretation of "employee" as it applies to Wis. Stat. §19.356, Moustakis' interpretation is based on the remaining

information at hand. The exclusionary clause in Wis. Stat. § 19.32(1bg) appears in between two (2) independent sub-definitions of the word, suggesting the restriction against state and local public office holders applies only to the first sub-definition. At the same time, the use of the word "employee" in Wis. Stat. § 19.356(9)(a) likewise suggests it is possible for an individual to be both a state public office holder and an "employee." Because it is possible to give reasonable effect to the use of the word "employee" in Wis. Stat. § 19.356(9)(a), the word should be deemed meaningful as defined, and not discarded as surplusage. Kalal, 2004 WI 58, ¶ 46. If it is possible for an individual holding local or state public office (including Moustakis) to fall within the second sub-definition of Wis. Stat. § 19.32(1bg), to be employed by an employer other than an authority, then that individual would qualify as an "employee" for open records purposes, irrespective of the exclusionary clause.

Moustakis' assertion his employer is the State of Wisconsin, an entity which is not an "authority" under Wis. Stat. § 19.32(1), thus making Moustakis an "employee" under Wis. Stat. § 19.32(1bg), constitutes a reasonable interpretation of the statutes. The DoJ interpretation of these related statutes cannot harmonize its interpretation of "employee" with the word's use in Wis. Stat. § 19.356(9), and therefore cannot be a reasonable interpretation of the statutes. Because there is only one (1) reasonable interpretation before the Court, there is not an ambiguity as to the meaning of the word "employee", which can be cured by examining extrinsic evidence, like legislative history. Kalal, 2004 WI 58, ¶ 47.

B. A Finding of Ambiguity Would Only Further Demonstrate the Flaw in DoJ's Interpretation of Wis. Stat. § 19.356(9).

The Court of Appeals suggests Moustakis' assertion of non-ambiguity for the definition of "employee" is an attempt to avoid extrinsic evidence, including the Joint Legislative Council's notes on 2003 Wis. Act 47. Ct. App. Decision, ¶ 22. This presumption of improper motive is unbecoming, as the legislative history is as harmful to the DoJ interpretation of the statutes as it is for Moustakis' interpretation. Any ambiguity over whether Wis. Stat. § 19.356(9) applies to state and local public officials, or whether the officials must be "employed by the authority" for subsection nine (9) to require notice, falls apart in light of the extrinsic evidence:

> 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.

2003 Wis. Act 47, § 4 note 6 (Emphasis added); Moustakis' Ct. App. Reply Brief, 10; R. 7 at 36[3]. Even if DoJ could assert the language of Wis. Stat. § 19.356(9) is ambiguous with respect to employees holding state public office, the legislative

[3] The Affidavit of Mary E. Burke dated May 20, 2014 indicates that Exhibit D includes a "true and correct" copy of 2003 Wis. Act 47, which the affiant printed from https://docs.legis.wisconsin.gov/2003/related/acts/47. The Affidavit contains only a partial copy of the act, cutting off immediately before the note referencing Wis. Stat. §19.356(9). The Wisconsin State Legislature website requires the user to scroll down the page to load the full text of an act before printing the complete act via Microsoft Internet Explorer. Attorney Burke apparently failed to do so in this instance. While Attorney Burke submitted a false affidavit, Moustakis does not believe the error was intentional; the cut-off point is an unfortunate coincidence. In any event, the quoted language should have been placed in the record, but for this error.

history makes plain that a "courtesy" notice to a record subject, absent the procedure necessary under the statute, is insufficient as a matter of law. At the barest of minimums, the court system must have standing to address the failure of a custodian to provide a Wis. Stat. § 19.356(9) notice where applicable prior to the release of a record.

Admittedly, the Joint Legislative Council's note regarding the exclusionary clause is problematic. *See*, 2003 Wis. Act 47, § 1, note 1. The reason the notes are problematic, as evidenced elsewhere in the legislative history on record in this case, is that the Special Committee on Review of the Open Records Laws apparently failed to identify or even contemplate the application of the bill to overlapping levels of government record generation, as present in the immediate case. The only reference in the committee's report to public officials came from a discussion of school administrators. R. 24 at 11, n.6; *citing*, R. 7 at 17. This is why extrinsic legislative history is used only when a statute section is ambiguous. "Men may intend what they will; but it is only the laws that they enact which bind us." Kalal, 2004 WI 58, ¶ 52, *quoting* Antonin Scalia, A Matter of Interpretation, at 17 (Princeton University Press, 1997). Regardless of how poorly the drafters anticipated the attempted release of records relating to one public sector employee in the custody of an independent public sector authority, it is the language they left behind which this Court must navigate. As the DoJ has thus far failed to provide a reasonable, second meaning which complies with the rules of statutory

interpretation, the question of legislative intent behind 2003 Wis. Act 47 is largely moot.

C. Moustakis, Holder of a State Public Office, is a State Employee.

Throughout the litigation, Moustakis has stated his belief that his employer is the State of Wisconsin. R. 24 at 6; Moustakis' Appellate Brief at 11. "Employer" is not defined in reference to Chapter 19 of the Statutes; the Black's Law Dictionary definition of the word speaks about direction and control over the worker:

> A person, company, or organization for whom someone works; esp. one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.

Employer, Black's Law Dictionary (10th Ed. 2014). As a District Attorney, Moustakis' salary and benefits are set by state statute. Wis. Stat. § 978.12, 20.923(2). The position of District Attorney is a product of the State Constitution. Wis. Const., Article VI, § 4.

If Moustakis is not an employee of the State of Wisconsin, it begs the question: who is his employer?

There is no person within the office[4] of Vilas County District Attorney with the capacity for direction or control over Moustakis to create a record which would fall under Wis. Stat. § 19.356(2)(a)1. There is no intra-office supervision of Moustakis' employment; the only way an investigatory or disciplinary record could be created would be through a state agency independent of the District Attorney's office. While Moustakis holds the office of Vilas County District Attorney, and he certainly works in that office, the indicia of employment demonstrate he does not work for that office. Moustakis is an employee of the State of Wisconsin. In the same manner a Federal Court Judge does not become an employee of the State of Wisconsin because their courtroom is in Madison or Milwaukee, Moustakis does not cease being a State of Wisconsin employee because the State Public Office he holds is located in Vilas County.

III. PUBLIC POLICY CANNOT FAVOR LEAVING RECORD CUSTODIAN DECISIONS UNCHECKED.

There is little in the way of a public policy benefit to the DoJ's position on standing. This is clearly an area of the law in which the DoJ has been looking to create case law, having issued Attorney General's opinions limiting the right to judicial review of open records releases since at least 2006. *See*, OAG 1-06.

[4] The Court of Appeals decision takes umbrage with Moustakis' distinction between the state public office and the person holding said office. *See*, Ct. App. Decision, ¶ 20. The actual text of the statute includes multiple references to an individual holding local or state office, as to draw a distinction between the individual and the office, not the least conspicuous of which is the exclusionary clause in the definition of "employee." Wis. Stat. § 19.32(1bg); *see also*, Wis. Stat. § 19.32(1), 19.32(1bd), 19.32(2), 19.33(1), 19.356(9).

Taking matters further, the DoJ argued for the Court to take up the question of standing in the matter of Schill v. Wisconsin Rapids Sch. Dist., 2010 WI 86, ¶ 35. The DoJ filed an amicus brief in the Schill case, despite the question of standing not having been raised by the parties to the suit, who urged the Court to decide the case on its actual merits. Id., ¶ 36. DoJ's laser-like focus on standing does give Moustakis cause for concern as to whether the balancing test for the release these records was fairly applied, given that the current litigation provides DoJ with a forum to control and direct litigation on the grounds of standing and competence. If nothing else, the DoJ, serving as a records custodian while the Attorney General is simultaneously tasked with the interpretation of the open records statutes, presents a rather unique conflict of interest. Wis. Stat. § 19.39.

Seemingly the only parties who benefit from a denial of standing in open records cases are the record custodians, as a removal of standing to seek judicial review of the balancing test insulates the record custodian from accountability. With the DoJ's argument on competency barring elected officials (like Moustakis) from stepping into a courtroom, the unintended consequence of such a policy

invites politicization of the custodial balancing test[5]. The political actor can leak a false allegation through an investigative agency, like the DoJ, to prompt an investigation, and then leak the existence of an investigation to a news agency to prompt an open records request. In such circumstances, it matters very little whether the allegation is true, as the investigation becomes the news story, even if the story is unsubstantiated, the record subject is damaged wherever some portion of the public places veracity in the *need for* an investigation. The political dirty trick – "laundering" the false allegations through an otherwise-credible state agency – should be both understood and denounced by a Court whose Justices are themselves elected officials. R. 63 at 12-13. The Wisconsin Open Records law should not allow false statements to be unearthed for political or financial gain. That is not its intended purpose.

Given that public records can include "uncorroborated or untrue hearsay, raw personal data, or a myriad of accusations, vendettas, or gossip," there is a very real risk of causing additional reputational harm when making the decision to release public records. Woznicki v. Erickson, 202 Wis. 2d 178, 198, 549 N.W.2d 699 (1996) (Bablitch, J., *concurring*). Many of the Court decisions in open

[5] The political consequences of records requests involving elected officials are certainly present in this case. Lucareli, the Intervenor in this case, has filed his own open records request for copies of the materials requested by "The Lakeland Times". R. 11 at 2. Lucareli has identified himself as one of the individuals interviewed by the DCI in relation to the unfounded allegations. R. 11 at 10-11. Lucareli held the office of District Attorney for Vilas County prior to losing (to Moustakis) in 1994. *See*, Matter of Disciplinary Proceedings Against Lucareli, 2000 WI 55, ¶ 11, 235 Wis. 2d 557, 611 N.W.2d 754. Though the nature of his involvement in the investigation is not a matter of court record, Lucareli has briefed the issue of whether the release of the records could result in defamation, since that the underlying allegations were found to be unsubstantiated. R. 21 at 2.

records cases focus on the difficulty of putting the proverbial genie back in the bottle when information harmful to a person's reputation is released to the public; the reputational harm is even greater when the underlying allegations are untruthful and not already public. Kailin v. Rainwater, 226 Wis. 2d 134, 155-157, 593 N.W.2d 865 (Ct. App. 1999) (public reporting on allegations in records affects the weight given to privacy under the balancing test); Linzmeyer v. Forcey, 2002 WI 84, ¶ 37, 254 Wis. 2d 306, 646 N.W.2d 811 ("…information that is already known to the public is germane to the balancing test."); Jensen v. School Dist. of Rhinelander, 2002 WI App. 78, ¶ ¶ 22-24, 251 Wis. 2d 676, 642 N.W.2d 638 (media reports of administrative relief and replacement diminished the weight given to privacy interests); Hempel v. City of Baraboo, 2005 WI 120, ¶ 77, 284 Wis. 2d 162, 699 N.W.2d 551 ("Once a secret is out of the box, it can never be put back."); Kroeplin v. Wisconsin Dept. of Natural Resources, 2006 WI App 227, ¶ 47, 297 Wis. 2d 254, 725 N.W.2d 286 ("...with the information that would pose the most potential harm to Kroeplin's reputation already in the public domain, "we cannot 'un-ring the bell.' " "). There is no substantial public interest in knowingly false statements. *See, e.g.,* Dennis v. United States, 341 U.S. 494, 544 (1951). Moustakis has provided an affidavit expressly stating:

> 6. Having reviewed the records, [Moustakis] first notes that the underlying allegations which led to the production of the records are false.
>
> 7. Not only are the allegations false, but the result of the investigation which created the records concluded that the allegations were unsubstantiated. Said another way, [DoJ] knows these allegations not to be true.
>
> 8. Further, no aspect of the records suggest either on-duty misconduct by [Moustakis], misconduct by any member of [Moustakis']

> professional staff, nor any wrongful acts by the Vilas County District Attorney's Office.

R. 23 at 2. Since there is no evidence or assertions from DoJ to the contrary, the record is not in dispute. While DoJ will no doubt argue that public officials like Moustakis should expect reduced privacy, even a reduced privacy interest should out-balance release of a knowingly false statement having zero public benefit. *See*, State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 685, 137 N.W.2d 470 (1965) ("On the other hand, statements based upon hearsay or suspicion, or inconclusive in nature, would be of small public benefit if made public, and might do great harm to reputations.")

The harm to Moustakis starts long before the false allegations are released via the open records requests. The harm begins when the false statements are first made to a law enforcement agency. The actions of liars and scoundrels, communicating false information about Moustakis with the intent to cause him ridicule, degradation, or disgrace within his occupation, are acts of criminal defamation. Wis. Stat. § 942.01.[6] Since the allegations must be investigated, the first false statement requires law enforcement agents to seed the identity of the defamed and the nature of the defamation within the community. Law

[6] Conveniently, the DoJ's redacted records were provided to Moustakis shortly after the three (3) year statute of limitations for misdemeanor defamation appears to have run. Wis. Stat. § 939.74(1). Since the copies received by Moustakis are redacted, however, the discovery rule on civil defamation does not start until Moustakis has notice of the identity of the individuals who made the initial defamatory remarks to law enforcement. DoJ's refusal to provide Moustakis with unredacted copies of the records creates an additional harm, as it prevents Moustakis from pursuing civil action, or an Office of Lawyer Regulation complaint, if applicable, against persons who knowingly lied to law enforcement about Moustakis' conduct in office.

enforcement can only conclude a defamatory statement is unsubstantiated by attempting to substantiate the allegation. If the false allegations are in any way salacious, it becomes highly unlikely the investigators will keep the nature of the defamation confidential within the law enforcement community. The source for "The Lakeland Times"' open records request into the investigation of the false statements must trace back to one (or more) of these sources. Finally, having to commence litigation to challenge the DoJ release of the records created due to these false allegations becomes its own story, carrying an adverse affect on Moustakis for the simple act of protecting himself and his family from the re-circulation of false allegations.

Moreover, were the Court to agree with DoJ's arguments and deny Moustakis, and other elected officials, standing to seek judicial review, it would mean that the doors to the Courthouse swing only in one direction. When the requester seeks a record, and that request is denied by the custodian, the requester has a statutory right to seek a Writ of Mandamus requiring the custodian to release the record. Wis. Stat. § 19.37(1). The enforcement statute even mandates that a successful requester-plaintiff receive damages and reasonable attorney's fees. Wis. Stat. § 19.37(2)(a). Punitive damages are even available if an authority is found to have acted in an arbitrary and capricious manner in withholding records, as well as forfeitures against either the authority or the record custodian. Wis. Stat. § 19.37(3)-(4). There is no countervailing award of damages when a custodian opts to release a record. The only remedy a record subject has under the

law is the right of judicial intervention to review the custodian's decision to release the requested records, the same right the DoJ seeks to strip away from public officials like Moustakis. However, the Courts must act as a gatekeeper of these disputed open record requests.

The reason why the Court established the Judicial review process was to make certain the records custodian would consider arguments put forth by the record subject, as it is "the duty of the custodian of public records, prior to their release, to consider *all the relevant factors* in balancing the public interest and the private interests." Woznicki, 202 Wis. 2d at 191 (Emphasis added). Here, the DoJ has unambiguously abandoned its duty, having failed to speak with Moustakis, prior to having already made its decision to release the records. R. 23 at 2. Considering the arguments of the record subject is "at the very least" the duty of the record custodian when applying the balancing test. Woznicki, 202 Wis. 2d at 191. In similar fashion, DoJ's has taken to issuing "courtesy notices" to avoid compliance with Wis. Stat. § 19.356(9). It is fundamentally unfair to strip away standing from Moustakis (or any other public official) under guise of following statutory procedure, when the actions of the DoJ's record custodian refuse to follow that same procedure.

IV. 2003 WIS. ACT 47 IS UNCONSITUTIONAL[7] AS APPLIED BY DOJ TO DENY MOUSTAKIS' FUNDAMENTAL RIGHTS.

The public policy discussion outlines much of why this Court had originally identified a right to judicial review for all individuals. *See*, Woznicki, 202 Wis. 2d at 185. An individual's ability to access the court system has been classified as a fundamental constitutional right. *See*, *e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977). To the extent that 2003 Wis. Act 47 was drafted to place limits on the standing of individuals like Moustakis to seek judicial review of open record release decisions, the Act would appear to impinge upon the individual's constitutional rights. R. 7 at 32-33. Since the Act, as applied by DoJ, places state and local public officials in a separate class from all other individuals, thereby seeking to restrict their standing to seek judicial review of records releases, constitutional issues of equal protection and the individual's right to privacy are also placed into question.

Constitutional rights are, by their very nature, fundamental individual rights. A government act which infringes upon fundamental rights is subject to strict scrutiny analysis. *See*, *e.g.*, Zablocki v. Redhail, 434 U.S. 374, 381 (1978). Under strict scrutiny, legislation intruding on fundamental rights must both

[7] Moustakis' Petition for Review also petitioned this Court to take original jurisdiction as to the second and third causes of action in the Amended Complaint. R. 25 at 3-5. The Order of the Court granting review does not address the question of original jurisdiction. Moustakis presents the issue, as well as the common law Writ of Mandamus cause of action, as they were raised in his petition, and with the knowledge that the Circuit Court had requested direction from the Court as to the application of the open records laws. R. 61 at 25.

advance a compelling state interest and employ the least-restrictive means available. Bernal v. Fainter, 467 U.S. 216, 219 (1984).

Wis. Stat. § 19.356(9) outlines a procedure by which state and local public office holders would be provided with a lesser right to author a commentary on the records to supplement their release. While this procedure would provide lesser protection than full judicial review of a records release, the procedures set forth in Wis. Stat. § 19.356(9) show that it is possible to employ a less-restrictive means of denying an individual judicial review than the application of the statutes endorsed and enacted by DoJ (which is to say: no standing for judicial review, and no right to supplement the records release). The question of whether there is a compelling state interest in denying public officials standing to seek judicial review in these instances is moot, so long as the statute provides the blueprint for a lesser-restrictive methodology than the one employed by DoJ.

V. DENIAL OF STANDING DRIVES MOUSTAKIS' ELIGIBILITY FOR THE COMMON LAW WRIT OF MANDAMUS.

Not to be confused with the remedies provided to requesters under Wis. Stat. § 19.37(1), the common law Writ of Mandamus is available when a party is left with: (1) a clear right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law. Law Enforcement Standards Bd. v. Village of Lyndon Station, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981).

Moustakis' rights of privacy and to judicial access have been set forth already in this brief. The DoJ custodian has a positive and plain duty to consider all relevant arguments, including those presented by the records subject, to balancing the public interests in favor of and private interests opposing the release of records. Woznicki, 202 Wis. 2d at 191. DoJ has clearly neglected this duty, having failed to consider arguments from the records subject prior to deciding to release records. R. 23 at 2. Having succeeded in denying Moustakis standing to seek judicial review of the records release decision, DoJ has left Moustakis without a remedy at law. The false statements to law enforcement have already caused Moustakis reputational harm. If the records are released, Moustakis will cause further damage to his reputation, which is the final element necessary to invoke the common law writ.

VI. THE CHANGES TO THE OPEN RECORDS LAWS IN 2003 WIS. ACT 47 MAKES A MESS OF WISCONSIN CIVIL PROCEDURE.

While it is undoubtedly easier to spot issues with the benefit of hindsight, the expedited timetable necessitated by Wis. Stat. § 19.356 causes more problems than it solves. The procedure is unrealistic.[8] The Court is required to issue a decision within ten (10) days of a plaintiff (records subject) filing for judicial review. Wis. Stat. § 19.356(7). While the time to issue a decision can be

[8] The reason the process is unrealistic is, most likely, any party who petitions for a Court review is going to have a rather complicated issue for the Court to consider and, moreover, a disputed argument. It is important to bear in mind the vast majority of open records requests are not reviewed and are processed without further scrutiny. However, the ones which are subject to a petition of a circuit court need ample time to be properly adjudicated.

extended to thirty (30) days upon requisite cause being shown, as was done in this case, the extended timetable still places a significant burden on a circuit court. R. 19. This is to say nothing of the burden Wis. Stat. § 19.356(7) places on the parties, as the issues raised in open records cases can require extensive time to research and brief, particularly if one of the parties seeks a procedural motion disposition prior to a hearing on the merits of the case (as happened here).

Many circuit courts are scheduled out more than thirty (30) days, particularly in one (1) or two (2) judge counties. Since actions against the State or its agencies are no longer required to be venued in Dane County, one of the repercussions of that change is that open records cases will be increasingly tried in smaller counties[9] having fewer judges available to hear cases. Wis. Stat. § 801.50(3)(a). With DoJ insisting that a failure to issue a decision within thirty (30) days would deprive the circuit court of competency to proceed, it was exceedingly difficult for the Court to fit in its two (2) homicide trials while abiding by the statutory timetable. R. 17 at 1; R. 4 at 27. Had Moustakis not waited out the lion's share of the time allotted under civil procedure to file proof of service, the thirty (30) -day timetable did not affect the end result. R. 15. *See also,* Wis. Stat. § 801.02(1).

Perhaps it would be better to note Wis. Stat. § 19.356(7) has not, as yet, affected the end result. While the statute clearly allows for the Judge's decision in

[9] Moustakis venued the case in Lincoln County for a variety of reasons, not the least of which was the attempt to avoid the appearance of a judicial conflict of interest in where Moustakis appears as a prosecutor or special prosecutor. R. 4 at 3-5.

the circuit court to be appealed, there is nothing in the statute altering the time for the circuit court to issue a decision upon remand following an appeal. Wis. Stat. § 19.356(8).

The timetable also requires both plaintiff and defendant to deviate from standard civil procedure with respect to the Summons. R. 1 at 1-2. Wis. Stat. § 19.356(4) specifies that plaintiff commences an "action," as opposed to a "special proceeding" in which specific procedural rules can overwrite the civil procedure statutes. *C.f.*, Wis. Stat. § 19.356(4), § 801.01(1). Civil actions are supposed to allow the State of Wisconsin up to forty-five (45) days from service of the Summons and Complaint to answer the allegations therein. Wis. Stat. § 801.09(2)(a)2. The statutes are silent as to whether the records subject should modify the form Summons to put the authority on notice of the ten (10) day timetable from filing of the proof of service. Wis. Stat. § 801.095. While DoJ did not contest the modification from the form Summons, the form and issuance of the Amended Summons was deemed defective when the Court initially dismissed Moustakis' second and third causes of action.[10] R. 53 at 43-44; R. 28.

Speaking of those additional causes of action in the Amended Complaint, the Wis. Stat. § 19.356(7) timetable is generally inconsistent with both the process to amend a Complaint and the joinder of other claims. A party's capability to amend its pleadings "at any time within 6 months after the summons and

[10] Since the Amended Summons was not necessary for the Court to obtain personal jurisdiction over the DoJ, the Circuit Court reversed its decision as to dismissing the second and third causes of action on reconsideration. R. 61 at 34; R. 57.

complaint are filed or within the time set in a scheduling order" are usurped by the expedited timetable in Wis. Stat. § 19.356 actions. Wis. Stat. § 802.09(1). The statutes do not even contemplate joinder of additional claims to a Wis. Stat. § 19.356 action. Must a defendant file an Answer within the expedited timetable, or within the time allowed for in the standard Summons? As Wis. Stat. § 19.356 does not prohibit joinder of related claims, we must presume joinder is permitted.

If additional claims required additional parties for complete adjudication, would a plaintiff be required to serve a different Summons to the additional parties than the Wis. Stat. § 19.356(7), Compliant Summons served on the authority, defendant? Fortunately, that is not an issue in this case, but is an issue the Legislature or this Court may wish to address going forward. If this case has demonstrated anything, it is that precious little thought or attention was paid to how the procedures in Wis. Stat. § 19.356 would be applied in an actual lawsuit between a records subject and a records custodian. Perhaps the Trial Court summarizes the issue best:

> There's no question that this is somewhat of a procedural nightmare for the litigants and the Court as to what's involved here and we, in all likelihood, will need some direction from the Court of Appeals or the Supreme Court on this case, not only in respect for this case but for a state-wide perspective.

R. 61 at 25. While Moustakis' suit has provided the test case for the new open records provision, it is only a matter of time before another litigant faces the same procedural hurdles, so long as they remain unaddressed.

Moreover, how does the provisions of Chapter Nineteen (19) harmonize with Wis. Stat. § 802.10(3)? Does the Wisconsin Open Records laws strip circuit court judges of the ability to manage their own calendars and dockets?

CONCLUSION

Nearly twenty (20) years removed from the Woznicki decision, this Court must have a sense of déjà vu when reviewing the parties' submissions. We have a record subject (Moustakis) suggesting the custodian failed to properly perform the balancing test, and a records custodian (DoJ) arguing the open records statutes do not permit the record subject to seek judicial review. We all know how that argument turned out: the passage of a subsequent law unconstitutionally scaling back Moustakis' standing as a state public office holder does not change the analysis. Moustakis has a right to judicial review of the records custodian's application of the balancing test.

Moustakis holds State Public Office; the "State" in the phrase "State Public Office" is his employer, the State of Wisconsin. The State is not an "authority" under the public records laws, as defined by the legislature, meaning Moustakis fits within the second definition of the word "employee." Since Moustakis is an "employee" under the open records definitions, he is entitled to Judicial review of the DoJ decision to release the records. Beyond the initial statutory interpretation error of the lower courts, the practice of sending so-called "courtesy" notices to public officials in lieu of Wis. Stat. § 19.356(9) -- compliant notices cannot be

reconciled with either the wording of the statutes or the documented legislative intent. The courts must have standing over obvious failures of the record custodian, either in providing an improper pre-release notice to a record subject, or failing to seek arguments from the record subject before applying the balancing test, to protect the privacy rights of the record subject.

In addition to granting standing, the Court would be well served to address the structural and procedural hurdles created by the statute. On its face, the post-Woznicki alterations to Chapter Nineteen (19) of the Wisconsin Statutes appear to single out public officials, taking away their right to access the Court to review records releases in a manner which is unconstitutional. The Court can also provide guidance as to how lower courts and future litigants should navigate the procedural obstacles which the drafters of the legislation failed to anticipate or address.

To be clear, it is not the objectives of the open records laws which prompted Moustakis to seek judicial review, nor to continue this action through an appeal and a petition. It is the shortcomings of the statute and of the open records

process, as applied by DoJ, which have necessitated action and have placed this matter before the Court.

Dated this 4th day of December, 2015.

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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 8,048 words.

Signed this 4nd day of December, 2015.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on December 4, 2015, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within three (3) calendar days. I further certify that the brief was correctly addressed.

Signed this 4th day of December, 2015.

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ELECTRONIC BRIEF AND APPENDIX CERTIFICATION

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

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

Signed this 4th day of December, 2015.

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