STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

FRIENDS OF FRAME PARK, U.A.,

Plaintiff-Appellant,

v.

Appeal No. 2019AP96
Cir. Ct. No. 17-CV-2197

CITY OF WAUKESHA,

Defendant-Respondent.

APPEAL FROM A FINAL ORDER ENTERED ON NOVEMBER 26, 2018 IN CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

BRIEF AND APPENDIX OF APPELLANT

Joseph R. Cincotta
State Bar No. 1023024
Attorney for Appellant

P.O. Address:
400 East Wisconsin Avenue – Suite 205
Milwaukee, WI 53202
414-416-1291
Jrc4@chorus.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Case Law

ISSUES PRESENTED FOR REVIEW

1. May a City withhold producing public records showing its interactions with a private business entity regarding redeveloping a public park under the competitive bargaining provisions of the open meetings law?

The Circuit Court found that the City could do so either because it was competing with another municipality for something or was engaging in negotiations with the private business.

2. Did the Circuit Court err in granting summary judgment regarding whether the filing of the underlying circuit court case was "a cause" of the City's release of the withheld records two days later?

The Circuit Court determined that the City's Attorney's statement as to its reasons for releasing the records 2 days after the case was filed was dispositive and that there was no genuine issue of fact regarding whether the filing of the court action was a cause for the release.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The decisional law regarding the open records law and the open meetings law contemplates court rulings that help delineate the limits and parameters of those laws both for requesting citizens and responding municipalities. This matter is a case of first impression, addressing whether an exception that is set forth in Wisconsin's Open Meetings law may be applied to the Open Records law and, if so, whether it was properly applied in this case.

The law on the effectiveness of the attorneys fees provision of the open records law is also at issue.

The Court's decision will provide significant and needed guidance on these issues. The circumstances support both publication and also having the Court schedule and hear oral argument.

STATEMENT OF THE CASE AND THE FACTS

I. Summary of Case and Procedural History.

This matter arises from an open records request served on the City of Waukesha in October 2017. The City responded and withheld certain records. The City asserted it was permitted to withhold those records pursuant to an exception in the Open Meetings law. *See App 38-39.*

The underlying activity of the City and the subject of the records request was the City's involvement with a private business and collegiate baseball promoter, Big Top Baseball. Big Top's plan was to engage the City to re-purpose the City's public park, Frame Park, into a for-profit baseball stadium operation. *See Record at 19 – Objection filed with City.* The records withheld were contractual documents between the City and Big Top. *App 49-87.*

Appellant filed the underlying case on December 18, 2017. The Common Council for the City met on December 19, 2017. The issue of the contracts and the partnership with Big Top was briefly addressed at the Council meeting. A review of the meeting and other submissions makes clear that the issue was controversial. The City does not deny that. However, the City points to this meeting as somehow removing its need to withhold the records. Nothing in the public record show that any action was taken regarding the plan to convert Frame Park and to allow Big Top's plan to go forward. That plan was not rescinded or cancelled at the December 19, 2017 meeting, just the opposite. *Record at 19 p. 6.*

The City, through the City Attorney, released the withheld records the next day, December 20, 2017. *App 40.* The circuit court case had just been filed. The case proceeded to a scheduling conference and pre-trial discovery. The City filed a motion for summary judgment. The circuit court held a hearing on November 5, 2018 and thereafter issued its ruling from the bench on November 9, 2018. *App 1-31.*

The Circuit Court determined that the City's justification for withholding the records was sufficient to allow that action by the City. The Court also determined that the filing of the Court case was not a cause for the City to release the records, which eliminated the ability for Appellant to recover attorneys fees pursuant to Wis. Stats. § 19.37.

Notice of Appeal was timely filed on January 9, 2019. This brief is also timely filed his day pursuant to an extension of time granted by the Court.

II. Facts Regarding Appellants' Open Records Request and Underlying Actions by the City of Waukesha.

The City of Waukesha through its City Administrator Kevin Lahner first communicated with representatives of Big Top Baseball ("Big Top") regarding converting Frame Park into a professional baseball park in fall of 2016. *Record at 42 – Depo of K. Lahner at p. 36 and infra.* Negotiations with Big Top, which is a private party, began soon thereafter and were ongoing from late 2016 and continued through spring of 2017 and thereafter into the fall of 2017. *App 44-45.*

Public awareness grew through the summer and into the fall of 2017. The project was quite controversial.

The reason for the controversy was that far from simply building a new ball diamond to replace the existing public baseball field at Frame Park, the ambitious plan being discussed called for the City to use public taxpayer/TIF money to build a new stadium facility. *Record at 19 – Objection filed with City.* Big Top Baseball, in the form of a separate LLC called Big Top Waukesha, LLC, would control the stadium. Big Top would presumptively be entitled to all revenues and would operate the facility for profit. The facility would be controlled by Big Top and only be used as per its discretion. Early drafts of an agreement between the City and Big Top make clear that these terms and conditions were being negotiated in detail as early as Spring of 2017. *See App 41, 46-49.*

In May 2017, the City Administrator sent an email to certain private parties who were involved in the behind-the-scenes discussions asking them to keep information about the Frame Park project secret and not share it with the Waukesha City Council:

> Please keep the information regarding the Frame Park improvements confidential as we are not yet ready to discuss it with the entire City Council until we are further along.

App 41 - Email from City Administrator to non-city third parties.

By early summer of 2017, word was getting out about the City Administrator's plan to convert Frame Park. However, very little was publically

discussed at City Council meetings. Questions persisted. Finally in an email on October 2017, the City Administrator explained that:

> **Status**
> After learning in July/August that the League had chosen Big Top Baseball as their preferred partner for a new team in this area we ***began working through the negotiation process for a use agreement for Frame Park.*** We are nearing the end of the negotiation process and are planning a public meeting schedule. The public meetings will include a general Public Informational Meeting, Parks Recreation and Forestry Board, Finance Committee and the Common Council. This is pretty typical for a potential project that has a parks impact and a financial impact. ....

App 44-45 (emphasis added).

In hindsight, this turned out to be inaccurate because extensive negotiations and draft contracts had already been exchanged between the City Administrator and the attorneys and other representatives of Big Top well before the July/August time frame represented by the City Administrator. *See App 46-48.*

The Friends of Frame Park, U.A. was formally established in November of 2017. However, a group of Waukesha citizens, property owners, and tax payers has been acting as an organized group for several months before that time. By the early fall of 2017, questions and concerns mounted. One of the members of the group, Scott Anfinson, prepared and submitted the open records request that is at issue in this matter on October 9, 2017. *App 36.* The request has several parts and included the following request:

> 6. Please include any Letters of Intent (LOI) or Memorandum of Understanding (MOU) or Lease Agreements between Big Top Baseball and or Northwoods League Baseball and the City of Waukesha during the time frame of 5-1-16 to the present time frame.

See App 36 - October 9, 2017 records request.

While the request was submitted to the City Administrator, the City Attorney prepared a written response and provided that to Mr. Anfinson on October 23, 2017. *App 38.* In that response, the City Attorneys office acknowledges that it is producing records but also that it is withholding certain records which would otherwise be responsive. These records were the contractual documents and correspondence between the City and Big Top. The pertinent excerpt from the City Attorneys response is set forth below:

> There are no letters of intent or memoranda of understanding between Big Top Baseball or the Northwoods League and the City of Waukesha. A park use contract with Big Top Baseball is presently in draft form. Because the contract is still in negotiation with Big Top, and there is at least one other entity that may be competing with the City of Waukesha for a baseball team, the draft contract is being withheld from your request, pursuant to Wis. Stats. §§19.35(1)(a) and §19.85(1)(e). This is to protect the City's negotiating and bargaining position. The draft contract is subject to review, revision, and approval of the Common Council before it can be finalized, and the Common Council have not yet had an opportunity to review and discuss the draft contract. Protecting the City's ability to negotiate the best deal for the taxpayers is a valid public policy reason to keep the draft contract temporarily out of public view – Wis. Stats. §19.35(1)(a) states that exemptions to the requirement of a governmental body to meet in open session are indicative of public policy in this regard, and Wis. Stats. §19.85(1)(e) exempts from open session "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session." There currently is a need to restrict public access for competitive and bargaining reasons until the Council has an opportunity to review the draft and determine whether it wants to adopt it or set different parameters for continued negotiations with the interested parties. If the

> contract's terms were made public, it would substantially diminish the City's ability to negotiate different terms the Council may desire for the benefit the City. Because the City's negotiating and bargaining position could be compromised by public disclosure of the draft contract before the Common Council have had an opportunity to consider the draft, after applying the balancing test, the public's interest in protecting that negotiating and bargaining position outweighs the public's interest in disclosing the draft contract at this point.

See App 38-39.

As the City Attorney's letter explains, the City determined to withhold from its production of records a so-called Park Use Contract. The City Attorney explained that:

> Because the contract is still in negotiation ***with Big Top,*** and there is at least ***one other entity that may be competing with the City of Waukesha*** for a baseball team, the draft contract is being withheld from your request, pursuant to Wis. Stats. §§19.35(1)(a) and §19.85(1)(e).

Id. App 49-87.[1]

Based on this response it is apparent that the City was engaged in negotiations with Big Top Waukesha, *and only Big Top Waukesha*, regarding the re-development of Frame Park into a baseball stadium operation. Also, the letter asserts that there is some competition, "for a baseball team," that the City and/or Big Top is a part of at that time.

---

[1] Copies of the documents actually withheld by the City were drafts of multiple contracts. These were later produced by the City and are included in the Appendix at pp 49-87. While these documents were obviously at issue below, and are part of the record between the parties, they inadvertently were not formally included in the circuit court record. As there is no dispute as to their genuineness and no prejudice from including them, and for the use of the Court, Friends requests that the Court take judicial notice of these records and add them to the court record in

However, on October 22, 2017, the day before the City's Attorneys response letter, the City Administrator issued an email to the Mayor and other City officials suggesting that he had waited until "July/August" to learn whether Big Top or another entity was awarded the franchise from the league before getting involved in negotiations with Big Top. *App 44-45, esp. 45 at "status."* Thus, according to the City Administrator, the competition with other entities was over by July/August. As noted, the City Attorneys October 23, 2017 letter takes the opposite position, explaining that the competition was still ongoing at that time.

Moreover, negotiations with Big Top have been ongoing long before July/August 2017 as the City Administrator discussed in his deposition:

> Q. You mentioned that the first contact you had I think with Big Top was in August of 2016.
>
> **A. Yes.**
>
> Q. And then we see e-mails and other information about -- related to the Frame Park baseball project sometime after that, spring of 2017. And then later, about a year ago now in the fall of 2017, there are meetings at the city and there's e-mails and such, and Big Top is the other party in the contract at that time; is that correct?
>
> **A. Yes.**
>
> Q. And throughout that time I should have said.
>
> **A. Yes.**
>
> Q. Was there ever a time when you or anybody at the City sought other submissions, or bids perhaps they'd be called, from people beyond – from entities other than Big Top Waukesha connected to the Frame Park baseball project?

---

the case. Wis. Stats. § 902.01; *Town of Holland v. PSC*, 382 Wis.2d 799 817 (Ct. App. 2018).

A. No.

Q. Was that ever a consideration in your mind, to seek other potential contracting parties for the team?

A. Before the conversations started I considered who might be a good partner.

Q. Okay. About when was that, if you recall?

A. It was around August of 2016.

Q. And what was the reason, the basis that you consider them to be a good partner?

A. I did research on the big -- the different Northwoods League franchises, and I looked at their track records and what they owned and if they had had success or not. And that's what I did.

Q. During this research did you become aware of the group that Mr. Kelneck was associated with?

A. No.

Q. Did there come a point in time where you in your judgment and under your understanding of your duties as City administrator made a determination that the Big Top group was the one that you wanted to partner with on behalf of the City; did that happen at some point in time?

A. Yeah, I -- in my professional opinion, they were a good group to work with. And that's why I sought them out.

Q. And was there any formality associated with that decision -- Let me step back. As part of that then you had to communicate with them to discuss this possibility of the project at Frame Park,
correct?

A. Yes. Yes.

Q. And you might call those negotiations or communications, and that happened over a period of time, correct?

A. Yes

Record at 42 - Depo of K. Lahner at pp 46 – 49:1.

It is clear that the City Administrator had selected Big Top many months prior to the open records response. That preference is concerning, and relevant. But what is directly at issue is the notion that Big Top and/or Big Top in partnership with Waukesha had yet to be selected by the league as of the October 23, 2017 response letter. Recall that the City Attorney explains that the "competition" as to who will get a baseball team is ongoing and is the basis for withholding the records. *App 38.*

Yet, in his October 22, 2017 email the day before the City Administrator explained that he had only started negotiations with Big Top, "in July/August" once Big Top was selected by the league. *App 45.*

The City Attorney's explanation for withholding the records raises two different concepts. The first is negotiating with Big Top over the conversion of Frame Park. The second is the idea of the City "competing" with another entity for a baseball team. The City Attorney's explanation does not identify who that might be and the nature of that competition. *App 38.*

The City Attorney's letter also set forth the formal exception under which the City was attempting to withhold the records:

> Wis. Stats. §19.35(1)(a) states that exemptions to the requirement of a governmental body to meet in open session are indicative of public policy in this regard, and Wis. Stats. §19.85(1)(e) exempts from open session "[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining

> reasons require a closed session."

Id.

This was the core legal issue that was presented to the circuit court below – whether the *open meetings* "competitive/bargaining" exception under Wis. Stats. §19.85(1)(e) could be used as an exception to withhold *open records* under § 19.35 and, if it could, whether the City's proffered justification satisfied the statutory standard.

After the City Attorney's October 23, 2017 response, and despite being denied certain records, the effort to investigate the potential Frame Park/Big Top Baseball deal continued. Appellant, Friends of Frame Park, U.A. ("Friends") hired legal counsel. Members of the group attended Waukesha City Council meetings to object - based on what they knew - but also try to learn the important details of what the City Administrator was negotiating with Big Top and, more generally, what was going to happen to Frame Park in the process.

Friends, filed an objection letter with the City on November 17, 2017. In that letter, Friends explained that it did not believe that the City Attorneys withholding of public records under the open meetings bargaining exception was valid:

> In addition, as you know, requests have been made under the open records law for inspection and/or copying of all public records related to the City and its staff's communications and interactions with Big Top. While some documents have been provided the City has invoked certain of the exceptions to the open meetings law to refuse to provide a copies of key documents, contending that the negotiation regarding the contract between the City and Big Top justifies secrecy.

> This is a misapplication of the exceptions. This exception is primarily designed to allow a City to engage in review of contracts when there is a competition between potential vendors to the city and multiple bidders. The exception recognizes that the City may need to maintain confidentiality while it negotiates for the benefit of the City.
>
> Here, the exception is being invoked for the apparent benefit of Big Top. The City and Big Top are or should be engaged in an arm's length negotiation. The subject of that negotiation is the disposition of a substantial piece of public property. There is no sound reason under the policy of the open records and open meetings law (nor their exceptions) to withhold documents that have been exchanged between the City and Big Top. The only apparent reason for this action by the City Administrator is so that he can negotiate without any public scrutiny. But this is the antithesis of the purpose of the open records law and of open government generally. The open records law is designed to allow the public to learn about public business contemporaneously as it occurs so that the public can be informed and hold its elected and other officials accountable. Invoking an exception for the purpose of preventing public accountability flies in the face of that policy and the letter and spirit of statute.

Record at 19 p. 6.

Despite this objection, the City did not produce any further records during later November and into early December 2017. However, the agenda for the City Council meeting of December 19, 2017 indicated that the issue of the use of Frame Park would be taken up by the Common Council at that meeting. *Record at 38 – Minutes of December 19, 2917 Common Council meeting.* The records that were being withheld directly addressed the nature and specific terms that the City Administrator had been negotiating with Big Top regarding the conversion of Frame Park into a for-profit baseball operation. This was the precise and controversial issue that was to be taken up at the December 19, 2017 public

meeting. *Id.*

Given this, Friends believed it was necessary to preserve its remedies and somewhat quickly filed the underlying court action seeking production of the withheld records. The summons and complaint was filed the day before the meeting on December 18, 2017 and a service copy provided to the City Attorney by email that evening and then again in the morning of December 19, 2019.

The December 19, 2017 Common Council meeting did take up the Frame Park issue. As the minutes indicate, there was little discussion and no resolution of the issue at stake. *Record at 38 p. 6.* The public record shows that the City Administrator was continuing with his negotiations with Big Top and the plans were to move ahead. *Id.*

Neither the minutes nor any other public record describe discussions regarding who the City was competing with, or that somehow that competition was resolved or no longer existed.

The next day, the City Attorney sent an email to counsel for Friends explaining that:

> Dear Mr. Cincotta –
>
> The remaining documents responsive to Mr. Anfinson's October 9 open records request are attached. These are being released now because there is no longer any need to protect the City's negotiating and bargaining position.

App 40.

The City Attorney released the records just two days after Friends filed this action. These records were not available to the public or to Friends as of the December 19, 2017 City Council meeting. Friends had previously explained in the November 17, 2017 letter to the City Attorney that the withholding of the contractual redlines and similar records did not appear to be permitted under the Open Records law. *Record at 19 p. 6.* The City was thus aware of the Plaintiff's position for over a month prior to the Common Council meeting of December 19, 2017, at which time the Frame Park baseball project was to be discussed.

As noted and as is obvious from the record, members of Friends and other citizens were not provided key records showing the contractual terms and conditions being discussed and negotiated with Big Top nor other correspondence. They were thus at a disadvantage at the December 19, 2017 meeting. The City Administrator admitted as much. *Record at 42 - Depo of K. Lahner at p.58-60:7.*

Moreover, it appears that the elected members of the Common Council were also prevented from receiving the withheld documents and information. At his deposition, the City Administrator explained that he could not recall if those same records had been kept from the Alderman on the City Council at that time. *See Record at 42 - Depo of Lahner at p. 73.*

The meeting of December 19, 2019 did not cancel or end the Big Top/Frame Park redevelopment project. The Big Top proposal continued to be debated at the City. In early 2018, the City Administrator (and apparently Big

Top) altered the potential project location, moving it away from Frame Park. The new location was proposed to be another site known as Mindiola Park.

While the risk to Frame Park appeared to have ceased, the City's withholding of records was still a problem that called for court resolution. Part of the reason for that was that the City had never explained in detail why it had suddenly decided to release the records. As noted, the City attorney issued his email on December 20, 2017 explaining that:

> Dear Mr. Cincotta –
>
> The remaining documents responsive to Mr. Anfinson's October 9 open records request are attached. These are being released now because there is no longer any need to protect the City's negotiating and bargaining position.

App 40.

Counsel for Friends responded to the City Attorney as follows:

> Thanks for these documents.
>
> I want to alert you that at this point my clients do not believe that this supplemental production is a basis to dismiss the current court action referenced above. However, in that connection I wanted to request the following information so that I can properly advise my client:
>
> What factual basis formed your opinion that the City was in a competitive posture described in your letter to Mr. Anfinson of October 23rd. Who was the City "competing" with and for what?
>
> What factual circumstances occurred or changed since your letter of October 23, 2017 that altered your opinion set forth in that October 23 letter. When did those facts arise?
>
> Will the City provide drafts of the exhibits referenced in the draft

agreement, if any exist?

App 40

The City never responded to these requests nor provided draft exhibits.

The underlying court case thus proceeded to a summary judgment hearing on November 5, 2018. As noted above, the circuit court determined that the justification invoked by the City Attorney was valid under its reading of the two statutes - §§19.85 and 19.35 - and the applicable caselaw. The circuit court stated that:

> The statements contained in the letter from the city attorney center on establishing the parameters of negotiations with Bigtop Baseball. It talks about developing a strategy. It talks about another entity seeking a baseball opportunity. It talks about counsel using a draft to determine future negotiating strategy for Bigtop Baseball.
> I'm satisfied that that's sufficient. This Court is satisfied that's sufficient under Wisconsin law, a sufficient statement, and it's sufficient to withhold a document under the exemption.

App 18-19

The Court later supplemented its reasoning as follows:

> So I want to explain my reading of the exemption on the use of the word competitive and bargaining. I think the Friends assumed that the bargaining would be going on with somebody else other than the parties involved. I read the exemption to mean the city was bargaining with Bigtop Baseball and that because of the nature of where these baseball facilities are placed, if the city was interested, as I believe they were, in having the baseball facility established someplace, that they would be bargaining with Bigtop Baseball for the best situation for the city.
>
> This Court recognizes that to do that type of discussion in the initial formation of the proposed contract is best done in a manner that is not public. You do that as a manner of private business practice. In this Court's view, that's a matter for good public business as well as to protect the security and the bargaining position of the public bottom.

> That's how I read the word bargaining and the word competitive. It doesn't necessarily mean you're in competition with somebody else, although you could be. There could be other municipalities out there looking to come in and pick up Bigtop Baseball. All of those I think are reasons for the city to restrict the disclosure of that document.

App 30-31.

Further facts will be noted below as appropriate.

ARGUMENT

I. Summary of Argument.

Appellant believes that the circuit court erred in holding that the records were properly withheld under the "competitive/bargaining" exception of Wis. Stats. § 19.85(1)(e). The competitive or bargaining exception is designed to allow municipalities to get the best contract from a vendor. For example, when the City wants to hire a sanitation contractor, it may get three bids and engage in internal discussions about the bids. Thus, in an open meetings context, those discussions between internal city officials could be held in confidence until the winning bidder is selected. This would be an appropriate application of the competitive/bargaining exception. It would also sensibly apply to public records that contain information about the City's internal discussions.

Another possible circumstance would be if a municipality was competing against others for an award of some kind. Again, it would likely be appropriate to keep confidential ***internal*** communications about how the City was planning to compete for the award.

Here, the justifications being presented are somewhat confused, overlapping and ultimately unpersuasive. If the City was competing for something – which was not identified by the City in a concrete way – then ***internal*** discussions or emails might be properly withheld. However, Friends was not asking for internal emails. Friends requested communications and draft documents between the City and a private third-party, Big Top.

Moreover, the reality appears to be that it was really Big Top that was competing for the baseball franchise or rights, not the City. The City's use of the competitive/bargaining exception to withhold records from the public (*but not from Big Top*) ends up using the exception to benefit a private party, Big Top.

Understood is this light, the posture of the parties undermines the idea that the City was negotiating with Big Top about something that needed to remain confidential. The City, and more precisely the City Administrator and Big Top were exchanging drafts of a contract. The City Administrator was thus, to that extent, in negotiations with Big Top.

However, what is not explained is how having redline drafts of contracts between the City Administrator and Big Top be produced to the public would have any impact on the City's bargaining position. If the two parties are engaged in an adversarial arms-length negotiation, release of records that both parties already know about would not have any impact on either parties' bargaining position. The City would have already revealed its position to its negotiating adversary, Big Top.

Big Top would thus already know the City Administrator's position based on the City Administrator's email and redline of the contract. Similarly, the City would know Big Top's positon as reflected in their proposed redlines of the key contracts.

There is no benefit to the City Administrator (or the City) in keeping those documents confidential with respect to the City's bargaining position vis-a-vis Big Top. And given the controversy, keeping the documents confidential could only help Big Top.

Two important points need to be restated.

First, the documents that were sought and withheld were documents that had already been exchanged between the City Administrator and Big Top. *App 49-97.* Documents internal to the City are not at issue and may well be protectable.

Secondly, the City Administrator's position at the time of withholding the documents was that any competition that Big Top had been in with a separate private company had been resolved several months earlier, in "July/August." *App 45.*

In sum and as further described below, the "competition/bargaining" exception did not and should not be found to apply to the records that are at issue in this matter.

II. Standard of Review.

The Circuit Court decided two issues on summary judgment. The standard of review of a summary judgment decision in well known. This Court reviews the

decision *de novo* because a decision on summary judgment is necessarily a legal one. The particular standard is whether there was a lack of any genuine material factual dispute. *Coppins v. Allstate Indemnity* 359 Wis.2d 179, 196 (Ct.App.2014).

With respect to the applicability of the records exception, that determination could be viewed as primarily legal, though the circuit court did take as a given certain facts about the nature of the City's actions regarding Big Top and obtaining a baseball team for Waukesha. *App 14-15, 18-19.*

The second issue is whether the filing of the case was "a cause" of the City's actions to release the records. This is clearly a factual issue. The circuit court found in favor of the City and thus by necessity made a legal determination that there was no genuine material fact at issue regarding whether the City released the records in part due to the filing of the underlying court case. This is also a legal determination that is reviewed without deference.[2]

III. The Exception to the Open Records Law Relied on by the City Did Not Permit Withholding the Subject Public Records.

This matter involves openness in government under Wisconsin Law and specifically addresses provisions of both Wisconsin Open Records and Open Meetings law. The express and stated public policy of Wisconsin as established by the plain language of the Open Records law requires that public bodies or

[2] *See WTMJ Inc. v. Sullivan*, 204 Wis.2d 452, 457 (Ct.App.1996) (When evidence to be considered is documentary, we review the document *de novo*).

authorities must provide access to all public records to the maximum extent possible. That public policy is set forth in Wis. Stats. §19.31 as follows:

> In recognition of the fact that a representative government is dependent upon an informed electorate, 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.

See Wis. Stats. § 19.31.

There are several express exceptions to the open records law. None of them covers the circumstances presented here. *See* Wis. Stats. § 19.35(1)(am). A general exception is also provided as follows:

> The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

See Wis. Stats. § 19.35(1)(a)

It is through this exception to the Open Records law that the City invoked a provision of the Open Meetings law as a basis for withholding the subject documents.

That exception in the Open Meetings law provides as follows:

> (1) Any meeting of a governmental body, upon motion duly made and carried,

> may be convened in closed session under one or more of the exemptions provided in this section. ... A closed session may be held for any of the following purposes:
>
> (e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.

See Wis. Stats. § 19.85(1)(e).

There is no case law applying the "competitive/bargaining" exception noted above to the *open records* law. There is a decision from this Court that does discuss the extent of the "competitive/bargaining" exception in the context of open meetings.

In *State ex rel Citizens for Responsible Development v. City of Milton*, this Court evaluated whether the City of Milton could hold closed sessions to discuss the development of an ethanol plant by a private company that wished to keep its negotiations secret. The Court rejected this approach and explained as follows regarding the bargaining exception:

> " ....the burden is on the governmental body to show that competitive or bargaining interests require closed sessions under Wis. Stat. § 19.85(1)(e). While we agree with Milton that it has not invoked a "blanket approach" by simply asserting that competitive or bargaining reasons require closed meetings without explanation, we do not agree that it has shown that closed sessions were required by competitive or bargaining interests for all of its meetings discussing the proposed ethanol plant.

See Citizens ... v. City of Milton, 300 Wis.2d 649, 656-57 (Ct.App.2007).

A close review of the Court's analysis in *City of Milton* is applicable to this matter.

In *City of Milton* the City's Administrative officer submitted an affidavit that set forth the City's justifications for the closed sessions:

> Milton submitted the affidavit by Todd Schmidt, Milton's Chief Administrative Officer, listing the reasons that Schmidt suggested to Milton that it close the meetings concerning the proposed ethanol plant until it approved a Developer's Agreement with United Coop. Those reasons were: (1) Milton had invested millions of dollars creating its tax incremental finance district, to encourage private industrial development in Milton; (2) United Coop had proposed constructing an ethanol plant in Milton, and had requested confidentiality throughout the negotiation process; (3) for part of the negotiation process, Milton was also engaged in negotiation for purchase of private property from Doug Goodger which United Coop sought to purchase for the ethanol plant site; (4) Milton wanted its negotiations with United Coop to remain confidential so that another municipality would not pursue negotiations with United Coop; (5) Milton did not want to disclose its negotiating position to United Coop;

City of Milton, 300 Wis.2d at 643-44.

The Court rejected the City of Milton's justification that it needed closed sessions in order to keep the private developer's negotiating position confidential from other potential developers:

> .... we are not persuaded by Milton's argument that United Coop's request for confidentiality required Milton to close all discussions over the proposed ethanol plant. Because Wisconsin's Open Meetings Law dictates that the public have the fullest access to government that is compatible with the conduct of governmental business, Wis. Stat. § 19.81(1), and the exception under Wis. Stat. § 19.85(1)(e) must be strictly construed, *Hodge,* 180 Wis.2d at 71, 508 N.W.2d 603, we conclude that a private entity's desire for confidentiality does not permit a closed meeting.

City of Milton at 644.

The Court also rejected the idea that confidential proceedings were allowed in order to keep the private developer from being pursued by

another municipality. That idea is the same as the City's justification here. While there is substantial inconsistency in the City's explanations, even assuming that the City could, in effect, partner with Big Top and "compete" for "baseball for Waukesha," the Court rejected that justification:

> ¶15 We are not persuaded by Milton's argument that it was allowed to close all meetings concerning the ethanol plant for fear of losing United Coop to another municipality. There is no indication that holding closed meetings deterred United Coop from seeking a better financial package from some other municipality. United Coop may have wanted to avoid an acrimonious debate about its proposed plant by keeping discussions with Milton secret, but that is not a permissible reason for closing Milton's meetings.
>
> ¶16 Milton asserts that keeping its negotiations to purchase land from Doug Goodger secret justified its closed meetings. It asserts that secrecy was necessary to avoid attracting interest in Goodger's land from other potential purchasers. But Goodger was not required to keep the negotiations confidential, and it defies common sense to believe that if he wanted to sell his land, he would not want to receive the best price for it. Possible competition for Goodger's land did not justify closed meetings.
>
> ¶ 17 Moreover, even if secrecy somehow deterred competition from other municipalities, it is not apparent that such a reason would support holding closed meetings. All Wisconsin municipalities are governed by Wisconsin's Open Meetings Law. There is no reason to believe that the free market does not work for ethanol plant siting, resulting in the lowest cost for the ultimate consumers. Permitting the governed to express opinions about prospective purchases may be time consuming, frustrating, counterproductive and might increase costs. But the Wisconsin legislature has decided that complete information regarding the affairs of government is the policy of Wisconsin. We cannot accept the proposition that a governing body's belief that secret meetings will save costs justifies closing the door to public scrutiny.

See City of Milton, 300 Wis.2d 649, 657-660.

The justifications presented by the City of Milton track almost exactly the nature of the justification put forward by the City in this case. As this Court understood and held in *City of Milton*, the "competitive/bargaining" exception does not cover closed sessions (and therefore does not justify withholding of documents) that discuss or disclose details about a governmental bodies efforts to create a competitive advantage for a contracting party related to some large public/private development. In *City of Milton* it was an ethanol plant. Here, the City's project was to re-purpose Frame Park into a for-profit baseball venue.

The City's relies on the "competitive/bargaining' exception as a justification in this case to withhold records for essentially the same reasons put forth by the City of Milton regarding development of the ethanol plant. Those reasons were rejected by the Court of Appeals in deference to the strong policy for openness in government established by the legislature in the open meetings statutes. That same strong public policy exists and has been firmly established by the Legislature with regard to open records. *See* Wis. Stats. § 19.31.[3]

In addition, the facts of this matter show that the City was not bargaining in a way that would be covered by a logical application of the bargaining exception. At his deposition, the City Administrator explained that he believed that the bargaining exception could apply to the records that were being negotiated and

---

[3] Consistent with this strong policy, the exceptions that allow withholding public records are narrowly construed. *See Kroeplin v. Wisconsin DNR*, 297 Wis.2d 254, 267 (Ct.App.2006) ("However, exceptions to the open records law are to be narrowly

exchanged between the City and Big Top. However, when asked how disclosing those records could impact the City's bargaining position, he could not explain how it would have any negative effect:

> **Q:** Okay. If the Council had been provided all the red lines on a sort of realtime rolling basis or ongoing basis through the ... spring and summer of 2017 regarding the negotiations back and forth at Big Top Waukesha, and then potentially the public as well, because they probably could distribute them to their constituents, how in your mind would that have affected the bargaining position of the City in comparison to Big Top Waukesha?
>
> **MR. BRUCE:** To the extent it calls for a legal conclusion, I'll object for lack of foundation, also calls for speculation.
>
> **Q:** Answer if you can.
>
> **A: I don't know.**
>
> Q Okay. Just seems to me if the City attorney and yourself and the mayor want to have a meeting and go over Big Top Waukesha's current proposal, and you e-mail to each other or you make some marginal notes or you have a discussion, maybe it's an audio recording or something, that would certainly be something that would address the City's competitive position vis-a-vis Big Top Waukesha; would you agree?
>
> Object to the form of the question.
>
> **A: If I'm following you correctly, I would say yes.**
>
> **Q:** But red lines between the two parties are not of that same nature, are they?
>
> **MR. BRUCE:** Object to the form of the question; vague.
>
> **A: I guess there could be distinction drawn between those two.**

---

construed; unless the exception is explicit and unequivocal, we will not hold it to be an exception.")

Record at 42 - Depo of K. Lahner at p 76-77.

The context for this analysis is that the City and a private party are engaging in contractual negotiations. The City is disclosing its preferred versions of contractual terms and conditions to the private party, Big Top in this case. Similarly, Big Top is disclosing its preferred terms and conditions in its redline versions of the draft contracts to the City. There is no benefit to either party from withholding those records from public review except that both parties avoid public scrutiny.

It would be a different circumstance if the records at issue were communications that included ***internal*** discussions and emails and such between City officials *and only City officials* about the negotiations with Big Top. Those type of records and communications would more sensibly be considered material that could reveal the City's bargaining strategy. Here, the records sought and withheld are not those types of records. Rather, they are records that the two contracting parties are fully aware of and are discussing. They are not therefore the types of records that could impact either parties bargaining position. By exchanging the documents between themselves, both the City and Big Top disclosed and explained their positions to each other through the proposed terms and conditions of the draft contracts. *App 49-87.*

The withholding of the draft contracts had the effect of depriving the public

from information that was available to a private party and certain City officials. It did so not to protect a bargaining position of the City but of a private party.

Withholding the records had the result of keeping information from the public and the Alderman such that it could not be reviewed ahead of the December 19, 2017 Common Council meeting. This was information on the terms and conditions and obligations that the City Administrator was offering and/or discussing with Big Top, a private party. It would be a very strange interpretation of the open records law that would allow certain select City officials to share information with private parties but withhold it from the public and the elected body of the City.

Notwithstanding the applicability of this Court's analysis in *City of Milton*, the City argued below that this Court did uphold Milton's conducting of certain meetings in closed session. The circuit court also noted the same. *App 16.*

However, this Court's reasoning in *City of Milton* is exactly consistent with Friend's position here. Internal discussions only within and among City officials regarding the City's contract with a private party can be kept confidential:

> ... we agree with Milton that portions of meetings that would have ***revealed their negotiation strategy with United Coop*** or their negotiation strategy for the purchase of land for the ethanol plant site could be closed under WIS. STAT. § 19.85(1)(e).

City of Milton, 300 Wis.2d at 660.

Thus, if the closed sessions (in an open meetings context) or the withheld

records (in an open records context) would reveal the City's negotiation strategy to United Coop, those discussions or documents could be held confidential.

That is what Friends has pointed to as the proper understanding of the "competitive/bargaining" exception. The City can keep internal documents confidential while negotiating the Park Use Agreement and associated contracts because of the need to keep them confidential from the other contracting party, Big Top. Once the City sends its proposed contractual terms to Big Top, the need for confidentiality is removed.

For the reasons above, Friends respectfully requests that the Court reverse the circuit court's decision and order and declare that the justification and withholding of the records at issue was not permitted under the Open Records law.

IV. The Circuit Court erred in granting summary judgment regarding the whether the filing of the underlying action was a cause of the City's subsequent production of the withheld records.

As described above, the withheld records were produced by the City soon after the filing of this action. As was recognized below, the production of those records after this action was filed did not moot the case. The circuit court was still in a position to determine if the City's actions were permissible under the applicable law. As discussed above, the circuit court did conduct that analysis and found for the City.

The other issue that remains is whether the filing of the underlying action entitles Friends to reimbursement of attorneys fees. Like the Open Meetings law,

the Open Records law provides for recovery of attorneys fees in some circumstances. As this Court has explained:

> In providing the requested information following the initiation of this action, the Commission rendered moot the Newspaper's request for a writ of mandamus. The fact that the Newspaper's record request became moot when the Commission provided the information, however, does not mandate dismissal of the entire action. The Newspaper still has a viable claim for attorney fees and costs if the litigation "was *a* cause, not *the* cause" of the Commission's March 22 release. *See* WTMJ, Inc. v. Sullivan, 204 Wis.2d 452, 458–59, 555 N.W.2d 140 (Ct.App.1996). To hold otherwise in this case would undermine the purpose of both the Open Meetings and Open Records Laws—transparency in government. *See* State ex rel. Auchinleck v. Town of LaGrange, 200 Wis.2d 585, 595, 547 N.W.2d 587 (1996). We therefore remand to the trial court for an evidentiary hearing on whether the filing of the lawsuit was a cause of the March 22 release of information and, if so, for a determination of attorney fees and costs.

See Journal Times v. Racine Board of fire and police commissioners, 354 Wis.2d 591, 600 (Ct.App. 2014) *reversed on other grounds* 362 Wis.2d 577 (2015).

The issue at stake here would never be litigated if a City could withhold records and then produce them after the court action was filed.

Regarding whether attorneys fees should be awarded, this Court has explained in an earlier case:

> A party seeking attorney fees under § 19.37(2), Stats., must show that 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. *State ex rel. Vaughan v. Faust,* 143 Wis.2d 868, 871, 422 N.W.2d 898, 899 (Ct.App.1988). In Wisconsin, the test of cause is whether the actor's action was a substantial factor in contributing to the result. *Id.* The action may be one of several causes; it need not be the *sole* cause. *Clark v. Leisure Vehicles, Inc.,* 96 Wis.2d 607, 617, 292 N.W.2d 630, 635 (1980). Causation is a question of fact, and we will not overturn a trial court's findings as to causation unless they are clearly erroneous. *See Eau Claire Press Co. v. Gordon,* 176 Wis.2d 154, 160, 499 N.W.2d 918, 920

> (Ct.App.1993). However, in an open records case, causation is often an inference drawn from documentary or undisputed facts. In that situation, as here, we will affirm the trial court's findings as to causation if they are reasonable. *Id.* at 160–61, 499 N.W.2d at 920.

WTMJ, Inc., v. Sullivan, 204 Wis.2d 452, 458-59. (Ct. App. 1996).

The Court in *WTMJ* also noted that:

> The State asserts that its good faith, not this lawsuit, caused the release of the records. But that is only one inference which could be drawn from the State's change of position after this lawsuit was filed. Indeed, under Wisconsin's view of causation, that could be *a* reason for the release. But ***what the State must now show to prevail is that this lawsuit was* not *a cause of the document's release.*** Thus, the State's good faith and WTMJ's advocacy could both be causes of the document's release, and we would still be required to affirm the trial court.

WTMJ, 204 Wis.2d at 460. (emphasis added).

Here the basic facts are not in dispute. Friends objected to the withholding of records by its November 17, 2017 objection. The City did not produce the records. Friends then filed this action on December 18, 2017. The Common Council meet on December 19, 2017. On December 20, 2017, the City attorney provided an email with the withheld records explaining that in his view the reasons for withholding the records no longer applied. In a quick follow up request to the City Attorney, Friends asked the City Attorney to explain what had changed that now allowed for the release of the records. That request has gone unanswered. *App 40 - Email to City Attorney of December 22, 2017.*

The City has not shown that it acted solely because it genuinely believed its asserted justification no longer existed.

The City asserted that there was a strong basis within the competitive/bargaining exception to withhold the records. This was based on the City's ongoing competition with some other unnamed entity for "baseball in Waukesha."

However, there is nothing in the public record or that has been put forward by the City that any of the relevant circumstances had changed between the City's October 23, 2017 letter withholding the records and the Common Council meeting of December 19 2017, except the filing of the underlying action. The City Attorneys letter is conclusory and contains no elemental facts. It is not admissible in a trial setting. The City Attorney would have to provide foundation for his conclusions. That has not been done.

In any event, the strong inference is that the filing of the action was at least "a cause" of the City's release of the previously withheld records. While the circuit court was thoughtful and took a cordial approach to this matter, Friends believed the court erred in making what was essentially a factual finding that the only reason the City released the records was due to the City attorneys assertions in his December 20, 2017 email.

For these reasons, Friends requests that this Court reverse the finding of the circuit court and order that the underlying action was a cause of the City's release of the records and remand for further proceedings addressing the appropriate award of attorneys fees to Friends.

CONCLUSION

For the above reasons, Appellant respectfully requests that the Court reverse the decision of the Circuit Court and remand this matter for further proceedings.

Dated this 13th day of June, 2019

Joseph R. Cincotta
State Bar No. 1023024
Attorney for Appellant

P.O. Address:
400 East Wisconsin Avenue – Suite 205
Milwaukee, WI 53202
414-416-1291
Jrc4@chorus.net

CERTIFICATIONS PURSUANT TO WIS. STATS. § 809.19(2) and (8).

I certify that this Brief conforms to the rules contained in s. 809.19(8) (b) and (c) as modified by the Court's order for a Brief produced with a proportional serif font. The length of this brief is 8917 words.

Joseph R. Cincotta

I hereby also certify that filed with the brief in this matter as a part of the brief is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials 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.

Joseph R. Cincotta

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12) and that said electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Joseph R. Cincotta

I further certify that an appendix has been filed with this brief and as a separate electronic document in accordance with s. 809.19(12) and (13) and that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Joseph R. Cincotta