STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP1853

ALBERT D. MOUSTAKIS,

Plaintiff-Appellant-Petitioner,

v.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE,

Defendant-Respondent,

STEVEN M. LUCARELI,

Intervenor.

ON REVIEW OD A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING AN ORDER ENTERED BY THE LINCOLN COUNTY CIRCUIT COURT, THE HONORABLE JAY R. TLUSTY, PRESIDING

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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INTRODUCTION

Albert Moustakis is not entitled to pre-release judicial review of the public records at issue in this case under Wis. Stat. § 19.356(4). The statute limits pre-release judicial review to "employees" as defined in Wis. Stat. § 19.32(1bg), which specifically excludes those who, like Moustakis, hold a "state public office." Under the plain meaning of the statute, Moustakis does not have standing to bring a claim under Wis. Stat. § 19.356 to prevent the release of public records maintained by the Wisconsin Department of Justice (DOJ). The Court should accept this straightforward interpretation of Wisconsin public records law over Moustakis's strained interpretation, which "creates a befuddling mess" of Wis. Stat. § 19.356. *Moustakis v. Wis. Dep't of Justice*, 2015 WI App 63, ¶ 23, 364 Wis. 2d 740, 869 N.W.2d 788.

STATEMENT OF THE ISSUE

1. Public records law defines an "employee" as someone employed by an "authority" but specifically excluding those that hold "state public office." Wis. Stat. § 19.32(1bg). The definition of "state public office" specifically includes district attorneys. *See* Wis. Stat. §§ 19.32(4), 19.42(13)(c), 20.923(2)(j). Given the specific inclusion of district attorneys in the "state public office" exception, are district attorneys employed by an authority?

The circuit court and court of appeals both answered yes.

2. Pre-release judicial review under Wis. Stat. § 19.356 applies to records that are "the result of an investigation into a . . . possible employment-related violation" of law. Wis. Stat. § 19.356(2)(a)1. DOJ is not Moustakis's employer and therefore was not investigating the actions of an employee. Are the records subject to pre-release judicial review?

The circuit court and court of appeals did not answer this question.

3. Do Moustakis's public policy arguments that public officials should have the right to prevent release of public records violate "the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31.

The circuit court and court of appeals did not answer this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate and the decision should be published.

STATEMENT OF THE CASE

I. DOJ's investigation

Albert Moustakis is the district attorney of Vilas County. (R. 1, ¶ 1.) The Division of Criminal Investigation (DCI), a division of DOJ, received and investigated certain allegations about Mr. Moustakis. (R. 6, ¶ 6, Ex. A.) DCI found those allegations to be unsubstantiated. (R. 5, ¶ 30; R. 6, ¶ 6, Ex. A:1, 3.)

II. The public records request

The Lakeland Times newspaper made a public records request to DOJ for any records relating to "[a]ny complaints or investigations regarding Vilas County District Attorney Al Moustakis that the Wisconsin Department of Justice and the Wisconsin Department of Criminal Investigation has." (R. 5, Ex. A.) The newspaper further requested "copies of any information regarding complaints regarding Mr. Moustakis or reports or documents regarding any investigation of his conduct or handling of cases while district attorney" including "complaints and investigations regarding Mr. Moustakis that were completed or ended without any action taken against him." (R. 5, Ex. A.) Lastly, the newspaper requested "any communications between Mr. Moustakis and your department since he took office in 1995." (R. 5, Ex. A.)

Under the direction of Kevin Potter, DOJ's Public Records Custodian and Administrator of the Division of

Legal Services, DOJ staff searched for and reviewed responsive documents, and made numerous redactions. (R. 5, ¶¶ 12–16.) On February 17, 2014, Potter determined that the records were ready for release. (R. 5, ¶ 15–16.) Two days later, as a professional courtesy and not pursuant to Wis. Stat. § 19.356, Potter notified Moustakis by voicemail that DOJ was going to be providing responsive records. (R. 5, ¶ 17.) DOJ then sent Moustakis a courtesy copy of the records that were to be released. (R. 5, ¶ 24.)

III. Procedural history

A. Circuit court proceedings

1. Ruling on the issue in this appeal

On March 10, 2014, Moustakis filed a complaint with one cause of action that sought pre-release judicial review of the records under Wis. Stat. § 19.356. (R. 1.) The DOJ moved to dismiss the claim on the grounds that the court lacked competency to proceed because Moustakis had no standing to bring a claim under Wis. Stat. § 19.356. (R. 8; R. 9.)

Among other arguments, DOJ contended that Moustakis did not meet the requirement under Wis. Stat. § 19.356(2) that the records relate to an "employee" as defined in Wis. Stat. § 19.32(1bg). An "employee" is defined as "any individual who is employed by an authority, other than an individual holding local public office or state public office, or any individual employed by an employer other than

an authority." Wis. Stat. § 19.32(1bg). DOJ argued that Moustakis was covered by the first category of employees (those employed by an "authority"), but he was not entitled to pre-release review because he specifically exempted as holding "state public office." (R. 8:14–15; R. 9, ¶¶ 5–6.) DOJ also argued that Wis. Stat. § 19.365 did not apply to the records at issue because they did not meet the criteria under Wis. Stat. § 19.356(2)(a). (R. 8:13–14; R. 9, ¶ 7.)

Moustakis countered that he had standing under Wis. Stat. § 19.356 because he was actually covered by the second category of employees (those who are employed by an employer other than an "authority"). He contended that because he holds a statute constitutional office, his employer is the State of Wisconsin, which is not an "authority" in the public records law. (R. 24.)

At a hearing on July 1, 2014, the circuit court granted the motion to dismiss on the grounds that Moustakis had no standing to pursue a claim under Wis. Stat. § 19.365 because he was not an "employee" as defined by Wis. Stat. § 19.32(1bg). The court reasoned that "all employees, anyone who is employed, is either employed in the public sector or private sector," and that Moustakis was covered by the first category because he was a public employee. (R. 54:15–16.) Because Moustakis held state public office, he was excluded from the definition of "employee," and therefore could not bring a pre-release review claim under Wis. Stat. § 19.356. (R. 54:15–16.) On a motion for reconsideration, the circuit

court affirmed its prior dismissal of the pre-release review claim. (R. 57.)

In a claim under Wis. Stat. § 19.356(4), the circuit court is directed to "issue a decision within 10 days after the filing of the summons and complaint and proof of service of the summons and complaint," which can be extended to thirty days. Wis. Stat. § 19.356(7). While Moustakis filed his initial complaint on March 10, 2014 (R. 1), he did not file the "proof of service of the summons and complaint" until June 6, 2014. (R. 13.) Thus, the circuit court's ruling was issued within the thirty day time period provided by law.

2. Proceedings relating to claims not at issue in this appeal

Moustakis currently has two causes of action pending in the circuit court that have not been decided by the circuit court or the court of appeals. While DOJ's motion to dismiss the first complaint was pending, Moustakis filed an amended complaint that added two causes of action to his existing claim under Wis. Stat. § 19.356: a writ of mandamus ordering the Department to "properly apply the balancing test" so as to make additional unspecified redactions and/or withhold unspecified documents; and a declaratory judgment count asserting that Wis. Stat. § 19.356 was unconstitutional on equal protection grounds. (R. 25.)

Counts 2 and 3 remain pending in the district court. The circuit court initially dismissed these claims, without

prejudice, due to inadequate service of the amended complaint. (R. 53:37–50.) The circuit court reinstated the claims following a motion to reconsider. (R. 47; R. 57.) The circuit court has not issued a final ruling on either Count 2 or Count 3, which have remained on hold while this appeal proceeded.

B. Court of appeals proceedings

1. DOJ's motion to dismiss

Moustakis filed a notice of appeal of the circuit court's dismissal of his claim under Wis. Stat. § 19.356 (R. 58), on which the circuit court purported to enter "a final order for purposes of appeal, as it relates to the dismissal of Count One (1)." (R. 57.)

Given the two causes of action still pending in the circuit court, DOJ moved to dismiss the appeal because there was no final judgment that disposed of all of the claims at issue in the litigation but indicated that it did not oppose the court of appeals using its discretion to accept the appeal as a petition for leave to appeal a non-final order. (DOJ Mot. to Dismiss.) The court of appeals denied the motion and "ordered that, if the order was not appealable as a matter of right, leave was granted to appeal the nonfinal order." *Moustakis*, 364 Wis. 2d 740, ¶ 7.

2. The court of appeals' decision

The court of appeals affirmed the circuit court's conclusion that Moustakis was not an "employee" entitled to bring an action under Wis. Stat. § 19.356(4). The court of appeals began by recognizing that "[i]t is the declared public policy of this state that 'all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.'" *Moustakis*, 364 Wis. 2d 740, ¶ 12 (quoting Wis. Stat. § 19.31). The court likewise noted the "presumption of complete public access" and that "denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id.* (quoting Wis. Stat. § 19.31).

The court held that Moustakis was not an "employee" entitled to bring a case under Wis. Stat. § 19.356(4). Moustakis was not an employee of an authority because he "as a district attorney, is the holder of a 'state public office' and does not qualify as an 'employee' of an 'authority' under the first category of employees established by § 19.32(1bg)." *Moustakis*, 364 Wis. 2d 740, ¶ 17.

The court of appeals rejected Moustakis's argument that he "is not employed by an 'authority' because he is employed by the State of Wisconsin, which is not specifically identified as an 'authority' under Wis. Stat. § 19.32(1)." *Moustakis*, 364 Wis. 2d 740, ¶ 19. The court held that this

"construction of Wis. Stat. § 19.32(1) is unsupported by the authorities [Moustakis] cites and is contrary to any reasonable reading of the statute." *Id.* ¶ 20. Instead, the court applied "the straightforward notion that he both holds the state office of district attorney and is an employee of that office; the two capacities are not mutually exclusive." *Id.* ¶ 20.

The court of appeals rejected Moustakis's argument that the use of the word "employee" in Wis. Stat. § 19.356(9) supported his interpretation of the term because Moustakis's interpretation "creates a befuddling mess of that statute." *Moustakis*, 364 Wis. 2d 740, ¶ 23. Instead, the statutes "recognize there are individuals who are employed by an 'authority' and who also hold a local or state public office. In this sense, an individual who is not an 'employee' under § 19.32(1bg) may nonetheless qualify as an 'officer or employee of the authority holding a local public office' under § 19.356(9)(a)." *Moustakis*, 364 Wis. 2d 740, ¶ 23.

Because the court decided the case based on the definition of "employee," it did not address DOJ's argument that the documents at issue were not covered by Wis. Stat. § 19.356(2)(a)1. *Moustakis*, 364 Wis. 2d 740, ¶ 15 & n.6.

STANDARD OF REVIEW

This case involves issues of issue of statutory interpretation reviewed "de novo while benefiting from the analyses of the court of appeals and circuit court." *Journal*

Times v. Police & Fire Comm'rs Bd., 2015 WI 56, ¶ 42, 362 Wis. 2d 577, 866 N.W.2d 563.

ARGUMENT

Moustakis is not entitled to pre-release review of public records because he is not an "employee" as defined in Wis. Stat. § 19.32(1bg). While the plain language of the statute is clear, this conclusion is confirmed by the legislative history. Moustakis cannot avoid the straightforward interpretation of the statute by focusing on the use of the word "employee" in a subsection not at issue in this case. In any event, the documents at issue are not covered by Wis. Stat. § 19.356 because they are not employment-related records. Lastly, the strong public policy in favor of public access outweighs any public interest in preventing release of the records.

I. Moustakis has no standing to bring a claim under Wis. Stat. § 19.356(4) because he is not an "employee."

The general rule is that "no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. 19.356(1). The pre-release judicial review procedure in Wis. Stat. § 19.356(4) contains an exception for three narrow classes of "employee-related records," which the legislature enacted as a "response to the supreme court's holdings in *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999),

and *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996)." *Local 2489, AFSCME, AFL-CIO v. Rock Cty.*, 2004 WI App 201, ¶ 2, 277 Wis. 2d 208, 689 N.W.2d 644. Pre-release judicial review is limited to "employees" because the records at issue in *Milwaukee Teachers'* and *Woznicki* were public employees' personnel records.

Moustakis is not an "employee" entitled to pre-release judicial review under Wis. Stat. § 19.356(4) based on the plain language of the definition in Wis. Stat. § 19.32(1bg). If there were any doubt about the plain language, the notes from the Joint Legislative Council confirm that Moustakis does not qualify as an "employee." Lastly, the use of the word "employee" in Wis. Stat. § 19.356(9) does not change the proper interpretation of the term in Wis. Stat. § 19.356(2).

A. The plain language of Wis. Stat. § 19.32(1bg) excludes Moustakis from the definition of "employee."

"[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis.2d 211, 612 N.W.2d 659). Moustakis is not an "employee" as defined by Wis. Stat. § 19.32(1bg) and thus he has no standing to invoke Wis. Stat. § 19.365(4) because he does not "fall[] within the ambit of the statute . . . involved."

Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc., 2011 WI 36, ¶ 54, 333 Wis. 2d 402, 797 N.W.2d 789.

The definition of "employee" has two categories: one for "any individual who is employed by an authority, other than an individual holding local public office or a state public office," and another for "any individual who is employed by an employer other than an authority." Wis. Stat. § 19.32(1bg). Under a straightforward reading of the statute, Moustakis is covered by the first category—those employed by an authority—but excluded as holding state public office. Only by resorting to a tortured reading with no support in the law can Moustakis contend that he is actually covered by the second category—those who are not employed by an authority.

District attorneys are "employed by an authority" because the legislature specifically listed district attorneys among those who hold "state public office." The legislature would not have included district attorneys among the "state public office" exclusion to the first category of employees if district attorneys were not intended to be covered by the first category. Specifically, Wis. Stat. § 19.32(4) defines "state public office" as having "the meaning given in s. 19.42(13)," which defines "state public office" as, among other things, "[a]ll positions identified under s. 20.923(2)." Wis. Stat. § 19.42(13)(c). In turn, Wis. Stat. § 20.923(2) identifies constitutional officers and other state elected

officials, including district attorneys. Wis. Stat. § 20.923(2)(j).

Moustakis's contention that he is covered by the second category of employees is refuted by the legislature's specific reference to district attorneys in the definition of "state public office." Moustakis's reading would make much of the "state public office" exception meaningless, contravening the rule that courts should interpret words "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, ¶ 46. Put simply, the legislature would not have defined the "state public office" exception to the first category of employees in a way that specifically includes district attorneys (and all other constitutional officers) if the legislature did not intend constitutional officers to be covered by that category.[1]

Moustakis's argument is based on the unsupported assumption that he is to be treated as employed by State of Wisconsin for purposes of Wis. Stat. § 19.32(1bg) because he holds a state constitutional position whose salary is set by

[1] The legislature excluded positions that would have been covered by the definition of "state public office," specifically the positions "identified in s. 20.923(6)(f) to (gm)." Wis. Stat. § 19.32(4). The legislature's actions with respect to those positions demonstrate that exceptions should be explicit, rather than the backdoor exception-to-the-exception advocated by Moustakis. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

the legislature. District attorneys' salaries are set in accordance with Wis. Stat. § 20.923(2)(e), but this is the very statutory subsection that makes him a holder of "state public office." Further, Chapter 19 makes no categorical exclusion for offices created by article VI, section 4 of the Wisconsin Constitution, which establishes the district attorney position. The public records law defines "state public office" to specifically include all state constitutional officers. *See* Wis. Stat. §§ 19.32(4), 19.42(13)(c), 20.923(2)(j). In addition, offices established by article VI, section 4, such as sheriffs and county chief executives, are covered by the definition of "local public office" in Wis. Stat. § 19.32(1dm). *See* Wis. Stat. §§ 19.32(1dm), 19.42(7u), 19.42(7w)(a).

This Court should reject Moustakis's contrived argument that he cannot both hold the office of district attorney and be employed by the district attorneys' office. These two capacities are not mutually exclusive, which is clearly shown by the legislature's inclusion of district attorneys (and other similar positions) in the definition of "state public office." The plain language, context, structure, and interrelation between the public records statutes all show that Moustakis is to be treated as employed by an authority but exempted from the definition of "employee" as a holder of "state public office."

B. To the extent there is any ambiguity, the legislative history confirms Moustakis is not an "employee."

At best, Moustakis has found an ambiguity in the statute. Any alleged ambiguity, however, is resolved by the legislative history, which confirms that district attorneys are not "employees" entitled to the protections of Wis. Stat. § 19.356. This Court can look to legislative history "to confirm or verify a plain-meaning interpretation." *Kalal*, 271 Wis. 2d 633, ¶ 51. The Joint Legislative Council issued explanatory notes for 2003 Wisconsin Act 47, which created both the definition of "employee" in Wis. Stat. § 19.32(1bg) and the pre-release judicial review process in Wis. Stat. § 19.356, that make clear that Moustakis is not an "employee."

The prefatory note to Act 47 explains that the statute was enacted in response to the *Milwaukee Teachers'* and *Woznicki* decisions, which had granted public employees rights of pre-release notice and judicial review for records relating to their employment. The prefatory note says that "the logical extension of these opinions is that the right to notice and the right to judicial review may extend to any record subject, regardless of whether the record subject is a public employee." 2003 Wisconsin Act 47, Joint Legislative Council Prefatory Note.

Thus, Act 47 created a definition of "employee" that addressed both public sector and private sector employees.

The Note explains that the Act "[c]reates a definition of the term 'employee' *to mean any public or private sector employee, other than an individual holding local public office or state public office*." 2003 Wisconsin Act 47, § 1, note 1 (emphasis added). The notes to Act 47 make clear that the category covering those "employed by an authority" was intended to cover public employees while the category covering those not employed by an authority was intended to cover private sector employees. The law does not contemplate a third category of public employees who are to be treated as private sector employees because they are employed by the State of Wisconsin.

C. The use of the word "employee" in Wis. Stat. § 19.356(9) does not override the plain meaning interpretation.

Moustakis focuses most of his argument on statutory subsection that is not at issue in this case, Wis. Stat. § 19.356(9). That provision contains a procedure allowing certain record subjects to augment the record production when an authority discloses "record[s] 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." Wis. Stat. § 19.356(9)(a). Moustakis contends that the use of the word "employee" in this context must include some people who hold state or local public office because otherwise the word "employee" would have no

meaning. Moustakis's argument, however, does not help his position.

Moustakis at best has pointed out that the word "employee" in Wis. Stat. § 19.356(9) may be surplusage. The rule against surplusage is not an immutable law of statutory construction; it only applies "where possible." *Kalal*, 271 Wis. 2d 633, ¶ 46. While courts "attempt to construe statutes and ordinances to avoid surplusages, a statutory redundancy or 'unexplained surplusage' does not necessarily require a declaration of ambiguity." *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 24, 260 Wis. 2d 633, 660 N.W.2d 656. Irrespective of the definition of the word "employee," the provision would still apply to "an officer . . . of the authority holding a local public office or a state public office." Wis. Stat. § 19.356(9). Thus, the Court should not concern itself with the definition of "employee" when Wis. Stat. § 19.356(9) will be operative for all "officers" of an authority that hold public office.

Moustakis's argument is puzzling because he would not be covered by Wis. Stat. § 19.356(9) even if his definition of "employee" is correct. The procedure in Wis. Stat. § 19.356(9) applies when an authority discloses records about "a record subject who is an officer or employee of the authority." Under Moustakis's definition of "employee," however, he is not employed by an authority. Thus, he would not be covered by Wis. Stat. § 19.356(9) because it is limited to records regarding "a record subject who is an officer or employee of the authority holding a local public office or a

state public office." Wis. Stat. § 19.356(9)(a). Thus, Moustakis's definition would actually make Wis. Stat. § 19.356(9) inapplicable to a large portion of the holders of local and state public office that were intended to be covered by the provision.

II. The records at issue in this case are not covered by Wis. Stat. § 19.356(2)(a)1.

The fact that the records at issue are maintained by an authority that is not Moustakis's employer does not show that the public records law is poorly drafted. Instead, it cuts against Moustakis's right to pre-release review. The legislature was aware of this issue and structured Wis. Stat. § 19.356(2)(a) such that the records at issue in this case are not subject to pre-release review even if Moustakis were an "employee." Further, allowing record subjects to obtain pre-release review of records from a law enforcement investigation would expand Wis. Stat. § 19.365 well beyond its intended application to employment-related records.

A. The investigatory records in this case are not subject to pre-release review.

Moustakis has failed to establish that the records are one of the three types of records to which the pre-release judicial review procedure applies. *See* Wis. Stat. § 19.356(2)(a)1.–3. The only potentially applicable category in this case is Wis. Stat. § 19.356(2)(a)1., which covers records "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." Wis. Stat. § 19.356(2)(a)1. (emphasis added).[2]

As an initial matter, Moustakis mistakenly claims there is no "bona fide dispute between the parties over whether the records at issue in this case fall into Wis. Stat. § 19.356(2)(a)1." (Moustakis Br. 15.) DOJ raised this issue in the circuit court (R. 8:13–14; R. 9, ¶ 7) and in the court of appeals, but both of these courts did not rule on the issue because they concluded Moustakis was not an employee. *Moustakis*, 364 Wis. 2d 740, ¶ 15 n.6.

Moustakis has never alleged, let alone established, that the records at issue in this case involve either "an investigation into a disciplinary matter" or an "employment-related violation" of law. Wis. Stat. § 19.356(2)(a)1. The records in this case cannot relate to an "investigation into a disciplinary matter" involving Moustakis because DOJ has no authority to bring a

[2] The second category does not apply because the documents at issue were not "obtained by the [DOJ] through a subpoena or search warrant." Wis. Stat. § 19.356(2)(a)2. The third category does not apply because the DOJ is an "authority" under public records law, so the records were not "prepared by an employer other than an authority," and because the records do not contain "information relating to an employee of that employer " given that Moustakis is not an employee of the DOJ. Wis. Stat. § 19.356(2)(a)3.

"disciplinary matter" against him given that he is not an employee of the DOJ.

The records in this case also do not relate to a possible employment-related violation of a statute, ordinance, rule, regulation or policy of the employee's employer. Moustakis's own pleadings never allege that DOJ's investigation was into an "employment-related" violation. In fact, Moustakis's complaint and amended complaint both admit "that this case does not involve allegations of on-duty misconduct by the record subject [Moustakis]." (R. 1, ¶ 9; R. 25, ¶ 10.) Moustakis submitted an affidavit attesting that "no aspect of the records suggest either on-duty misconduct by Affiant, misconduct by any member of Affiant's professional staff, nor any wrongful acts by the Vilas County District Attorney's Office." (R. 23, ¶ 8.) Simply put, DOJ's investigation into potential criminal activity of a public official does not equate to an "employment related-violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer." Wis. Stat. § 19.356(2)(a)1.

B. A holding that the records in this case are covered by Wis. Stat. § 19.356(2)(a)1. would expand the statute beyond its intent.

In interpreting the scope of pre-release judicial review, it is important to remember that the intent of Wis. Stat. § 19.365 was "to narrow and codify the notice and judicial

review rights set forth in *Woznicki*." *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 42, 327 Wis. 2d 572, 786 N.W.2d 177. In *Woznicki,* this Court granted a public employee the right to notice and de novo review in circuit court of a district attorney's decision to release the employee's "complete personnel file from his employer" and his "personal telephone records." 202 Wis. 2d at 182. The *Milwaukee Teachers'* court extended those same rights to public employees "when a records custodian who is not a district attorney decides to release information from the employees' personnel records in response to request made under Wisconsin's open records law." 227 Wis. 2d 779, ¶ 1. The statutory pre-release review procedure must be analyzed with this background in mind.

In contrast, this case involves pre-release review of a DOJ investigation into potential criminal activity. The most reasonable interpretation of the statute is that it covers records created by the employee's employer. As the Attorney General concluded in an opinion, extending Wis. Stat. § 19.356(2)(a)1. to include "employment-related records prepared by an employee's employer, but also records prepared by other entities, would be contrary to the Committee's goal of limiting the scope of required notification under *Woznicki* and its progeny."

OAG-1-06.[3] Statutes must be read to "avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. A reading that expands Wis. Stat. § 19.365 beyond what was allowed in *Woznicki* and its progeny is not a reasonable reading a statute intending to limit the scope of those cases.

III. The stated public policy of this state is in favor of open access to records, not the right of public officials to shield records from disclosure.

The declared public policy of the State of Wisconsin supports denying the right of public officials to pre-release review. In enacting the public records law, the legislature recognized "that a representative government is dependent upon an informed electorate." Wis. Stat. § 19.31. Therefore,

> it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

[3] (https://docs.legis.wisconsin.gov/misc/oag/recent/oag1_06.)

Id. This is "one of the strongest declarations of policy to be found in the Wisconsin Statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis.2d 290, 731 N.W.2d 240.

Moustakis's public policy argument contradicts the "presumption of complete public access" embodied in Wisconsin law. The courthouse door does swing only in one direction when records relating to public officials—that in the direction of openness—because that is the policy of the legislature. The balancing of the interests involves "balanc[ing] the *public interest* in disclosure against the *public interest* in non-disclosure," *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700 (emphasis added), not the public interest in disclosure against a public official's interest in preventing release of documents.

The public has a right to access documents related to investigations done by the government, even those from investigations of allegations that turn out to be unfounded. This Court has already applied the balancing test to records from a law enforcement investigation that did not lead to any criminal charges or disciplinary action. *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 1, 254 Wis. 2d 306, 646 N.W.2d 811. The court ruled that the public interest in disclosure outweighed the public interest in non-disclosure, in part because the potential embarrassment and damage to reputation of the subject of the investigation did not

outweigh the interest in release of the report. *Id.* ¶¶ 34–35. The public interest in disclosure applies even more in this case because Moustakis, unlike Linzmeyer, is "an elected official." *Id.* ¶ 29.

IV. Moustakis's brief addresses numerous issues that are not before this Court.

DOJ will only briefly address Moustakis's two claims that remain pending in the circuit court, which are not before this Court because it did not take original jurisdiction of these causes of action. Similarly, DOJ does not address the alleged procedural problems in Wis. Stat. § 19.356 because the circuit court met the various statutory deadlines in this case.

A. Wis. Stat. § 19.356 does not deny Moustakis any fundamental right.

Moustakis does not identify a recognized fundamental right of which he has been deprived. Moustakis cannot reframe the right of a record subject to pre-release judicial review of any public records that mention them into a right to access to the courts. If this is the case, then every record subject would have the right to pre-release judicial review, which is inconsistent with this Court's precedent. The case he cites stands for the proposition that prisoners have a right to access the courts, *Bounds v. Smith*, 430 U.S. 817 (1977), which is entirely different from a legislature's decision to only allow certain records and record subjects the right to pre-release judicial review.

While Moustakis's equal protection claim will ultimately fail for these reasons (among others), it should be addressed by the circuit court in the first instance.

B. Moustakis has no right for this Court to issue a writ of mandamus.

While DOJ doubts that Moustakis can avoid the exclusive remedy in Wis. Stat. § 19.356 by seeking a writ of mandamus, the claim for a writ of mandamus should likewise be left to the circuit court. As his cited authority shows, the writ of mandamus "is a discretionary writ in that it lies within the sound discretion of the trial court to either grant or deny." *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 493, 305 N.W.2d 89, 99 (1981). Therefore, his claim for the writ must be addressed first by the circuit court.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals.

Dated this 28th day of December, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,625 words.

Dated this 28th day of December, 2015.

s/Brian Keenan
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 28th day of December, 2015.

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