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STATE SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2016AP2214

Madison Teachers, Inc.,

Plaintiff-Respondent,

vs.

James R. Scott, Chairman and Records Custodian, Wisconsin Employment Relations Commission,

Defendant-Appellant.

Appeal from a Final Order of the Dane County Circuit Court,
the Honorable Peter C. Anderson, Presiding,
Case No. 2015CV3062

NON-PARTY BRIEF OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL, THE WISCONSIN NEWSPAPER ASSOCIATION, AND THE WISCONSIN BROADCASTERS ASSOCIATION WIS. STAT. § (RULE) 809.19(7)

GODFREY & KAHN, S.C.
James A. Friedman, Bar No. 1020756
Dustin B. Brown, Bar No. 1086277
One East Main Street, Suite 500, P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609

Attorneys for the Wisconsin Freedom of Information Council, the Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association

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INTRODUCTION

This appeal poses questions whose answers can have a far-reaching effect on Wisconsin's public records law. The key legal issues—the proper application of the balancing test and a prevailing party's right to recover attorney fees—are common and recurring questions in public records litigation. Therefore, the undersigned coalition urges this Court to reinforce several bedrock principles of Wisconsin's public records law in deciding this case.

This lawsuit arises out of two time-sensitive requests by a public-sector labor organization, Madison Teachers, Inc. (the "requester"), for records identifying the Madison Municipal School District employees who had voted in a recertification election by a certain date. The records custodian, Chairman James Scott of the Wisconsin Employment Relations Commission (WERC) (the "custodian"), denied both requests based on several

rationales, only one of which he relies on here: his determination, in applying the balancing test, that the public's right of access to the record was outweighed by the "potential for voter coercion while balloting is ongoing." The requester challenged the denials, prevailed before the circuit court, and was awarded its attorney fees. The custodian now appeals that judgment.

The arguments of both parties implicate legal issues that reverberate well beyond the narrow factual confines of this dispute. The custodian here asks this Court to reverse the circuit court's application of the balancing test. The central question, as it always is under the balancing test, is "whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551. Any time this Court reviews a trial court's application of the

balancing test to one set of facts, its decision may affect countless others. This appeal also raises questions about the content and timing of records requests, the import of a denial, and a requester's right to recover legal fees.

The coalition of media organizations and freedom of information advocates filing this brief—the Wisconsin Freedom of Information Council , the Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association (collectively "amici")—represents a diverse collection of perspectives. They advocate not in support of any party *per se*, but rather in support of principles of openness. Wisconsin's promise "that all persons are entitled to the greatest possible information regarding the affairs of government" means little if basic tenets of the public records law are not uniformly applied and upheld. *See* Wis. Stat. § 19.31 (2015–16). Amici therefore urge this Court to

endorse or reaffirm the following principles underlying Wisconsin's public records law:

1. The public records law applies without regard to the requester's identity or purpose, with only the most limited of exceptions.

2. The unsupported speculation that records may be used for improper purposes is insufficient to outweigh the public's right to access.

3. A custodian's denial is a complete and definitive act triggering a requester's right to sue without further inquiry or action.

4. A requester's stated preference to receive a response within a specific timeframe has no effect on a custodian's obligations under the public records law.

5. A custodian's disclosure of a disputed record in discovery does not reduce the attorney fee recovery.

A decision that reaffirms these principles will reinforce the public records law itself. A retreat from any of them risks eroding this State's essential commitment to government transparency and accountability.

ARGUMENT

I. THE PUBLIC RECORDS LAW GENERALLY APPLIES WITHOUT REGARD TO THE REQUESTER'S IDENTITY OR PURPOSE.

The identity of a requester, or the reason for a request, should play no role in the application of the balancing test. *See State ex rel. Ledford v. Turcotte*, 195 Wis. 2d 244, 252, 536 N.W.2d 130 (Ct. App. 1995) ("Neither the identity of the requester nor the reasons underlying the request are factors that enter into the balance."). This foundational principle is derived from the statute itself, which bars a request from being "refused because the person making the request is unwilling to be identified or to state the purpose of the request." Wis. Stat. § 19.35(1)(i) (2015–16). The law is

explicit that, subject to equally explicit exceptions, "*any* requester has a right to inspect any record." Wis. Stat. § 19.35(1)(a) (emphasis added).

In this appeal, the requester and the custodian agree that the requester's identity and purpose should be irrelevant—but they cite this rule to competing ends. The requester contends that the custodian, in raising concerns over voter intimidation, was in fact considering its identity as a labor union. Pl. Resp. at 18–19. The custodian argues that the requester, by articulating its intent to further its "get out of the vote" campaign, was asking that its stated purpose be factored into the balance. Def. Br. at 18–19.

The requester's identity and purpose should not be considered for any reason. A custodian cannot discriminate among requesters. A record that is public for one is public for all, and one requester's motives or assurances cannot bind another. *See Kraemer Bros. v. Dane Cty.*, 229 Wis. 2d 86,

102, 599 N.W.2d 75 (Ct. App. 1999) ("If the names . . . are available to the [requester], they are available to anyone."). Likewise, one entity's conduct, suspect or not, should not receive weight in the assessment of a similar entity's request. The requester's identity as a labor union, and its own intended use for the requested records, simply do not matter.

There is a narrow and appropriate exception to this rule: credible threats of physical violence. In such circumstances, the requester's identity and purpose can be considered. *See State ex rel. Ardell v. Milwaukee Bd. of Sch. Directors*, 2014 WI App 66, ¶ 17, 354 Wis. 2d 471, 849 N.W.2d 894 (concluding that the requester "forfeited his right to disclosure of the . . . employment records by demonstrating an intent to hurt the employee"). That is already the law.

But that should remain the only such exception.[1]

[1] In *Democratic Party of Wisconsin v. Wisconsin Department of Justice*, this Court considered the apparent "partisan purpose underlying the request" in concluding that the balance did not tip towards disclosure.

Any contemplation, even in passing, of the requester's identity and purpose contradicts longstanding precedent and the statute itself. The interests or questions that sparked the request should not spill into the statutory issue of records access. The public's right to access records is a question that must be considered independently.

II. THE UNSUPPORTED SPECULATION THAT RECORDS MAY BE USED FOR IMPROPER PURPOSES IS INSUFFICIENT TO OUTWEIGH THE PUBLIC'S RIGHT TO ACCESS.

The balancing test is not a pure balance: rather, the scale is heavily calibrated in favor of disclosure. The public records law is explicit that access may be denied "only in an exceptional case." Wis. Stat. § 19.31. Only when "the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure, *notwithstanding* the

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2016 WI 100, ¶ 23, 372 Wis. 2d 460, 888 N.W.2d 584. This reference to purpose could, amici fear, provide a toehold for further exceptions to the rule. Amici therefore ask this Court to reinforce the long-held recognition that identity and purpose should not factor into the balance *at all*.

strong presumption favoring disclosure," may a record be withheld. *Hempel*, 284 Wis. 2d 162, ¶ 63 (emphasis in original).

The custodian here denied the request due to "the potential for voter coercion while balloting is ongoing." In other words, the denial was based on speculation that the information would be used for an improper purpose. To support this decision, the custodian cited unsubstantiated allegations that a different labor union, in a different city, in a different election, once engaged in potentially unfair labor practices.

The risk that information will be put to an unlawful purpose may be an appropriate factor to be weighed in the balance. Information is potent. It can be used for purposes both positive and negative, although which is which may depend on one's perspective. But information—and an informed citizenry—is also the lifeblood of democracy. That

understanding is built into the public records law through its strong presumption in favor of disclosure.

The mere fact that information *could* be used in an unlawful or otherwise improper manner is therefore not enough to counteract the public interest in disclosure. Voter coercion is an unfair labor practice that WERC—the custodian here—is empowered to investigate, penalize, and enjoin. *That* is the tool the legislature created to redress this problem. Records cannot be withheld based on a generalized assertion that they could be used for an unlawful purpose. *See John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenbach*, 2014 WI App 49, ¶ 26, 354 Wis. 2d 61, 848 N.W.2d 862 (holding that the public interest weight given to "the *possibility* of threats, harassment or reprisals . . . increases or decreases depending upon the likelihood" that they would "actually occur[]") (emphasis in original).

To hold otherwise would defy the presumption favoring disclosure and fundamentally shift the calculus of the balancing test. The fact that a record could be used for unlawful conduct does not mean public policy favors nondisclosure. That risk must be weighed against the importance of disclosure and transparency. When the risk is not only speculative but also readily and explicitly redressed through other laws, it is difficult to see how the balance can yield any result but disclosure.

III. A CUSTODIAN'S DENIAL IS A COMPLETE AND DEFINITIVE ACT WHICH A REQUESTER MAY CHALLENGE WITHOUT FURTHER INQUIRY OR ACTION.

A records custodian has but two choices in response to a request for public records: "comply or deny." *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 457, 555 N.W.2d 140 (Ct. App. 1996). This stark choice is explicit in the public records law, which requires a custodian to "either fill the request or notify

the requester of the authority's determination to deny the request in whole or in part and the reasons therefor." Wis. Stat. § 19.35(4)(a).

The custodian here attempts to insert a new choice into the mix: ask again. He "would have, if asked, disclosed the records sought after the elections," he now says—even though he had already denied both requests. Def. Br. at 23.

This is anathema to the statutory review process that undergirds the public records law. Every written denial has to "inform the requester that . . . the determination is subject to review by mandamus" or "upon application to the attorney general or a district attorney." Wis. Stat. § 19.35(4)(b). A requester is entitled to rely on the denial to pursue its due process right to review.

The custodian tries to undercut the requester's entitlement to attorney fees by asserting that he would have disclosed the record in the absence of this lawsuit. An award

of "reasonable attorney fees" to a prevailing requester is mandatory as long as "prosecution of the action could reasonably be regarded as necessary to obtain the information and that a 'causal nexus' exists between that action and the agency's surrender of the information." *WTMJ, Inc.*, 204 Wis. 2d at 458 (citing *State ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 871, 422 N.W.2d 898 (Ct. App. 1988)); *see also* Wis. Stat. § 19.37(2)(a). The custodian argues that this causal connection was lacking, because the requester needed only ask again—not file this action—to secure the record.

A decision endorsing this viewpoint would undermine due process and render empty the public records law's mandatory fee-shifting regime. How could a requester know whether a custodian would change its mind after issuing a written denial? One never could, which is why the custodian's argument here is unworkable.

Moreover, the denial here cited three separate rationales, only one of which—the asserted fear of voter coercion—related to timing. The custodian also insisted that he did not have responsive records and that disclosure would violate the secrecy of the ballot. After the recertification election, the requester would have no reason to believe that anything had changed with respect to those rationales.

There is simply no basis for denying an attorney fee award based on a counterfactual narrative of what a custodian would have done, might have done, or should have done under different circumstances. A denial is a complete and definitive act which a requester is entitled to challenge. A prevailing party's fee recovery should not hang in the balance, dependent on a custodian's ambivalence or second thoughts.

IV. A REQUESTER'S STATED PREFERENCE TO RECEIVE A RESPONSE WITHIN A SPECIFIC TIMEFRAME HAS NO EFFECT ON A CUSTODIAN'S OBLIGATIONS UNDER THE PUBLIC RECORDS LAW.

The mandate for custodians to respond to public records requests "as soon as practicable and without delay" is simultaneously firm and flexible. Wis. Stat. § 19.35(4)(a). It is a standard that demands efficiency but recognizes reality. Practicability may impose a limit on speed.

At the same time, however, nothing prevents a requester from asking a custodian to respond within a specific time period. It is simply a request; it is not an order, and the custodian is not required to comply. The requester here asked to receive a response by a certain time, and the custodian chose to respond within that window.

But a public records request does not "expire," as the custodian suggests, when the desired timeframe has lapsed.[2] The custodian claims that the public records law "creates no right to real time information." Def. Br. at 15. Regardless, it does create a right to information "as soon as practicable and without delay," and a requester should not be penalized for asking that records be provided by a certain time.

If there is any ambiguity as to whether a requester still wants an answer once that date has lapsed, nothing stops the custodian from reaching out and asking. Indeed, amici encourage dialogue and believe that many disagreements over public access can be resolved through discussion and negotiation, as they often are. Requesters and custodians should be partners in transparency. Unilaterally concluding that a request has "expired" does not advance those goals.

[2] If a request could "expire" in this way, it would eviscerate the statute of limitations that the legislature explicitly established for such actions. Wis. Stat. § 893.90(2).

V. A CUSTODIAN'S DISCLOSURE OF A DISPUTED RECORD IN DISCOVERY DOES NOT REDUCE THE ATTORNEY FEE RECOVERY.

In this case, the requested records were produced in litigation as part of the discovery process. The custodian now argues that the "discovery request was, in essence, no different than a public records request." Def. Reply at 8. As such, the custodian asserts that the requester is not entitled to any attorney fees incurred after the records' production in discovery.

This Court should unequivocally reject such illogical reasoning, which flies in the face of mandatory fee-shifting and, if adopted, would short-circuit public records litigation. A requester's attorneys often cannot properly argue the case without the disclosure of the record in discovery—often under seal and for attorneys' eyes only. Otherwise, they would be arguing in the dark. Such disclosure should never risk a premature forfeiture of attorney fees. To the contrary,

such disclosure in discovery occurs *because* the action was prosecuted—which means "a 'causal nexus' exists between that action and the agency's surrender of the information." *WTMJ, Inc.*, 204 Wis. 2d at 458.

Amici represent entities that have been at the forefront of public records litigation in Wisconsin and across the country for generations. The risk and expense of such lawsuits can be difficult to bear. A reporter's salary for the week is equivalent to what many attorneys charge for a few hours of legal work. For ordinary citizens, exercising the right to access on their own, the challenge is even greater. The legislature recognized such challenges when it imposed mandatory fee-shifting.

To deny requesters their recovery of attorney fees *even when they prevail* would defy this unequivocal legislative mandate. The result would be a public records law that is less

robust; a government that is less transparent; and a public that is less informed.

CONCLUSION

No matter how closely it is tied to the facts of this case, the Court's decision here may have a profound effect on the public records law going forward. Amici therefore respectfully ask this Court to preserve and reinforce the aforementioned precepts of transparency in its resolution of this dispute.

Dated this 16th day of November, 2017.

GODFREY & KAHN, S.C.

By:/s/ Dustin B. Brown

James A. Friedman
Bar No. 1020756
Dustin B. Brown
Bar No. 1086277

Attorneys for the Wisconsin Freedom of Information Council, the Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association.

P.O. ADDRESS:
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
Jfriedma@gklaw.com
dbrown@gklaw.com

RULE 809.19(8)(D) CERTIFICATION

I hereby certify that this brief conforms to the rule contained in s. 809.19(8)(b) for a brief produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 2,721 words.

By:/s/ Dustin B. Brown
Dustin B. Brown

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

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: November 16, 2017.

/s/Dustin B. Brown
Dustin B. Brown

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