STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

FRIENDS OF FRAME PARK, U.A.,

Plaintiff-Appellant,

vs.

Appeal No. 19 AP 96
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

CITY OF WAUKESHA RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Defendant-Respondent City of Waukesha ("the City") does not request oral argument. The City does not believe publication of the opinion of the Court of Appeals would be appropriate in this case. The arguments of the Plaintiff-Appellant Friends of Frame Park, U.A., ("Friends") are largely based on speculation and derive from what seems to be a fundamental misconception of the law of municipal contracts. The appeal may be resolved by application of well-established law to the factual circumstances presented.

STATEMENT OF THE CASE

This is an appeal of an order granting a motion to dismiss a mandamus action brought under the Public Records Law. (R. 49; A-Ap. 34-35). Friends initially claimed in its Complaint that the City had improperly failed to disclose certain records in response to a request made in writing on October 9, 2017. (R. 1, Ex. A; A-Ap. 36-37). Certain records were disclosed in response to that request; some were not. (R. 1, 4 ¶ 11). The City Attorney had written a letter to the requester dated October 23, 2017 explaining why particular records were being withheld. (R. 1 Ex. B; A-Ap. 38-39).

The records that had been withheld were disclosed two days after commencement of the action. The City Attorney wrote a letter to the requestor explaining that they were being disclosed because the reasons for withholding them no longer applied. (R. 14, 5 ¶¶ 23-24).

Although the records regarding which Friends commenced the action had been disclosed, Friends proceeded to amend its complaint, claiming that additional record requests were made subsequent to the commencement of the action, and that Friends

believed those requests had not been responded to appropriately. (R. 14). Thereafter, the City filed a motion for summary judgment. (R. 26). A hearing was held on the motion. The circuit court rendered its decision on the motion from the bench. (R. 69; A-Ap. 1-32). A written order was entered on November 26, 2018. (R. 49; A-Ap. 34-35). This appeal ensued.

Friends has effectively abandoned most of its Amended Complaint in this action. It acknowledged in that pleading that it had received the records withheld in connection with the October 9, 2017 request, but made additional allegations regarding subsequent records requests of December 8, 2017 and March 9, 2018. However, its appeal brief is limited to argument pertaining to the response to the records request of October 9, 2017. Therefore, Friends' claims as to all but the City's response to the request of October 9, 2017 are not relevant in this appeal. *See* ***A.O. Smith Corp. v. Allstate Insurance***, 222 Wis.2d 475, 491, 588 N.W.2d 285 (Ct.App. 1998) (An issue raised in the trial court but not raised on appeal is deemed abandoned.).

The only issue to be addressed, therefore, is whether the City's October 23, 2017 response to the October 9, 2017 request was appropriate. In addressing that question, it is not necessary to consider, let alone respond to, Friends' self-serving claims in its pleadings and its Statement of Facts and Statement of the Case mischaracterizing the proposed use of Frame Park, implying that the entirety of that park was to be devoted to use by Big Top Baseball (sometimes referred to in the record as "Bigtop") and to the effect that a municipality may not contract with a private entity for use of park property. As to the latter, it clearly can; see, e.g., ***Kranjec v. West Allis***, 267 Wis. 430, 434-435, 66

N.W.2d 178 (1954) (Upholding lease of portion of public park to private parking lot operator), and in its appeal Friends makes no argument otherwise.

STANDARD OF REVIEW

This is an appeal of the grant of a motion for summary judgment. The Court of Appeals reviews summary judgment decisions de novo, applying the same standards as the trial court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 N.W.2d 31 (Ct.App.1997). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). This appeal also involves the interpretation of statutes. The standard of review by the Court of Appeals on issues of statutory interpretation is also *de novo.* ***State ex rel. Leung v. City of Lake Geneva***, 2003 WI App 129, ¶3, 265 Wis.2d 674, 666 N.W.2d 104.

ARGUMENT

I. RELIEF AVAILABLE UNDER THE PUBLIC RECORDS LAW

Pursuant to Wis. Stat. § 19.37(1), a requester of public records may commence an action for mandamus if a legal custodian withholds a public record or part of a record. "In order for a writ of mandamus to be issued, four prerequisites must be satisfied: '(1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law.' " ***Pasko v. City of Milwaukee,*** 2002 WI 33, ¶24, 252 Wis.2d q, 643 N.W.2d 72, quoting ***Law Enforcement Standard B. v. Village of Lyndon Station***, 101 Wis.2d 472, 494, 305 N.W.2d 89 (1981).

As noted above, for purposes of its appeal Friends has limited its claims to those arising from the City's response to the records request of October 9, 2017. Therefore, the

pertinent allegations of its Amended Complaint regarding the relief Friends seeks, which must satisfy the prerequisites for a mandamus action, are as follows:

1. In paragraph 20 of the Amended Complaint Friends claims that during the period from October 9, 2017 to December 17, 2017, "Friends and its members were hindered during this time and indeed throughout the entire summer and fall of 2017 because they were unable to review the drafts of the so-called 'park use contract' and surrounding correspondence. Because of that the public was not in a position to understand the full nature of the proposed development nor the position of the City as part of that development." (R. 14 ¶ 20).

2. In paragraph 21 of the Amended Complaint it is alleged that at the time of the commencement of this action on December 18, 2017, the City Council had previously taken up the Frame Park/Bigtop redevelopment proposal issue at multiple public meetings. It is also alleged that Friends and its members and supporters and other City taxpayers and residents were prejudiced from participating in the meetings and hearings because they were deprived of important information regarding the issues involved in the proposed development. (R. 14 ¶ 21).

3. In paragraph 22 of the Amended Complaint it is alleged that "almost immediately following the filing of the original complaint in this matter, the City Attorney delivered to undersigned as counsel for Friends additional records responsive to the October 9th request. These were provided by email during the late morning of December 20, 2017.

Unfortunately, they were provided a day ***after*** the Common Council meeting held on the evening of December 19, 2017. The Bigtop/Frame Park proposal was discussed at that December 19, 2017 Council meeting." (R. 14 ¶ 22). (Emphasis in Original).

4. In paragraph 23 of the Amended Complaint, Friends alleges regarding the records provided by the City on December 20, 2017 in response to the October 9, 2017 request that "[b]ecause they were provided after the meeting at which the issues were to be discussed, the production of additional records did not alleviate the prejudice to Friends and others, and continued to hinder their ability to be fully informed about the issue." (R. 14 ¶ 23).

5. In paragraph 48 of its Amended Complaint, Friends alleges that because of the City's alleged failure to provide all responsive records, "[p]laintiff was without access to that information and was unable to fully and meaningfully understand or participate in the 'affairs of its government' in particular with respect to the December 19, 2017 Common Council meeting." (R. 14 ¶ 48).

6. In paragraph 49 of the Amended Complaint it is alleged that "[t]he withholding of the draft contract prevented Friends and other Waukesha residents from evaluating whether or not the City is legally permitted to "compete" for a baseball franchise, whether it may assist another private entity to compete for such a franchise, and whether the terms and

conditions that were negotiated in the proposed park use agreement are reasonable or proper under law." (R. 14 ¶ 49).

II. ANY MANDAMUS ACTION IS MOOT; FRIENDS SEEKS ONLY FEES

Friends makes no allegation in its Amended Complaint that records responsive to the October 9, 2017 request continue to be withheld. The voluntary release of records by a custodian following the institution of a mandamus action renders such an action moot. ***Racine Educ. Assoc. v. Board of Education***, 129 Wis.2d 319, 323-324, 385 N.W.2d 510 (Ct. App. 1986); ***Journal Times v. City of Racine Board of Police and Fire. Commissioners,*** 2014 WI App 67, 10, 354 Wis.2d 591, 849 N.W.2d 888.

Therefore whether records were released before or after the filing of the Amended Complaint, Friends' mandamus action is moot. Any claim that may remain would be limited to attorney's fees and costs if Friends can establish that the litigation caused the release of records. ***Id.*** Because Friends has abandoned any claims unrelated to the October 9, 2017 request, Friends' claim for attorney's fees and cost would be limited to those incurred in connection with that request only, which it acknowledges was fully responded to on December 20, 2017. Its claim is therefore limited to reasonable fees and costs incurred in obtaining the release of records which took place two days after this action commenced on December 18, 2017. (R. 1).

III. THE CITATION OF WIS. STAT. § 19.85(1)(e) IN SUPPORT OF TEMPORARILY WITHHOLDING RECORDS WAS APPROPRIATE

The records withheld by the City in connection with the records request of October 9, 2017, and disclosed on December 20, 2017 were draft contracts between the City and Big Top Waukesha, LLC. Friends argues that the Waukesha City Attorney's reference to Wis. Stat. § 19.85(1)(e) in his letter of October 23, 2017 (R. 1 Ex. B; A-Ap.

38-39) as grounds to withhold the draft contracts was improper. Wis. Stat. § 19.35(1)(a) states that exemptions to the requirements of a public body to meet in open session under § 19.85 are indicative of public policy, but may be used as grounds for denying access to a record only if the legal custodian "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." Friends claims there has been no such specific demonstration.

The "specific demonstration" required need not be detailed. "[W]hen denying inspection, the custodian is not required to provide a detailed analysis of the records and why public policy directs it must be withheld." ***Journal/Sentinel, Inc. v. Aagerup***, 145 Wis.2d 818, 823, 429 N.W.2d 772 (Ct. App. 1988).

The case of ***Law Offices of Williams Pangman & Associates, S.C. v. Zellmer***, 163 Wis. 2d 1070, 473 N.W. 2d 538 (1991) explains what is required to make a specific demonstration under Wis. Stat. § 19.35(1). The court in ***Pangman*** held that the mere citation of the open meetings law exemption statute, § 19.85, is insufficient in itself to provide a specific demonstration. "Mere recitation of the exemption statute is insufficient without providing an added public policy reason for dismissal." ***Id*** at 1084.

The records custodian must explain why the exemption statue is applicable. So, the court found that refusal of disclosure pursuant to §19.85(1)(b), (c) and (f) allowing closed sessions in connection with the consideration of discipline, performance and promotion and evaluations of employees and officials was sufficient where it was noted that refusal was made on the basis disclosure would seriously hamper "the Milwaukee Police Departments ability to conduct thorough, confidential and internal personnel

investigations, including the gathering of statements from members of the department as a condition of their employment." ***Id*** at 1081.

In addition, the court held the specificity requirement was satisfied in the case of reliance on Wis. Stat. § 19.85(1)(b) to withhold records when a governmental body considers forms of discipline, and in the case of 19.85(1)(c) where a governmental body considers financial, medical or social history of an employee or official, because the records custodian gave "additional or complimentary" reasons for denying disclosure. ***Id.*** at 1086. Those reasons were that there was nothing in the records that suggest an interest to be served by disclosure; and involved contrasting disclosure to nondisclosure in light of the necessity to maintain confidentiality for day-to-day operations; and the fact nondisclosure was warranted because disclosure is not an alternative to discovery statutes in criminal, municipal and traffic codes. ***Id.***

In ***Journal/Sentinel, Inc. v. Aagerup***, *supra,* a coroner denied a request for a copy of an autopsy report. 145 Wis.2d at 821. In doing so, the coroner cited Wis. Stat. § 19.85(1)(d), which grants an exception to the requirements of the Open Meetings Law where a governmental unit considers probation and parole applications and strategy for crime prevention or detection. The custodian stated that withholding the report was appropriate in the interest of crime detection. ***Id.*** at 823. The Court of Appeals held that this statement satisfied the specificity requirement of Wis. Stat. § 19.35(1). ***Id.*** at 824.

A review of the City Attorney's letter of October 23, 2017 establishes that the temporary nondisclosure of draft contracts pursuant to Wis. Stat. § 19.85(1)(e) met the specificity requirement. That statute provides exemption from open session for "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 closed session."

The City Attorney in that letter did far more than cite to the statute in giving the reasons for withholding the records in question. He noted that the contract is in draft form and the City was still in negotiation with Big Top Baseball, and that there was at least one other entity that may be competing with the City for a team. He noted that the draft contract is subject to review, revision and approval by the City's Common Council before it can be finalized, and that the Council has not had an opportunity to review and address the draft contract. (R. 1 Ex B; A-Ap 38-39).

He also explained that nondisclosure was based on protecting the City's ability to negotiate the best deal for taxpayers, and that there is a current need to restrict public access to provide the Council with the opportunity to review the draft and determine whether it wants to adopt it or set different parameters for continued negotiations within interested parties. The City Attorney noted further that if the contract terms were made public, it would diminish the City's ability to negotiate different terms that the Common Council may desire for the City's benefit. (R. 1 Ex B; A-Ap 38-39).

The City Attorney's letter establishes, therefore, that the City did not merely cite to § 19.85(1)(e) in withholding disclosure. Applying the balancing test, it explained how the disclosure of a draft contract which had not even been presented to or reviewed by the Common Council did not serve the public interest.

Friends asserts that the open meetings law exemption appearing at Wis. Stat. § 19.85(1)(e) does not apply, citing as authority the case of ***State ex rel. Citizens for Responsible Development v. City of Milton***, 2007 WI App. 114, 300 Wis. 2d 649, 731,

N.W. 2d 640. That case addressed whether that exemption applied to ten closed meetings held by the Milton City Council. ***Id*** at ¶ 1. In the circuit court, the fact that multiple meetings were involved was not noted by Friends, nor did it mention that the Court of Appeals actually held that only certain portions of those meetings were not properly held in closed session. The court also held that certain portions of those meetings were properly held in closed session. It is the holding that portions of the meetings were properly closed that is significant, because the court found they were properly held in closed session for the reasons relied on by the City in this case.

According to the court, "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). Developing a negotiating strategy or deciding on a price to offer for a piece of land is an example of what is contemplated by 'whenever competitive or bargaining reasons which require a closed session.'" ***Id.*** at ¶ 19.

The City Attorney pointed out that the City's Common Council had not had an opportunity to review the draft contract. That review would be essential in determining what terms the Council would or would not approve in acting on behalf of the City and its citizens. It would establish what it felt to be appropriate and desirable provisions of a contract and the reasons why certain terms were acceptable and others were not. It would determine what was acceptable to the Council and what was not, what could or should be done if other terms were offered or particular terms rejected, and whether the draft contract was appropriate for use in negotiations or should be modified or rewritten prior to submission to the party with which negotiations were being held.

IV. FRIENDS' ARGUMENT THAT § 19.85(1)(e) DOES NOT APPLY BECAUSE DRAFT CONTRACTS WERE ECHANGED BEFORE COMMON COUNCIL REVIEW FAILS

Friends argues that as the draft contracts had been exchanged by the City and Bigtop, there was no need to withhold them to preserve confidentiality or for competitive or bargaining reasons.

In the course of raising this argument, Friends seeks to supplement the record on appeal by adding to its appendix copies of the draft contracts disclosed. It maintains that the Court of Appeals may take judicial notice of those documents, although they are not part of the record. Friends does not explain why it failed to submit these documents, which it had in its possession as early as a few days after it commenced this action, to the circuit court, nor does it explain why it did not previously seek to supplement the record to include these documents.

Neither does Friends bother to explain why it believes these documents satisfy the requirements of Wis. Stat. § 902.01(2). It cites to the case of ***Town of Holland v. PSC,*** 2018 WI App 38,382 Wis.2d 799, 913 N.W.2d 914 in this regard. However, in that case the court took judicial notice of a decision of the Public Service Commission pursuant to case law holding that courts may take judicial notice of the files of the Commission. ***Id.*** at ¶ 30, n. 9. Friends fails to make any argument that the draft contracts it refers to are comparable to a PSC decision, nor does it cite any authority in support of its request but for the statute itself, the application of which to the records in question it fails to discuss except by reference to ***Town of Holland.***

The appellant has the duty to ensure that the record is sufficient to review the issues raised on appeal, and in the event that relevant materials are not included in the

record the Court of Appeals will assume that they support the trial court's ruling. *See* ***State Bank of Hartland v. Arndt,*** 129 Wis.2d 411, 423, 385 N.W.2d 219 (Ct.App.1986). The Court of Appeals is bound by the record in front of it. ***Fiumefreddo v. Mclean,*** 174 Wis.2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Judicial notice should not be taken in this case.

Regardless, however, Friends' argument in this respect serves to highlight a fundamental flaw in its position. Friends fails to recognize that only the City's Common Council has the authority to approve, and authorize entry into, a contract on behalf of the City. Accordingly, negotiations involving a contract, and bargaining, may continue until such time as there is common council approval of the contract by vote duly noticed and taken. Those who negotiate a contract with a municipality are, practically speaking, negotiating with the municipality's governing body, not its officers or employees.

In ***Town of Brockway v. City of Black River Falls,*** 2005 WI App 174, 285 Wis.2d 703, 702 N.W.2d 418, it was claimed that the city officials who negotiated a contract bound the city to the contract before it was considered and approved by the common council. ***Id.*** at ¶ 22. It was maintained that it was a "foregone conclusion" that the common council would approve the agreement because it had been negotiated by city officials. ***Id.*** at ¶ 23.

The Court of Appeals rejected these claims and held that the city was not bound by the contract before the common council voted to authorize its execution by the mayor and the clerk. It noted the "general rule of municipal law" that a valid contract with a municipality cannot be created except by its governing body or a duly authorized officer. ***Id.*** at ¶24. The common council has a broad grant of authority under Wis. Stat. §

62.11(5) for the management and control of city property and finances, while mayors, clerks and attorneys have no such power. ***Id.***

Nothing even suggests that the City Administrator or City Attorney in this case had the authority to bind the City's Common Council to terms of the draft contract or enter into a contract on behalf of the City. What Friends sought, therefore, was the disclosure of draft contracts before the City's Common Council, which had the sole authority to approve any contract with the City, had reviewed them. The claim made by Friends that the City and Bigtop both knew the terms of the draft contracts is incorrect. The City's decision-maker was not aware of them, and had not had the opportunity to discuss their terms with the City's representatives. Meeting in closed session to do so was necessary to prevent those with whom the City was negotiating from learning of the Common Council's reactions to proposed terms, preferences, willingness to accept alternatives, and other matters which would put the City at a disadvantage in the bargaining process, as was noted by the City Attorney in his letter of October 23, 2017 as described above.

The extensive effort made by Friends in its appeal brief to detail communications between the City Administrator and Big Top Baseball or others over a period of time, or to suggest there was no other person involved in competing with the City, therefore serves no purpose. Simply put, those communications and whatever negotiations they represent do not establish negotiations with the City were completed, or that any agreement between the City and Big Top Baseball had been reached, nor do they indicate competitive or bargaining reasons did not exist and Wis. Stat. § 19.85(e) was not applicable. Further, it does not matter whether the City was engaged in negotiations

solely with Big Top Baseball or with others as well for purposes of the applicability of that exemption to the Open Meetings Law.

As noted above, the Common Council had no obligation to approve any draft negotiated by City officials or representatives (and clearly it ultimately did not do so). It could therefore refuse to accept any of the terms of the draft contracts, insist on other terms, accept some terms and require that others be imposed, thereby requiring additional communications and negotiations with the other party. Negotiations, i.e. bargaining, had by no means ended at the time the request was made. It was ongoing, in fact.

The Common Council's review and comment on the draft and its possible modification, and consideration of how to respond to reactions to the draft contract by Big Top would therefore be essential in the development of a negotiating/bargaining strategy. Its discussions regarding its intents and wishes could be used against it, and the City and its citizens, if disclosed.

V. FRIENDS DID NOT INCUR SUBSTANTIAL DAMAGES AS A RESULT OF THE TEMPORARY WITHHOLDING OF THE DRAFT CONTRACTS

These factors clearly outweigh any public interest in satisfying Friends' curiosity regarding the terms of the draft contracts, particularly since Friends (or any other person) was not entitled to participate in Common Council meetings regarding any contract to begin with. This fact indicates that Friends cannot satisfy the prerequisite for a mandamus action that it sustain "substantial damages" due to the failure to disclose the draft contracts until December 20, 2017. ***Pasko v. City of Milwaukee,*** *supra* 2002 WI 33, ¶24

As noted above, Friends alleges generally that without the records, or because they were not provided in a timely fashion, it was unable to understand what the City was

doing in its negotiations regarding what Friends calls the "Big Top/Frame Park proposal," and was prejudiced because it was unable to be fully informed about the issue so that it could evaluate it and participate in the "affairs of government." Friends' complains that it was unable to understand or participate in the "affairs of government" particularly as related to the Common Council meeting of December 19, 2017. As Friends acknowledges that the additional documents were provided in response to the October 9, 2017 request "almost immediately after the filing of the original complaint in this matter" on December 20, 2017 (R. 14 ¶ 22), it must establish that it incurred "substantial damage" before that date.

However, nothing indicates that Friends has sustained damages of any kind. Assuming for the sake of argument only that Friends' allegations are true, it is clear that the Big Top/Frame Park proposal did not come to fruition. In other words, even if it was the case Friends was not provided with all documents responsive to its public records request, what it wanted to inquire into to determine whether and how it was being addressed by the City did not take place. The fact that it did not receive such records, therefore, made no difference to that result. It could have received all documents it alleges were withheld at precisely the time it feels was appropriate and there would have been no different outcome.

The language used by Friends in describing its alleged injuries indicate that Friends believes it had the right to participate in the December 19, 2017 meeting and any other meetings of the Common Council at which the proposal was addressed, and was deprived of that right by the alleged withholding of public records. There is no such right, however. Members of the public have the right to address the governing body of a

city or any governmental body at meetings of those bodies only in the case of statutorily mandated public hearings, such as those required where the council of a city takes action on zoning matters. *See* Wis. Stats. § 62.23(7). Otherwise, common councils and other governmental bodies are not required to allow public comment on any agenda item, though they may do so in their discretion.

Therefore, under the Open Meetings Law, although the subject matter of a meeting is to be described by notice "in such form as is reasonably likely to apprise members of the public and the news media" governmental bodies are given the discretion to determine whether or not public comment is to be allowed. "The public notice of a meeting of a governmental body *may provide for* a period of public comment, during which the body may receive information from members of the public." Wis. Stat. Sec. 19.84(2). (Emphasis added).

The City's Common Council had no obligation to allow members of Friends to participate in its discussions related to this proposal at its meetings. As a result, Friends would sustain no injury or damages in that regard if certain records were unavailable to them at the time council meetings were held.

Friends' allegations regarding the injuries it purportedly sustained or prejudice it purportedly suffered are vague enough that it is possible it intends to assert that the violations of the Public Records Law it claims occurred resulted in violations of the Opens Meeting Law by the City. However, it is clear that Friends cannot seek relief under the Public Records Law for an alleged violation of the Open Meeting Law. ***Journal Times v. Racine Board of Police and Fire Commissioners supra***, 2015 WI 56 ¶ 51.

VI. THE CIRCUIT COURT'S DECISION THAT THE FILING OF THIS ACTION WAS NOT A CAUSE OF THE RELEASE OF WITHHELD RECORDS IS REASONABLE

Friends claims that the Circuit Court improperly determined that the commencement of this action did not cause the City to disclose records it previously withheld in connection with the records request of October 9, 2017. Friends maintains that "the strong inference" is that the filing of the action was at least a cause of the City's release of those records. (Friends' Brief p. 36). It states that the City "has not shown that it acted solely because it generally believed its asserted justification no longer existed."

First, it is clear that "the mere filing of the complaint and the subsequent release of the documents is insufficient to establish causation." ***WTMJ, Inc. v. Sullivan***, 204 Wis. 2d 452, 459, 555 N.W. 2d 140 (Ct. App. 1996). Therefore, Friends cannot rely on the fact that it commenced this action to establish an entitlement to attorney's fees under Wis. Stat. Sec. 19.37(2).

Second, Friends' apparent belief that the City has the burden of establishing that the commencement of this action was not a cause of the release of the withheld records is incorrect. In fact: "A party seeking attorney's fees under Sec. 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." ***Id*** at 458, citing ***State ex rel Vaughn v. Faust***, 143 Wis. 2d 868, 871, 422 N.W. 2d 898 (Ct. App. 1988). The test of cause in Wisconsin is whether the action was a substantial factor in contributing to the result. ***WTMJ Inc. v. Sullivan***, 204 Wis. 2d at 458. "In an opens record 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 459.

Friends acknowledges that "the basic facts are not in dispute." (Friends' Brief pg. 35). As Friends states: "The City did not produce the records. Friends then filed this action on December 18, 2017. The Common Council met on December 19, 2017. On December 20, 2017, the City Attorney provided an email with the withheld records explaining that in his view his reasons for withholding the records no longer applied." (Friends Brief p. 35).

The Circuit Court noted that the records were released the day "after apparently a critical common council meeting." (R. 69 p. 23; A-App 23). Friends agreed with the Circuit Court regarding the significance of the December 19, 2017 meeting because, as noted above, it claimed that the withholding of the records prior to that meeting prejudiced it and hindered its ability to be fully informed regarding the issues and prevented it from being able to "fully and meaningfully understand or participate in the affairs of government in particular with respect to the December 19, 2017 Common Council meeting." (R. 14 ¶ 48).

Regarding the letter by which the withheld records were disclosed on December 20, 2017, the Circuit Court noted that "it said that the issues had been resolved. I think actually the Bigtop situation had resolved (sic), there being no contract or agreement entered with Bigtop thus the city's position is the need for withholding the contract from public scrutiny had resolved itself or dissolved and thus the agreement was set forth that the agreement could be released." (R. 69 pp. 23-24; A-App 23-34). The Circuit Court further stated that "trying to look at it favorably from the Friends side" "I'm satisfied

from my initial reading of the documents that the contract was released because of the fact the city viewed that the reasons to negotiate and conduct strategy meetings and resolve with Bigtop Baseball that the contract would be released." (R. 14 p. 24; A-App 24).

Friends complains that there is no record regarding the Common Council meeting of December 19, 2017 which establishes that "competition was resolved or no longer existed." (Friends' Brief p. 17). However, there is no law requiring that a Common Council take formal action *declining* to approve or enter into a contract, and Friends cites no authority indicating a lack of action by a Common Council must be memorialized in any fashion. Further, if negotiations continued after that meeting, it clearly does not follow that the reasons for withholding the draft contracts must in that case remain in effect. The draft contracts could have been rejected or deemed unnecessary to any future negotiations, and in that case disclosed as their review and discussion had taken place.

Friends appears to believe that the fact that the City Attorney did not respond to its attorney's email of December 22, 2017 requesting that he explain why the draft contracts were disclosed somehow indicates that the commencement of the action was a cause of their release. (Friends' Brief p. 35). However, the Public Records Law does not require that requestors of records be provided with information or explanations; it only requires disclosure of records. ***Journal Times v. Racine Board of Police and Fire Commissioners supra***, 2015 WI 56, ¶ 73.

The fact of the matter is Friends has referred to nothing in the record supporting its claim that there is a "causal nexus" between its commencement of this action and release of the withheld records two days later, beyond the filing of the action itself. That

is inadequate under the law cited above and the inference is itself an example of the logical fallacy of *post hoc ergo propter hoc.*

It was reasonable for the Circuit Court to infer in these circumstances based on the documentary evidence, and Friends' own belief in the critical nature of the Common Council meeting of December 19, 2017, that the records were released because the Common Council did not wish to pursue the agreement draft with Bigtop Baseball, and so there was no further reason for the draft contracts to be withheld. There is nothing in the record even suggesting that the explanation by the City Attorney contained in his letter of December 20. 2017 is untrue or inaccurate.

CONCLUSION

The decision to temporarily withhold the draft contracts in response to the records request of October 9, 2017 was explained in detail by the City Attorney in his letter of October 23, 2017. The specificity requirements of Wis. Stat. § 19.35(1)(a) was amply satisfied, and the reasoning behind the temporary non-disclosure valid and proper under the law. The draft contracts were disclosed immediately when the reasons for withholding them no longer applied.

Friends has failed to show it sustained substantial damages of any kind due to the temporary withholding of the records. It therefore has failed to meet one of the preconditions of a mandamus action.

The Circuit Court decision regarding whether commencement of this action was a cause of disclosure of the draft contracts was reasonable under the circumstances of this case. Friends argument that it was a cause is speculative; ultimately, Friends does

nothing more that maintain its action was a cause of the disclosure of those records because it took place after the action was commenced.

The City respectfully requests that the Court of Appeals affirm the decision of the Circuit Court.

Respectfully submitted.

Dated this 12th day of July, 2019.

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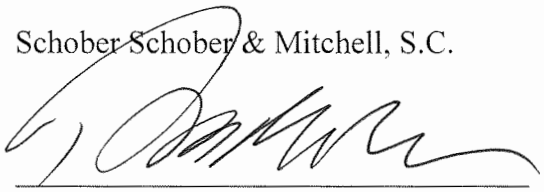
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief 5,951 words.

Dated this 12th day of July, 2019.

Schober Schober & Mitchell, S.C.



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 12th day of July, 2019

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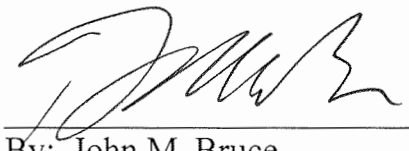

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