STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2018-AP-1189

SANDRA J. WEIDNER,

Petitioner-Appellant,

v.

CITY OF RACINE,

Respondent-Respondent.

Appeal from a Final Judgment entered on May 16, 2018,
in Racine County Circuit Court,
the Honorable Eugene A. Gasiorkiewicz Presiding Circuit
Court Case No. 17-CV-1644

BRIEF OF PETITIONER-APPELLANT SANDRA J. WEIDNER

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STATEMENT OF ISSUES

(1) Did Petitioner-Appellant Weidner have the right to file an amended petition for writ of mandamus to clarify that her claimed relief extended to all documents presented at the Executive Committee meeting approving the Ethics Board advisory opinion?

Answered by the circuit court: No.

(2) Was the case rendered moot as a matter of law by virtue of the Common Council's receipt of copies of the Ethics Board submission, despite the need to resolve the issue of whether non-production based on privilege was justified?

Answered by the circuit court: Yes.

(3) Was it unreasonable for the circuit court to conclude, in considering whether Weidner prevailed, that the filing of the present action was not "the catalyst" for the City Attorney's ultimate production of the requested public records?

Answered by the circuit court: No.

(4) Were the subject documents requested via the Public Records Law protected as attorney-client privileged, attorney work product, or confidential health information, thus justifying the City's non-production of the documents in response to the request?

Answered by the circuit court: Yes.

(5) Should all of the Racine City Attorney's memorandum to the City Ethics Board and much of the circuit court's final decision be sealed?

Answered by the circuit court: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court's opinion should be published because the case applies established rules of law to a factual situation significantly different from that in published opinions and is a case of substantial and continuing public interest.

Because the briefs can fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side, oral argument is likely unnecessary.

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This is a public records case. It arises from the Racine City Attorney's refusal to provide documents mooring his Racine Ethics Board advisory opinion request on whether some alderpersons unlawfully disseminated emails to and from the City Attorney's office ostensibly containing confidential or privileged information.

This case presents the interplay between the inherent transparency of public records and the shield of attorney-client privilege in the municipal government context. It pits a citizen's right to open records against a city's authority to refuse production based on alleged privileges.

Petitioner-Appellant Sandra J. Weidner ("Weidner") is a long-serving Alderperson on Racine's Common Council. In August 2017, the City Attorney obtained Executive Committee approval for a City Ethics Board advisory opinion on whether some Common Council members' disclosure of e-mail exchanges with the City Attorney was illegal. He refused Weidner's subsequent open records request for the emails, citing closed meeting and attorney-client confidentiality.

Weidner filed this mandamus action to compel the records' production. Five days later, the City Attorney submitted to the Ethics Board for consideration 18 of the email exchanges presented at the Executive Committee meeting that launched the process.

When he did, he also provided copies of the submission to Common Council members, including Weidner.

Although the circuit court ruled that that production rendered the action moot, it nonetheless reviewed the documents in camera, holding that all but five were privileged. Ruling that Weidner had not prevailed under the Public Records Law, it dismissed the action and this appeal ensued.

Weidner challenges the circuit court's non-acceptance of her Amended Petition, dismissal of her original Petition for Mandamus as moot, and rulings that most of the subject documents are exempt from public exposure as privileged. She also seeks reversal of the circuit court's rulings on two redacted documents – the court's final decision and the City Attorney's memorandum to the Ethics Board.

II. PROCEDURAL BACKGROUND AND STATEMENT OF FACTS.

A. City Attorney Seeks Ethics Board Advisory Opinion.

On August 22, 2017, the Racine City Attorney convened the Racine Common Council Executive Committee in closed session[1] to consider whether to request an advisory opinion from "the City of Racine Board of Ethics regarding the applicability of Racine Ordinance Section 2-581(a)[2] to the disclosure of certain confidential information and privileged information, by certain officials, which information was gained in the course of, or by reason of, the officials' official position or official activities." (R6:3-4, ¶6).

Following the City Attorney's presentation at the meeting, the Committee recommended the referral to the Ethics Board. The Common Council thereafter approved. (R6:4, ¶¶8, 10).

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[1]"Consideration of requests for confidential written advice from [any] municipal ethics board under s. 19.59 (5)" may be held in closed session. Wis. Stat. § 19.85(1)(h).

[2]City of Racine Ord. § 2-581(a) ("Prohibited conduct") provides in part that "[a]ppointed officials and employees . . . shall not disclose confidential information or privileged information gained in the course of, or by reason of his/her official position or official activities."

B. Weidner's Records Request is Denied.

Weidner (via counsel) subsequently requested copies of the communications which were the subject of the Executive Committee meeting (ostensibly to be submitted to the Board of Ethics). (R1:6-10). The City Attorney refused the request, stating in part that he could not comment on the "substance" of the meeting and, "[f]urther, such Executive Committee meeting was held in closed session. No person has the authority to reveal matters discussed in closed session." (R1:11).

Weidner thereafter reiterated her request [R1:13-14] and again was denied. Via email of October 3, 2017, the City Attorney replied in part: "Inasmuch as I am bound by attorney-client confidence and by the confidentiality of a Closed Meeting, I cannot, and do not, comment on anything contained in your correspondence." (R1:15).

C. Weidner Files Mandamus Action.

In view of the refusal to produce the requested records, on November 29, 2017, Weidner commenced this action by filing a

Petition for Mandamus. (R1). Five days later, the City Attorney formally submitted his advisory opinion request to the Ethics Board. (R6:5-6, ¶ 16). The request included a memorandum and copies of the allegedly privileged communications presented at the Executive Committee meeting. (R21, 22).

Copies of the materials were provided to each alderperson on the morning of December 5, 2017. (R6:5-6, ¶ 16). Later that day, the City was served with the Petition for Mandamus. (R1, R6:6, ¶ 19).

The City then moved to quash the Petition, primarily alleging that it was moot because of Weidner's receipt of the Ethics Board submission. (R:5, 8).

D. Circuit Court Refuses to Accept Weidner's Amended Petition.

On February 5, 2018, Weidner filed an Amended Petition for Writ of Mandamus and Other Relief. (R28). The Petition clarified that the mandamus request sought "all documentation (information)" the City Attorney presented at the Executive Committee meeting wherein he sought approval of the ethics board

advisory opinion request. (R28:5). The circuit court *sua sponte* refused to accept the Amended Petition for filing. (R111:8).

E. Circuit Court Seals the Pleadings and Proceedings.

In conjunction with its motion to quash, the City moved to file its supporting brief and submissions under seal. (R11). The circuit court thereafter ordered that all pleadings filed under seal or ordered sealed (including exhibits) could not be shared or disseminated by the parties or their counsel to non-parties until otherwise ordered by the Court. (R31:2, ¶3; A-App. 2). Ultimately, the court ordered that all pleadings "shall be filed under seal and shall remain under seal in their entirety until otherwise ordered by the Court." (R32:1, ¶2; A-App. 3).

At the initial hearing of this matter, the circuit court closed the proceedings to the public. (R111:6-7). It ordered that "[t]he contents of any hearings in this matter that have been closed to the public may not be shared or disclosed by the parties or their counsel to non-parties to this lawsuit until otherwise ordered by

the Court." (R31:2, ¶4; A-App. 2). Thereafter, all proceedings predating this appeal were closed.

F. Circuit Court Grants the City's Motion to Quash.

On March 13, 2018, the circuit court heard the City's Motion to Quash. (R112). It granted it as it related to Weidner's request for a writ requiring "that the City provide her with any and all documentation (information) it alleges or submits to the Ethics Board in support of its request of the Board for an advisory opinion." (R41:1; A-App. 4).

The circuit court held that the request was moot in view of Weidner's receipt of documents on December 5, 2017, when the City Attorney provided them to all Common Council members via his Ethics Board submission. (R112:12). It also confirmed its non-acceptance of Weidner's Amended Petition. (R41:2, ¶3; A-App. 5).

G. The Court Reviews Subject Documents In Camera.

Despite the mootness ruling, the circuit court recognized Weidner's requests for information as public records requests and declared that it would consider to what extent there should have

been disclosure under the Wisconsin Public Records Law (Wis. Stat. §§ 19.31-19.39). (R112:11-12).

The court chose to consider the subject documents in camera to assess the extent to which the City could justify non-disclosure on the basis of attorney-client privilege. It ordered the City to file, for in camera review, a privilege log and the subject documents, along with its reasoning as to non-disclosure. (R112:11-12). The City did so and Weidner replied. (R46, 48, 54, 59).

H. The Circuit Court's Decision: All But Five Documents Are Privileged.

Following review of the documents and the parties' positions, the court rendered its decision on the "limited issue of determining what was and was not appropriately disclosed under a Wisconsin Public Records request." (R62:1; A-App. 6). The court noted that it was undisputed that Weidner made a public records request regarding specific emails and, based on attorney-client privilege, the City Attorney did not disclose any of the items. (*Id.*).

Following a discussion of the applicable legal standards and context, the court found 13 of the 18 items to be privileged: 10 protected by attorney-client privilege, two were attorney "work product,"[3] and one contained "federally protected Health Information (HIPPA) and a confidential communication possibly leading to legal exposure to the City." (R62:8-10; A-App. 13-15).

The court rejected the claim that the mandamus action "was required to secure release of the records requested," noting that Weidner received a complete copy of the Ethics Board materials days after filing the action. Thus, it could "not find that the present action was the catalyst for compliance in production of records by the City of Racine." (R61:10-11; A-App. 5-6). Because of Weidner's access, the court held "that issue then became moot." (R61:11; A-App. 16).

Ultimately, while noting that five of the items were not protected "by attorney-client privilege or other asserted

[3]The City never asserted privilege based on attorney work product, either when responding to the records requests or during the lawsuit.

privilege,"[4] the court found that the litigation did not in whole or substantial part secure production of the items "as they had already been provided or were fully accessible on the City website." (R61:12; A-App. 17). Thus, the Court denied Weidner's request for attorney's fees, damages, and costs under Wis. Stat. § 19.37(2). (*Id.*).

The circuit court thereafter entered judgment in the City's favor, dismissing the case in its entirety with prejudice. (R68:2).

I. The Circuit Court Unseals Much of the Record.

As this Court has noted, prior to deciding what records were privileged, the circuit court sealed the entire record and, later, its decision and final judgment. (R102:2). In conjunction with the media parties' intervention request, this Court ordered the circuit court "to determine which specific documents in the circuit court record should be sealed from public view, if any, and whether the circuit court docket should remain sealed." (*Id.*).

[4]Actually, the court found that seven of the items were not protected by attorney-client privilege, but as to two of the seven it ruled *sua sponte* that they were protected as attorney work product [R62:9; A-App. 14] – despite the City never asserting that as a non-production basis at any time.

The circuit court complied. (R109). Most documents were unsealed, some albeit with redactions, and the record was returned to this Court. (R109, 118, 120).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REFUSING TO ACCEPT WEIDNER'S AMENDED PETITION BECAUSE, AS A MATTER OF LAW, WEIDNER HAD A RIGHT TO AMEND IT ONCE WITHIN 6 MONTHS, PURSUANT TO WIS. STAT. § 802.09(1).

In her original Petition for Writ of Mandamus, Weidner sought "[a] writ of mandamus requiring that the City provide her with any and all documentation (information) it alleges or submits to the Ethics Board in support of its request of the Board for an advisory opinion as to her actions involving such documentation." (R2:6).

On February 5, 2018, Weidner filed an Amended Petition for Writ of Mandamus and Other Relief which expanded the relief sought to "[a] writ of mandamus requiring that the City provide her with any and all documentation (information) City Attorney Letteney presented at the August 22, 2017 Executive Committee

meeting. . . . " (R29:5). (It is Weidner's contention that the entirety of the emails presented at the Executive Committee meeting were not ultimately submitted to the Ethics Board). (R28:3, ¶ 10).

A. The Circuit Court Rejects the Amended Petition as "Not Timely."

At the initial hearing, the circuit court rejected the Amended Petition filing as "not timely." (R111:8). At the March 13, 2018 hearing, the circuit court reiterated its rejection of the pleading and, in conformance therewith, ordered that it "is not accepted." (R41:2, ¶3; A-App. 5).

B. In Civil Actions, Including Mandamus, Wisconsin Law Affords a Party the Right to Amend Pleadings Within Six Months of Filing Suit.

Refusing to accept an amended petition is tantamount to refusing to allow the amendment of a pleading.

Mandamus is a civil action and, as such, the Wisconsin civil procedure rules apply. Wis. Stat. §§ 783.01, 801.01(2). Section 802.09(1) of the Wisconsin Statutes provides in relevant part that a party may amend its pleading "once as a matter of course at any

time within 6 months after the summons and complaint are filed . . . and leave shall be freely given at any stage of the action when justice so requires."

Thus, "[a]s a matter of course, the statute allows a party one amendment of the pleadings provided it is done within the time limitations established in the statute." *Wiegel v. Sentry Indem. Co.*, 94 Wis. 2d 172, 287 N.W.2d 796, 802 (1980). Subsequent amendments require written consent of the adverse party or leave of court. *Id.*

While a circuit court has wide discretion regarding pleadings amendment, deference to such discretion is only afforded after the 6-month amendment period has passed. *Butcher v. Ameritech Corp.*, 2007 WI App 5, ¶34, 298 Wis. 2d 468, 727 N.W.2d 546 (2006).

C. Weidner Had an Absolute Right to Amend Her Petition Within Six Months.

Whether a court has usurped the right to amend afforded by section 802.09 is a matter of law the Court reviews de novo. *Kox*

v. Ctr. for Oral and Maxillofacial Surgery, S.C., 218 Wis. 2d 93, 579 N.W.2d 285, 288 (Ct. App. 1985).

This case was initiated on November 29, 2017 via Weidner's filing of her original Petition. (R1). The Amended Petition [R28] was filed just over two months after the action was filed – long before the 6-month limitation of section 802.09. Thus, it was indeed timely, contrary to the circuit court's statement.

In *Kox*, this Court held that the circuit court improperly refused to accept the Koxes' amended complaint, because they had "an absolute right to amend within the six-month period without leave of the court." 218 N.W.2d at 289, n. 9. The Court also noted that '[t]he statute is, by its terms, mandatory: If the six-month period has not yet passed, a party has the right to amend the pleading .... '" *Id*. at 288. Weidner also had an absolute right to amend.

D. It is Inconsequential That the Amended Petition Was Filed After the Motion to Quash and That the Motion Was Granted.

The fact that the Amended Petition was presented after the City filed its motion to quash the original petition is immaterial and of no consequence to thwart Weidner's right to amend within the 6-month period. *See Welzien v. Kapec*, 98 Wis. 2d 660, 298 N.W.2d 98 (Ct. App. 1980)(vacating trial court's original complaint dismissal because motion to amend was made less than four months after the original complaint filing and plaintiff "had not previously amended his complaint and thus still had the right to amend as a matter of course").

Nor does it matter that the City's motion to quash the original petition was granted. *See, e.g., Fuhrer v. Fuhrer*, 292 F.2d 140, 143 (7th Cir.1961)(holding that plaintiff had "an absolute right to amend" despite trial court's dismissal of the original complaint in the interim); *Peckham v. Scanlon*, 241 F.2d 761, 764 (7th Cir. 1957)(although heeding defendants' contention that the complaint failed to state a claim, noted that plaintiff had the

"absolute right" to amend and was "entitled as a right to make the attempt").

Per this Court, section 802.09(1) "leave[s] no room for interpretation or construction" and sets forth a right to amend that "is extinguished only after the passage of six months from the filing of the original complaint." *Kox,* 218 N.W.2d at 288-89 (quoting *Peckham v. Scanlon, supra*). Despite this, the circuit court refused to accept the amended petition, thereby denying Weidner the right to amend. Had the amendment been allowed, the City's motion to quash the original petition would have been moot, although the City presumably would have had the right to file a new motion attacking the amended petition.

The circuit court's decision and order to not accept the amended petition and granting the motion to quash the original petition should be reversed and the case remanded back to the circuit court to afford Weidner the right to file the Amended Petition and have the case proceed accordingly.

II. WHERE THE ISSUE OF WHETHER NON-PRODUCTION BASED ON ATTORNEY-CLIENT PRIVILEGE REMAINED, IT COULD NOT BE SAID AS A MATTER OF LAW THAT THE CASE WAS RENDERED MOOT BY VIRTUE OF WEIDNER'S RECEIPT OF COPIES OF THE ETHICS BOARD SUBMISSION.

Should the Court rule that Weidner's Amended Petition should have been accepted and remands on that basis, that presumably would make it unnecessary for the Court to decide the remaining issues. Nonetheless, Weidner presents those issues and her arguments thereon to aid this Court should it proceed to consider them.

A. The Circuit Court Held That the Mandamus Request Was Moot Due to the City's Provision of the Ethics Submission to the Common Council Members, Including Weidner.

The City asserted that Weidner's mandamus request for documents was moot because on December 5, 2017, she received the documentation submitted by the City Attorney to the Ethics Board. (R9:14). The circuit court agreed, dismissing the claim as moot, although it also acknowledged viability as to whether there

ought to have been disclosure per the records request. (R112:11, 12).

While normally the denial of a mandamus petition is discretionary, "[w]here a trial court determines whether to grant a writ of mandamus under the Wisconsin Public Records Law," review is de novo. *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶ 15, 259 Wis. 2d 276, 655 N.W.2d 510. The Court does "so ever mindful of" the "presumption of complete public access, consistent with the conduct of governmental business.'" *Id.* (citation omitted).

Mootness is a question of law that is reviewed de novo. *In re DeLaMatter,* 151 Wis. 2d 576, 591-92, 445 N.W.2d 676 (Ct. App.1989). "A matter is moot if a determination is sought which cannot have a practical effect on an existing controversy." *Id.* (citation omitted).

It is undisputed that on December 5, 2017, Weidner received the City Attorney's submission to the Ethics Board, along with her Common Council colleagues. After suit was filed, the City asserted that Weidner received the documents then in her capacity

as a common council member – "because she is a sitting Alderperson" [R39:5] – and not in response to her records request or the lawsuit.

It is generally true that voluntary release or production of previously-denied records following the institution of a mandamus action renders such an action moot. *Racine Educ. Ass'n v. Board of Educ.*, 129 Wis. 2d 319, 323-24, 385 N.W.2d 510 (Ct. App.1986). A typical scenario would be where a requester seeks certain documents, the custodian asserts no objection, and after a delay fully produces all requested documents - free from privilege assertion - following initiation of suit. In such a case, the specter of privilege justifying non-production will not loom because it was never asserted by the custodian or, if asserted initially, later voluntarily abandoned. This is not such a case.

B. The Post-Filing Production Did Not End the Controversy as the Specter of Privilege Remained.

Here, there was an adamant and swift rejection of Weidner's records request, causing her to ultimately resort to the mandamus

action. After suit was filed, the City moved to quash, challenging whether Weidner had any right to the requested relief and remaining steadfast in its assertion that its non-production prior to suit was justified. It also justified its non-production on the basis that Weidner's counsel was an "outsider" to the privilege and thus had no independent right to obtain the documents sought [R6:5, ¶ 12] – a "justification" never asserted by the City prior to the suit.

From the City's perspective, its December 5, 2017 provision to the Common Council was the delivery of allegedly confidential information not to be shared with third parties. From Weidner's perspective, because it was not a direct and voluntary response to her open records request untethered to any assertion of privilege, it did not resolve the issue or give Weidner her entitled relief. *See Riley v. Lawson*, 210 Wis. 2d 478, 490, 565 N.W.2d 266 (Ct. App. 1997) ("[A] case is moot when a party has obtained the relief to which he or she is entitled").

C. The Circuit Court's Consideration of the Viable Issue of Privilege Application in Effect "Unmooted" the Case.

Typically, a mootness decision in an open records case (albeit challenged here) would vitiate the need to consider any further issues relating to the documents' substance or alleged reasons for non-production. That makes sense: a requester receiving fully-responsive documents post-suit – without qualification, condition, or privilege – has received all he or she sought and is entitled to. Here, Weidner sought the Ethics Board documents free from the constraints of any legal privilege. To get these, she had to file suit and contest the City's assertion that their non-production was justified because the documents were privileged or confidential.

Despite ruling the case moot, the trial court incongruously proceeded ahead with in camera analysis to determine what it recognized as a still-viable issue: whether the City was justified to withhold production on the basis of attorney-client privilege. In doing so, it in effect "unmooted" the case, thereby allowing Weidner to pursue the relief she sought: an order compelling

production of the documents without cloak or contention of privilege.

Under these circumstances, it cannot be said as a matter of law that the December 5, 2017 provision to the Common Council rendered Weidner's action moot.

III. THE TRIAL COURT'S CONCLUSION THAT THE MANDAMUS ACTION WAS NOT "THE CATALYST" FOR THE CITY'S ULTIMATE PRODUCTION OF REQUESTED RECORDS IS NOT REASONABLE.

One whose mandamus action is rendered moot by a voluntary release can still be entitled to attorney fees and costs under the Public Records Law. *Racine Educ. Ass'n v. Board of Educ.*, *supra*, 129 Wis. 2d at 325. He or she must show that suit was necessary to obtain the information, and that a "causal nexus" exists between the action and the agency's surrender of the information. S*tate ex rel. Vaughan v. Faust*, 143 Wis. 2d 868, 871, 422 N.W.2d 898 (Ct. App. 1988).

If this Court rules that the December 5th production did not render the case moot, then it will presumably be unnecessary to

determine whether there was a suit-production nexus. Without conceding its arguments as to non-mootness, Weidner nonetheless addresses the "causal nexus" issue should this Court see need to consider it.

A. The Standard: Whether the Action Was "A" Cause - Not "The" Cause - of Eventual Production.

The test for causation is "whether the actor's action was a substantial factor in contributing to the result." *WTMJ, Inc. v. Sullivan,* 204 Wis. 2d 452, 555 N.W.2d 140, 143 (Ct. App. 1996). The action may be one of several causes and need not be the sole cause. *Id.* Thus, Weidner was not required to show that the action's filing was *the* cause of the document production on December 5, 2017.

Whether a party has made the requisite causal nexus showing is a factual determination for the trial court. *Racine Educ. Ass'n v. Board of Educ., supra*, 145 Wis. 2d at 522 (citing *Cox v. United States Dep't of Justice,* 601 F.2d 1, 6 (D.C. Cir. 1979)). However, where causation is an inference to be drawn from

undisputed or established facts, a court applies the reasonableness standard. *Eau Claire Press Co. v. Gordon,* 176 Wis. 2d 154, 160, 499 N.W.2d 918 (Ct. App. 1993). The Court affirms the trial court's finding unless it finds that the inference drawn by the trial court may not reasonably be drawn from the established evidence. *Id.* at 160-61.

B. The Trial Court Applied the Wrong Standard.

Weidner does not dispute that she received the Board of Ethics submission, along with her Common Council colleagues, six days after suit was filed. Yet, as stated previously, she does not agree that this constituted sufficient compliance with the public records law so as to render the action moot.

Nonetheless, even if the mootness finding is affirmed, Weidner would still prevail if the action was "a" cause – not "the" cause -- of the City Attorney's production. *See WTMJ, Inc. v. Sullivan*, *supra,* 204 Wis. 2d at 458–59 (Ct. App. 1996)("Keeping in mind that all that WTMJ had to show was that this lawsuit was

a cause, not the cause, of the records' release, we examine the trial court's reasons for its findings of causation").

With respect to Weidner's contention that the present action was required to secure release of the records, the circuit court could "not find that the present action was *the catalyst* for compliance in production of records by the City of Racine." (R62:11; A-App. 16). (Emphasis added).

The circuit court apparently assumed that it was Weidner's burden to prove that this action was "the catalyst" – and not "a catalyst" – for the production. This error – consideration of the issue using an incorrect analysis – renders the trial court's conclusion unreasonable as a matter of law. *See Borreson v. Yunto,* 2006 WI App 63, ¶6, 292 Wis. 2d 231, 713 N.W.2d 656 (failure to apply the correct legal standard constitutes an erroneous exercise of discretion); *State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997)(choosing what legal standard to apply is a legal question review de novo).

C. The Trial Court's No Causation Finding is Not Supported by Established Evidence.

Wrong prism aside, this Court must examine the circuit court's reasons for its "no causation" finding.

There was no evidence in the record to support a finding that the Ethics Board submission was prepared long before suit was filed. The City Attorney did aver that "[t]he press of other business and the time it took to prepare" the Ethics Board submission "prevented the City Attorney's Office from making its request" earlier. (R6:6, ¶18). Yet, it is not reasonable to infer from this statement that preparation of the documents took a substantial amount of time starting long before suit (or that it even started before suit was filed).

The City Attorney's Affidavit [R6] was devoid of any indication as to when the process of preparing the Ethics Board submission memorandum took place or how long it took. As such, the only evidence in the record surrounding the City Attorney's preparation of the materials relates to timing of the production. It does not touch on the City Attorney's motivation in providing the

documents at that particular time and does not expressly state that the lawsuit had no impact on the decision to provide the submission documents to the Common Council and Weidner.

D. Because the Trial Court Applied the Wrong Standard, it Ignored Evidence Supporting an Inference That the Action Was "A" Production Catalyst.

The circuit court ignored or refused to give credence to undisputed facts that support an inference that the suit was "a catalyst":

- The City Attorney's initial refusals were adamant and straightforward, albeit generalized;
- Weidner filed suit after over two months had passed since the City Attorney's denials;
- The ultimate production to Weidner and her Common Council colleagues was an about-face of the prior position – that privilege and closed meeting confidentiality precluded production;
- In his Affidavit [R6], the City Attorney did not deny having knowledge that the suit had been filed before the City was served; and
- The documents were produced six days after Weidner filed suit. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.,* 811 F. Supp. 2d 216, 232 (D.D.C. 2011) (Although "the mere filing of the complaint and the

subsequent release of documents is insufficient to establish causation," it "is certainly a salient factor" in the analysis).

E. Weidner Filed Suit After the City's Absolute Refusal to Produce the Documents. Its About-Face Production 6 Days After Suit was Filed Raises a Reasonable Inference That the Action Was a Cause.

Weidner filed her action after her requests were soundly rejected and more than two months passed. This was not a case where she ignored justifiable delays and impatiently jumped the gun.

Here, documents were produced just 6 days after the suit was filed – after the City adamantly refused production for over two months. This "about-face" following the City's absolute resistance to disclosure raises a reasonable inference that the present suit was "a" catalyst for the production. Conversely, the circuit court's inference that the suit was not "the" catalyst – based solely on an unsupported observation that the Ethics Board submission was in process before the lawsuit was filed - is unreasonable.

F. At the Very Least, Weidner Should Be Afforded the Opportunity to Explore the Factual Issue Via Discovery or an Evidentiary Hearing.

Because the circuit court applied the wrong standard in assessing causation, and relied on alleged facts not supported by the record, its inference that this action was not "the catalyst" for the production "may not "reasonably be drawn from the established evidence" and should be reversed and remanded back to the trial court for appropriate further proceedings on the issue.

Although the facts noted previously can reasonably support an inference that there was causation, Weidner should nonetheless at the very least be afforded the opportunity to further confirm through discovery or an evidentiary hearing that the action's filing was indeed "a catalyst" for inevitable production.

IV. BECAUSE THE REQUESTED DOCUMENTS ARE NOT PROTECTED AS ATTORNEY-CLIENT PRIVILEGED, WORK PRODUCT, OR CONFIDENTIAL HEALTH INFORMATION, THEY ARE NOT EXEMPT FROM PRODUCTION UNDER THE WISCONSIN PUBLIC RECORDS LAW.

The circuit court ruled that 13 of the 18 documents were exempt from disclosure on various grounds and that the remaining

five were not exempt from Public Records Law production. (R61:8-10; A-App. 13-15).[5]

As to two others, it ruled that while they were not attorney-client privileged, they were attorney work product. (R61:9; A-App. 14). (Thus, in effect it held that 7 of the 18 documents were not entitled to attorney-client privilege protection – the basis initially asserted by the City).[6]

A. Standard of Review is De Novo.

Whether the City properly denied access to the documents at issue presents a question of law reviewed de novo. *Wisconsin Newspress v. Sheboygan Falls Sch. Dist.*, 199 Wis. 2d 768, 775, 546 N.W.2d 143 (1996). And whether under undisputed facts any of the documents are attorney-client or work product privileged are also questions of law reviewed de novo. *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 148, 502 N.W.2d 918 (Ct. App. 1993).

[5]As to those five, two merely provided a resolution and ordinances, one was a duplicate, and two contained information shared at public Committee of the Whole meetings.

[6]The City did not appeal these non-privilege determinations.

B. General Presumption is Openness Unless Clear Exception.

Public records are to be open to the public unless there is a clear statutory exception, a common law limitation, or "overriding public interest in keeping the public record confidential." *Hathaway v. Joint School Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 342 N.W.2d 682, 687 (1984).

Certainly, under the appropriate circumstance, privileges may apply to documents in the open records context. But "[t]he party asserting the privilege has the burden to show that it applies." *Dyer v. Blackhawk Leather LLC,* 2008 WI App 128, ¶ 8, 313 Wis. 2d 803, 758 N.W.2d 167 (citation omitted).

C. Courts Should Consider the Relationship of the Parties and Nature of the Information Sought.

"When determining whether a privilege exists, the trial court must inquire into the existence of the relationship upon which the privilege is based and the nature of the information sought." *Franzen v. Children's Hosp. of Wisconsin, Inc.,* 169 Wis. 2d 366, 485 N.W.2d 603, 610-11 (Ct. App. 1992).

1. The Uniqueness of Municipal Government.

This case is set in the unique government administration context. The sanctity of government openness differentiates this setting and must be considered in the privilege analysis. *See Restatement (Third) of Law Governing Lawyers* § 74 cmt. B ("Open-meeting and open-files statutes reflect a public policy against secrecy in many areas of government" and "unlike persons in private life, a public agency or employee has no autonomous right of confidentiality in communications relating to governmental business"); Nancy Leong, *Attorney–Client Privilege in the Public Sector: A Survey of Government Attorneys,* 20 Georgetown J. of Legal Ethics 163, 165 (2007) (noting that "for government entity clients," justifying privilege "must account for the diminished expectation of confidentiality in the public sector as well as the disfavor of "secrecy in government").

2. The Respective Roles of City Attorney and Alderpersons.

The City Attorney is charged with handling "all the law business in which the City is interested." Wis. Stat. § 62.09(12). In

this pervasive role, it is not uncommon, and indeed a matter of public record, that he and his colleagues answer questions about procedure and substance at meetings of the Common Council or the City's many committees and boards. In doing so, they in essence openly provide the exact same services that the City contends are privileged here.

An alderperson's tasks are also wide-ranging, especially since they must wear two hats: to preserve and promote the City's best interests and to represent their constituents by tending to citizens' individual causes, concerns, and requests. Although the City and alderpersons generally row in the same direction, it is inevitable (and perhaps beneficial in a democracy) that a municipal legislator will not always toe the municipal line. An alderperson must often adopt an ombudsman role and question the City's action (or anticipated action) or stance on a matter or go to bat for constituents, whose desired outcome may be antithetical to that of City officials.

Like the City Attorney, alderpersons are bombarded with inquiries. Oftentimes, an alderperson is asked for information that he or she does not know or have at the ready and thus must reach out to the City Attorney to get an answer. It is unreasonable to assume that in each and every such instance, all involved would intend such inquiries (and responses) to be automatically cloaked by confidentiality or privilege.

D. Much of The City's Law Business – Including Giving General Legal Advice – is Done in the Open.

Municipal meetings "shall be publicly held" and "shall be open to all citizens at all times unless otherwise expressly provided by law." Wis. Stat. § 19.81(1), (2). At such meetings, all discussion and action is to be done "in open session." Wis. Stat. § 19.83(1). Thus, municipal business conducted by meeting is done with recognition of the duty to maintain a level of public transparency.

There are few exceptions to Wisconsin's Open Meetings Law. One is to confer "with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be

adopted by the body with respect to litigation in which it is or is likely to become involved." Wis. Stat. § 19.85(1)(g). Providing general legal advice unrelated to existing or potential litigation is not exempt. *See Minneapolis Star & Tribune Co. v. Housing & Redev. Auth.* 310 Minn. 313, 251 N.W.2d 620 (1976)(noting that open meetings exceptions "would almost never extend to the mere request for general legal advice or opinion by a public body in its capacity as a public agency").[7]

Therefore, Common Council members and other City leaders regularly obtain the benefit of the City Attorney's legal services via public (open) interaction in many meetings covering innumerable topics. The privilege is rarely if ever invoked in that context to hinder the free and open exchanges that often occur between alderpersons and the City Attorney when they openly meet to conduct the City's business.

[7]*See also Prior Lake American v. Mader*, 642 N.W.2d 729, 737-38 (Minn. 2002) ("Although the attorney-client privilege is available both to public bodies and to private clients, public bodies are subject to the Open Meeting Law whereas private clients are not. The attorney-client privilege is, therefore, available to public bodies as constrained by the Open Meeting Law").

Emails are natural byproducts of the open legislative process that moors City business. It is unreasonable to assume that the City Attorney and City officials and employees expect that much of the City's legal business can be aired in public meeting (without the privilege shield) but that when that same type of business is broached via email it is to be considered confidential and privileged.

E. General Tenets of Attorney-Client Privilege.

The party asserting attorney-client privilege has the burden to show that it applies. *State v. Meeks*, 2003 WI 104, ¶ 20, 263 Wis. 2d 794, 666 N.W.2d 859.

The privilege protects "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." Wis. Stat. § 905.03(2). It contemplates a confidential client-to-attorney disclosure "which the client reasonably believes to be related to obtaining professional legal services." *Jax v. Jax*, 73 Wis.2d 572, 579, 243 N.W.2d 831 (1976).

"A mere showing that the communication was from a client" does not mean "that the communication is privileged." *Id.*

"The privilege applies only to confidential communications from the client to the lawyer; it does not protect communications from the lawyer to the client unless disclosure of the lawyer to-client communications would directly or indirectly reveal the substance of the client's confidential communications to the lawyer." *Journal/Sentinel, Inc. v. Shorewood School Board*, 186 Wis. 2d 443, 460, 521 N.W.2d 165 (Ct. App. 1994).

F. There is No Blanket Privilege for Municipal Government.

Courts generally do not extend a blanket privilege to municipal attorney communications. In *AHF Community Development, LLC v. City of Dallas*, 258 F.R.D. 143 (N.D. Tex. 2009), the plaintiff landlord sought emails between a city police officer and an assistant city attorney. The court held that some of the emails were not privileged because they did not contain legal advice or confidential communications to obtain such advice. 258 F.R.D. at 147.

Per the court, emails falling into the non-privileged category concerned "logistical matters" such as setting the date and agenda for a meeting and scheduling an inspection; conversations with a community member and a City Council member concerned about crime at the apartment complex; and the identification of a specific ordinance needed for reference in an agreement. 258 F.R.D. at 147.

The court noted that "in-house" attorneys - not retained for specific matters - often become involved with the organization's broader goals, "blur[ring] the line between legal and nonlegal communications." *Id.* Nonetheless, it observed that the attorney-client privilege does not encompass every communication made to inside counsel "to keep her apprised of an ongoing situation regarding which she may be asked to provide specific legal advice or services." *Id.*

G. The Court Should Not Carve Out a Municipal Email Privilege.

To accept the City's invitation to blanket the documents with privilege contravenes law, ignores the policy of open government,

and in effect carves out a public records exception for all City Attorney-Common Council emails, regardless of content. It would create a situation where the public has complete access to open communications at public meetings regarding City legal matters (including questions and answers on laws and procedures) but not to emails between City representatives and the City Attorney wherein the representatives ask the similar questions and receive similar answers on the same or similar topics presented in open meeting. The consequent chilling effect threatens the transparency underlying efficient and effective municipal governance and administration.

H. A Review of the Subject Documents Reflects That They Are Not Privileged.

As the court noted in *AHF Community Development, LLC v. City of Dallas, supra,* a court must carefully consider "each communication to determine whether it should be protected from disclosure to further the purpose of the privilege." 258 F.R.D. at 148 (citations and quotation omitted).

In conjunction with its de novo review, this Court is asked to consider the 13 communications found by the circuit court to be privileged to determine if they indeed deserve to be protected from disclosure.

1. Email from alderperson to City Attorney regarding a constituent's claim.[8]

Circuit court basis for privilege: "Content references internal processing of a pending claim." (R62:8)(A-App. 13).

A request for information on a constituent's claim status and process is not a request for legal advice.

The City Attorney would presumably recognize that the information inevitably provided would in turn be provided to the constituent. The alderperson is in essence standing in the shoes of a constituent and asking that the City Attorney act as a mere conduit for information. *See In re Grand Jury Proceedings,* 616 F.3d 1172, 1182 (10th Cir. 2010) (stating that where the attorney "was acting as a 'conduit' for non-confidential information, the client may not invoke the attorney-client privilege").

[8]R21:20.

Here, the City Attorney, rather than reply, merely forwarded the initial e-mail to City Paralegal Salvo. That is, at the very least, tacit recognition that "legal advice" was not being sought.

It is reasonable to assume that an alderperson seeking information about status and process on behalf of a constituent will not have an expectation of confidentiality. *U.S. v. Pipkins*, 528 F.2d 559 (5th Cir., 1976)("It is vital to a claim of privilege that the communication have been made and maintained in confidence" and "[t]hus courts have refused to apply the privilege to information that the client intends his attorney to impart to others").

2. Email from City Attorney regarding a petition for direct legislation.[9]

Circuit court basis: "Content references legal advice regarding changes to a City ordinance." (R62:8)(A-App. 13).

[9]R21:21-22.

The email is merely a preliminary notice, and basic summary of, the Petition and process, without analysis. It is not "legal advice" on substance.

As a lawyer-to-client communication that neither directly not indirectly reveals the substance of clients' confidential communications to the lawyer, this document is not privileged. *See Journal/Sentinel, Inc. v. Shorewood School Board, supra,* 186 Wis. 2d at 460.

The fact that it is marked "ATTORNEY-CLIENT CONFIDENTIAL COMMUNICATION" is inconsequential. *See Kobluk v. University of Minnesota,* 574 N.W.2d 436 (Minn. 1998)(stating "a document is not cloaked with the privilege merely because it bears the label 'privileged' or 'confidential'").

3. Email chain regarding retention of counsel on a development project.[10]

Circuit court basis: "Content references confidential thought process regarding retention of outside counsel. This Court rejects the ombudsman argument." (R62:8)(A-App. 13).

[10]R21:23-24.

Because the alderperson's initial inquiry was of Administrator Friedel and not the City Attorney, it is fair to infer that it was not intended to be a request for legal advice. The alderperson was in essence acting as an ombudsman challenging the subject hiring. Responses from the then City Attorney provide no "legal advice" - no recommendation or directive -- and neither directly nor indirectly reveal confidential communications.

4. Email requesting closed session statutes and ordinances and City Attorney's reply.[11]

Circuit court basis: "Content references legal opinions of City Attorney regarding closed sessions." (R62:9)(A-App. 14).

The alderperson requested statutes and ordinances regarding when the City may go into closed session. The reply provided the relevant statutes (the Public Meetings Law). The City Attorney's transmittal email merely noted where to find the open meeting exceptions.

The request for information is not a request for legal advice and contains no direct or indirect revelation of confidential

[11]R21:25.

communications from the client. Providing statutes and pointing to a specific statute is not providing "legal advice" and certainly not rendering a "legal opinion."

When a lawyer acts merely as a conduit for information readily available from other sources (and not implicating any confidential information), the communication is not attorney-client privileged. *See In re Grand Jury Proceedings, supra. See also Ohio-Sealy Mattress Manufacturing Co. v. Kaplan,* 90 F.R.D. 21, 29 (N.D. Ill. 1980)(noting that "[m]any of the documents reveal matters of public record that could have been discovered by other means" and none "reveal any information that even approaches a breach of the confidentiality necessary for the proper functioning of the attorney-client relationship").

It is perplexing that the trial court found the City Attorney's transmittal email here to be privileged as a "legal opinion" despite finding that other City Attorney emails transmitting the Redevelopment Authority resolution, ordinances regarding procuring professional services, statutes regarding the RDA's

authority, and Racine nuisance ordinances were not attorney-client privileged. As with these non-privileged transmittal emails, the City Attorney's reply contains no "legal processes or thoughts" and no "legal analysis."

5. Request for information on RDA's authority and City Attorney's response.[12]

Circuit court basis for work product privilege: "While this Court finds the providing or the statute is not privileged, the forwarding of **[redacted]** is attorney work-product and, therefore, reflects legal thoughts of the City Attorney on that subject." (R62:9)(A-App. 14).

Upon receipt of Weidner's request, the City was obligated to promptly fill or deny the request and give specific reasons for denial. § 19.35(4), Wis. Stats.; *Osborn v. Board of Regents of Univ. of Wis. Sys.*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158.

Here, the City Attorney refused production based on simple references to "attorney-client privilege" and "closed meeting confidence," which were insufficiently specific. *See Oshkosh Nw.*

[12]R21:27.

Co. v. Oshkosh Library Bd., 125 Wis. 2d 480, 485, 373 N.W.2d 459 (Ct. App. 1985)(noting that the mere citation to an exemption statute is not specific enough to successfully withhold a record).

"Work product" privilege was never asserted by the City; the trial court applied it *sua sponte*. Yet it is not a court's role to consider reasons that were not asserted by the custodian. *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). *See also Oshkosh Nw. Co. v. Oshkosh Library Bd., supra*, 125 Wis.2d at 484 (noting that "it is the custodian," not the government's mandamus action attorney, "who must give specific and sufficient reasons for denying inspection.").

The work product privilege, adopted by *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 150 N.W.2d 387 (1967) partially codified by Wis. Stat. § 804.01(2)(c), is a "qualified privilege" that applies to matters "prepared in anticipation of litigation or for trial." *Borgwardt v. Redlin*, 196 Wis. 2d 342, 352, 538 N.W.2d 581 (Ct. App. 1995). The test is "whether, in light of the nature of the document and the factual situation in the particular case, the

document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.*

The City never asserted attorney work product doctrine on its own. Nonetheless, even now it cannot meet its burden. The subject document is clearly not attorney work product. Aside from not being prepared by the City Attorney or his colleagues, it certainly was not prepared in anticipation of litigation.

6. Email chain regarding a City contract.[13]

Circuit court basis: "The content sought insight to legal reasoning of the City Attorney regarding the contract." (R62:9)(A-App. 14).

This is all "public record" information. *See* Wis. Stat. § 19.36(3), Wis. Stats. (requiring access to "any record produced or collected under a contract entered into by the authority with a person other than an authority").

A request for public information is not a request for legal advice. The City Attorney's reply email is devoid of any comment

[13]R21:28-29.

which can be construed as a "legal reasoning," much less "legal advice."

The transmitting email neither contains confidential communications from the client nor indirectly reveals the substance of any confidential communications from the client. When a lawyer acts merely as a conduit for information readily available from or created by other sources (and not implicating any confidential information from the client), the communication is not attorney-client privileged. *See In re Grand Jury Proceedings, supra*, 616 F.3d at 1182.

7. Email from Asst. City Attorney regarding ordinances.[14]

Circuit court basis: "While providing City Ordinances are not privileged, the inclusion **[redacted]**, is work product." (R62:9)(A-App. 14).

As with item no. 5. above, the trial court applied the work product doctrine *sua sponte*, ruling that the subject document is work product. It is not. It was not prepared by the City Attorney

[14]R21:30-31.

or his colleagues and it cannot "fairly be said to have been prepared or obtained because of the prospect of litigation." *Borgwardt v. Redlin*, *supra,* 196 Wis. 2d at 352.

8. Email and memorandum from City Attorney regarding filling mayoral vacancy.[15]

Circuit court basis: "Content reflects legal analysis and opinion." (R62:9)(A-App. 14).

These are communications from the City Attorney to City officials and employees merely summarizing procedures set forth in state law and city ordinance to fill the mayoral vacancy. The City Attorney provides no legal insight or legal advice and renders no opinions.

The communications neither directly nor indirectly reveal any confidential communications to the lawyer. *See Journal/Sentinel, Inc. v. Shorewood School Board, supra.*

[15]R21:32-38.

The fact that the document is expressly marked as "Attorney-Client Privileged" does not alone make it so. *See Kobluk v. University of Minnesota*, *supra*.

9. Emails regarding request whether a contract would need Council approval.[16]

Circuit court basis: "Content reflects legal analysis of contract **[redacted]**." (R62:9)(A-App. 14).

These documents relate to the same contract as no. 6 above. Considering the nature and context of the request, it cannot be said that the alderperson was confidentially requesting "legal advice" (and this is confirmed by the alderperson's subsequent sharing of the information).

As stated previously, the public records law reflects legislative intent that records relating to City contracts be transparent. *See* § 19.36(3), Wis. Stats. There is no reason why a query regarding procedure as to such contracts should also not be disclosed.

[16] R22:5-7.

The City Attorney's replies neither disclosed confidential information nor directly or indirectly revealed any confidential communications.

10. Email from City Attorney regarding tentative settlement.[17]

Circuit court basis: "Content discusses City resolution of ongoing litigation and **[redacted]**." (R62:9)(A-App. 14).

In *Journal/Sentinel, Inc. v. Shorewood School Board*, 186 Wis. 2d 443, 521 N.W.2d 165 (Ct. App. 1994), the school board refused to provide a memorandum of understanding that recited the terms of a settlement. The Court held that the document was an "open record" and not attorney-client privileged because the privilege does not apply to lawyer-to-client communications that neither directly nor indirectly reveal the substance of the client's confidential communications to the lawyer. 186 Wis. 2d at 460.

The email sets forth terms of a prospective agreement, without advice or comment, and reveals no legal "thought processes." As in the *Journal/Sentinel, Inc. v. Shorewood School*

[17]R22:11-13.

Board case, the privilege would only apply if disclosure would directly or indirectly reveal client confidential communications to the lawyer. An email containing proposed settlement terms is not such a revelation.

The settlement terms are not "confidential communications" in that that were wrought from interaction between attorneys on behalf of the two settling parties. The fact that the document is expressly marked as "Attorney-Client Privileged" does not change that fact.

11. Letter from Third-Party Attorney to City Attorney and Alderperson.[18]

Circuit court basis: "Content contains federally protected Health Information (HIPPA) and a confidential communication possibly leading to legal exposure to the City." (R62:10)(A-App. 15).

The circuit court apparently believed the City's assertion that the subject email and attached letter "contained confidential health information regarding a city employee." (R47:24).

[18]R22:26-28.

Yet neither contains "confidential health information." The letter references a document that allegedly contains protected information but that document is not appended to, or provided with, the letter. And because the letter is from a third party outside City government, it is obviously not privileged. *See In re Grand Jury Proceedings*, 616 F.3d 1172, 1183 (10th Cir. 2010)("A communication by an attorney to a third party or a communication by a third party to an attorney cannot be invoked as privileged").

12. Email chain regarding Committee of the Whole scheduling.[19]

Circuit court basis for privilege: "Content contains [sic] reflects thoughts and processes regarding various ongoing legal matters involving the City or Racine." (R62:10)(A-App. 15).

The emails relate to the alderpersons concerns about scheduling, specifically the order of items to be taken up by the Committee of the Whole. As such, legal advice is not sought. The alderperson was merely questioning and challenging the proposed agenda order.

[19]R22:29-32.

The emails contain no confidential information and the alderperson's copying the reply to a *Journal Times* correspondent – a third party – as a practical matter confirms that there was no intent to seek legal advice. The City Attorney's emails also contain no legal advice and do not directly or indirectly reveal any confidential client communications.

13. Email regarding a liquor license (copied to several constituents).[20]

Circuit court basis: "Content asks for legal opinion and analysis from the City Attorney." (R62:10)(A-App. 15).

This email was impelled by, and intending to address, constituents' concerns about revisions to the nuisance ordinance, not a request for legal advice. No confidential or privileged or otherwise protected information is disclosed.

As the City advised the circuit court, the recipient was the City Attorney and at least "several people outside of City government." (R47:29). Having been copied to several constituents (third parties to the attorney-client relationship), the document

[20]R22:33.

cannot be considered confidential. *See Jenkins v. Bartlett,* 487 F.3d 482 (7th Cir. 2007)(noting that "ordinarily, statements made by a client to his attorney in the presence of a third person do not fall within the privilege, even when the client wishes the communication to remain confidential, because the presence of the third person is normally unnecessary for the communication between the client and his attorney").

"[T]he attorney-client privilege is an obstacle to the investigation of the truth [and] it should be strictly confined within the narrowest possible limits consistent with the logic of the principle." *Jax v. Jax, supra,* 243 N.W.2d at 836.

None of the scrutinized communications comprise "confidential" communications constituting legal advice or made to facilitate the rendering of legal advice. As such, they are not within the narrow confines of attorney-client privilege (or attorney work product).

Should this Court conclude that all or most of the documents are not privileged, then it must conclude that Weidner has

prevailed "in whole or in substantial part," entitling her to attorney's fees, damages, and costs pursuant to Wis. Stat. § 19.37(2) of the Public Records Law, and remand the matter to the trial court for further proceedings.

V. MUCH OF THE CITY ATTORNEY'S MEMORANDUM TO THE ETHICS BOARD AND THE ENTIRETY OF THE CIRCUIT COURT'S FINAL DECISION SHOULD NOT BE SEALED.

Per this Court's order, the circuit court was "to determine which specific documents in the circuit court record should be sealed from public view…." (R102:2). The circuit court complied. Some documents were unsealed entirely, some partially, and some remain sealed.

A. General Rule: Court Filings Are Presumptively Open.

As this Court has noted, "court filings are presumptively open for public inspection" and sealing filings "is the exception to the rule." *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, ¶89, 365 Wis. 2d 351, 875 N.W.2d 49.

A circuit court may "limit public access to judicial records when the administration of justice requires it." *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983). However, the party seeking to close court records must demonstrate, "with particularity, that the administration of justice requires that the court records be closed." *Id*. at 556–57, 334 N.W.2d 252.

Weidner challenges the circuit court's seal rulings as to two documents: (1) The City Attorney's memorandum submitted to the Ethics Board in support of the advisory opinion request [R42], which it held should remain entirely sealed; and (2) The trial court's final decision [R. 62; A-App. 6-17], which it ruled could be unsealed with certain portions redacted.

Whether and to what extent filed documents are to be kept from public disclosure is a question of law reviewed de novo. *State v. Panknin*, 217 Wis.2d 200, 579 N.W.2d 52, 55 (Ct. App. 1998).

B. The Ethics Board Submission Memorandum Does Not Contain Information Justifying Its Complete Sealing.

1. The City's Position: Memo Is Confidential Because It Was So Marked.

Per transmittal letter of December 4, 2017, the City Attorney submitted to the Ethics Board the 17-page document labeled "CONFIDENTIAL MEMORANDUM. (R. 42). The first seven pages ("Summary Portion")[A-App. 3-9] set forth background and summarized the request. The remaining pages contain a description of the 18 submitted documents.

Weidner and the Media argued that the Summary Portion and descriptions of the documents the court ruled as non-privileged should be unsealed. (R118:56).

The City contended that the submission should be entirely sealed. It based its request not on any ethics board procedural guidelines,[21] but because of City Ordinance section 2-578's

[21]City Ord. §2-584(a) requires the Ethics Board to "adopt guidelines and procedures necessary to carry out" its duties. It appears that at the time of the City's Ethics Board submission in December 2017, no guidelines or procedures were in place.

"confidential" definition and the fact that the memorandum is marked as confidential. (118:55-56). The trial court agreed and sealed the entire memorandum.

2. The City's Asserted Basis For Confidentiality to Support Complete Sealing Is Insufficient.

Racine Ordinance section 2-578 defines "Confidential information" as "written material or oral information related to city government, which is not otherwise subject to the public records law and which is expressly designated or marked as confidential." Marking a document "confidential" does not in and of itself strip it of public record status.

The City has implied throughout that the entire Ethics Board advisory opinion process is confidential.

Per Racine Ordinance section 2-585, an individual may request of the Board "an advisory opinion regarding the propriety of any matter to which the person is or may become a party. . . " and "[a]dvisory opinions and requests shall be in writing."

As for confidentiality, the ordinance provides that the requester and "any individuals or organizations mentioned in the opinion shall not be made public, unless the individual, organization or governmental body consents to it and alterations are made to the summary of the opinion, which prevents disclosure of the identities of individuals involved in the opinion." Section 19.59(5)(a) of the Wisconsin Statutes substantially mirrors the ordinance.

"Consideration of requests for confidential written advice" from a municipal ethics board are exempt from the Open Meetings Law. Wis. Stat. § 19.85(1)(h). While the written advice is to be kept confidential, nothing in statute or ordinance provides that the request itself (other than identities) must be confidential.

The only confidentiality mandate relates to the identities of the requester or those mentioned in the ultimate advisory opinion. Nothing supports a conclusion that the initial submission (other than identities) are to be treated as confidential. Moreover, there appears to be no other statutory or ordinance edict reasonably

supporting the City's position that the Ethics Board submission should be cloaked with confidentiality.

As such, because of the absence of express statutory edict and nothing inherent in the process warranting secrecy (other than identities of those involved), the first seven pages of the Ethics Board submission [R42] are not confidential and thus should be unsealed.

C. The Circuit Court's Entire Final Decision Should Be Unredacted (Open).

The circuit court ruled that its final decision [R62] should be open to the public (unsealed), with redactions. The redactions (in bold), with Weidner's arguments against redaction, are as follows:

(1) p. 7 (¶ 3)(A-App. 12): "In this context, **[redacted]** were submitted to the City of Racine Board of Ethics **[redacted]** and an advisory opinion. The file reflects that all **[redacted]** sent to the City of Racine Board of Ethics on December 4, 2017.

Weidner reply: Per the circuit court, the redactions were done to maintain the integrity of the ethics board decision process. (R118:73). As discussed previously, the Ethics Board advisory opinion process does not *ipso facto* bestow confidentiality status.

The number of items submitted and that there were identity redactions is not confidential information.

(2) p. 8 (¶ 1)(A-App. 13): "Attorney Letteney's transmittal letter to the City of Racine Board of Ethics contains a **[redacted].** SCR 20:1.13(b) demands that under the stated situation "the lawyer shall proceed as is reasonably necessary in the best interests of the organization including consultation with a higher authority in the organization. The operative verb is "shall" **[redacted]**, although that term does not exist in the rule adopted in Wisconsin. **[redacted]**[9]

(3) p. 8 (¶ 2)(A-App. 13): The foregoing is consistent with the legal authorities referenced by the parties. Indeed, this fact is conceded by Attorney Letteney when he states **[redacted]**."

Weidner reply to Nos. (2) and (3): Should this Court rule that the Advisory Opinion request Summary Portion should be unsealed, then these portions of course would be unredacted since presumably the City based its redaction request on the alleged inherent confidentiality of the Ethics Board process (and the court agreed). Nonetheless, there is no independent basis – either as to substance or context - to consider them confidential.

(4) p. 9 (item "8 of 48")(A-App. 14): "While this Court finds the providing or the statute is not privileged, the forwarding of **[redacted]** is attorney work-product

and, therefore, reflects legal thoughts of the City Attorney on that subject."

(5) p. 9 (item "11-12 of 48")(A-App. 14): "While providing City Ordinances are not privileged, the inclusion **[redacted]**, is work product.

(6) p. 9 (item "20-22 of 48")(A-App. 14): "Content reflects legal analysis of contract **[redacted]**."

(7) p. 9 (item "26-28 of 48")(A-App. 14): "Content discusses City resolution of ongoing litigation and **[redacted]**."

Weidner reply to Nos. (4) – (7): Should this Court rule that these items are not privileged, then presumably they could be unredacted in full. Regardless, it is unclear how specific references to these documents are "confidential" so as to justify redaction.

Because none of the foregoing redactions are justified, the Decision should be unsealed in full.

CONCLUSION

Based on the foregoing, Petitioner-Appellant Sandra J. Weidner respectfully requests that this Court remand the case to the circuit court to allow her to file her Amended Petition and proceed accordingly. Alternatively, the Court is asked to rule that

because the case is not moot and because the subject documents are not privileged, Weidner has substantially prevailed, mandating remand to the circuit court for proceedings as to an award of attorney's fees, damages, and costs under the Public Records Law.

She also requests that the Court order the specified unredactions and remand the case to the trial court to facilitate the same.

Dated this 21st day of May, 2019.

Respectfully submitted,

Electronically signed by Mark R. Hinkston
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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 and appendix produced with a proportional serif font. The length of this brief is 10,644 words.

Dated this 21st day of May, 2019.

Electronically signed by Mark R. Hinkston
Mark R. Hinkston
State Bar No. 1022427

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) FOR ELECTRONIC BRIEF

I hereby certify that:

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

This electronic brief and appendix are identical in content and format to the printed form of the brief and appendix 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 21st day of May, 2019.

Electronically signed by Mark R. Hinkston
Mark R. Hinkston
State Bar No. 1022427

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petitioner-Appellant Sandra J. Weidner's Brief and Appendix were hand-delivered to below counsel on May 21, 2019:

Michael J. Cohen, Esq.
MEISSNER TIERNEY FISHER
& NICHOLS S.C.
111 East Kilbourn Avenue, 19th Floor
Milwaukee, Wisconsin 53202

I further hereby certify that the requisite number of copies of Petitioner-Appellant Sandra J. Weidner's Brief and Appendix were hand delivered to the Wisconsin Court of Appeals on May 21, 2019 at the following address:

Sheila Reiff
Clerk of the Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, WI 53701-1688

Dated this 21st day of May, 2019.

Electronically signed by Mark R. Hinkston
Mark R. Hinkston
State Bar No. 1022427

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of May, 2019.

Electronically signed by Mark R. Hinkston
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