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

REPLY BRIEF OF APPELLANT

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300 Wis.2d 649 (Ct.App. 2007) 4,10,11

SUMMARY REPLY

The City's brief includes ample criticism of Friends and other distracting assertions and arguments, none of which are relevant or helpful in addressing the issue before the Court. That primary issue is whether a City or more precisely a City Administrator may provide public records to a private third party developer but keep them secret from the public (and his own Common Council) while he is in discussions with that private party over a development project in which the City may be involved. As discussed below and in Appellant's brief this Court's decision in *Citizens for Responsible Government v. City of Milton* has addressed this circumstance and determined that a City may not conduct secret closed session public meetings based on a desire to compete against another municipality in a "partnership" with a private developer. The City does not accurately discuss or apply *City of Milton* but the circumstances here are the same as those in that case where this Court determined that such public business may not be kept from the public.

ARGUMENT

I. Summary of Argument.

As noted in the initial Brief, 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). There are two scenarios where a "competitive or bargaining posture" might apply regarding

public records. First, a City is having internal discussions over which of several bids it may accept for a certain public contract. This is a straightforward situation and obviously contemplated by the "competitive/bargaining" exception within Wis. Stats. § 19.85

A second circumstance could be where a City is competing with some other City or entity for an award of some kind. Again, that circumstance would be one in which the exception could properly apply. The City's brief touches on and combines each and to that extent creates some confusion which will be addressed below.

II. Application of the Competitive/Bargaining Exception.

A. The City was not negotiating with Big Top in a way that would justify keeping records from public disclosure.

Regarding the idea that the City was negotiating with Big Top and that those negotiations are a basis for withholding the records, the City's asserted justification is muddled and confusing and appears to lead to a result allowing for more secrecy, not less.

The City's argument is that it may withhold the records so that the City may effectively and confidentially negotiate with Big Top regarding a contract between the City and Big Top that would result in "baseball in Waukesha." This is not a scenario where the City is having internal discussions about which of multiple developers the City should select to carry out the project, but rather keeping from

the public records or bi-lateral discussions between parties who are supposedly at arms-length. The City's brief argues that:

> "meeting in closed session to [keep discussions confidential] was necessary to prevent those with whom the City was negotiating from learning of the Common Council's reactions to the proposed terms, preferences, willingness to accept alternatives, and other matters which would put the City at a disadvantage in the bargaining process.

City's brief at p. 13.[1]

This excerpt seems to be suggesting that the City (in the form of the City Administrator) needs to keep documents confidential because public disclosure could "put the City at a disadvantage in the bargaining process" *with Big Top*. *Id.*

However, as noted throughout this matter, the records at issue were already being exchanged with Big Top. Friends did not seek records of internal discussions exchanged only amongst, or generated by, City officials. Thus, it is difficult to discern how public disclosure of records already provided to Big Top would harm the City's bargaining position vis-à-vis Big Top. The City's argument here seems to be that a City official should be able to conduct confidential discussions with a private party but keep those discussions and records confidential from his own Common Council in order to benefit that same Common Council and therefore the City, generally.

But if the Common Council is the ultimate authority regarding any contract

[1] While the City's brief starts with the idea of "meeting in closed session" as its premise, here the issue is withholding public records. However, the language used by the City may just be an oversight as the concept and issues raised are similar as between the public records and open

between the City and Big Top, how could preventing, "those with whom the City was negotiating (i.e. Big Top) from learning of the Common Council's reactions to the proposed terms, preferences, be an advantage for the "City"? This is a very odd scenario – the City Administrator wants to keep his and Big Top's redline contracts from his own Common Council because doing so will benefit that Common Council. This is not sensible.

Keeping the terms of draft contracts from the Common Council – who could or may disagree with them, which is the premise of the argument – cannot benefit (or impair) Big Top or the City Administrator in those ongoing negotiations. This scenario could make sense if the City Administrator has taken the position as an advocate for the proposed redevelopment and partnership with Big Top and does not want to allow the elected officials to get wind of the proposed deal for fear that public scrutiny could negatively impact it coming to fruition. But that would turn the public records law truly on its head. Under that logic, the City Administrator would be permitted to withhold public records from the Common Council (and the public) so he can, in effect, negotiate more effectively *against* his own Common Council??

It might be convenient for City Administrators if they could unilaterally and secretly negotiate with private third-parties and keep records of those negotiations from scrutiny. But that is the opposite of the transparency and accountability that

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meetings laws.

the public records and open meetings laws are designed to protect and foster. The rather unsettling upshot of this argument is that we should allow for secrecy because secrecy leads to a better outcome for the public even though they may not agree with the City Officials vision for the City. The City makes the argument explicitly, explaining that the City Administrator and City Attorney may keep the records secret from the public because they had not yet disclosed them to their superior, the Common Council:

> " ... nondisclosure was based on protecting the City's ability to negotiate the best deal for the taxpayers, and that there is a current need to restrict public access to provide the Council with the opportunity to review the draft ....

City's brief at p. 9.

While allowing high-ranking City officials to conduct secret negotiations is certainly convenient and avoids real time scrutiny and accountability, such an approach is in no one's interest. One scenario is that the deal will be secretly discussed to a point where the draft documents have been heavily negotiated and the City Administrator will then reveal *a fait accompli* to his Common Council in hopes that the Council will defer to the terms previously agreed to rather than unravel the lengthy secret interactions that lead up to that point. This is highly undesirable, tending towards less accountability, less openness and, ultimately, less legitimacy in government.

The other bad outcome is what appears to have happened here. The lengthy

secret negotiations occur but the Council and the public grow frustrated that they have been kept in the dark. The Council rejects the proposed contract, making all the previous negotiations a waste of time and a cloud of suspicion affects the remaining effort by the City Administrator to pursue the objective. The public records law does not require the Courts to choose – it is strictly construed and compels disclosure unless there is an express exception. Even if there is some practical virtue in allowing secret negotiations, that approach is expressly rejected by the broad policy of the most disclosure possible mandated by the public records law.

B. The City's Desire to Partner with Big Top and Compete with some other Municipality or Private Party Is Not a Proper Basis for Withholding Public Records.

The other competitive/bargaining scenario discussed by the City is where a municipality is competing against others for an award of some kind. This approach seems to be closer to what the City and City Attorney had in mind when invoking the exception.

First, as noted, the factual record shows that the City a part of its de facto/confidential partnership with Big Top was actually ***not*** in competition with anyone else as of October 22, 2017. Indeed, the City Administrator admits that the City and Big Top were actually clear of that "competition by July or August 2017." *See App 44-45 – October 22, 2017 Email from City Administrator to Council.*

However, even if the City Attorney was correct and there was some sort of

non-public competition for a baseball franchise afoot, the City may not keep its communications *with Big Top* secret and confidential for the purpose of trying to compete in partnership with Big Top against some other private entity. The *City of Milton* case directly addressed this issue and should be dispositive of this Court's approach here:

> ¶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.

City of Milton, 300 Wis.2d 649, 657-58.

This Court's reasoning addressed the practicalities involved in City of Milton situation, which are similar to those presented here:

> ¶ 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.

Id.

The City misapplies the City of Milton arguing that:

> The [Court of Appeals] 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 of Appeals] found they were properly held in closed session for the reasons relied on by the City in this case."

City's Brief at p. 10

In fact, the exceptions that permitted closed sessions discussed by this Court in *City of Milton* involve the City discussing, internally, negotiations with United Coop, the developer in that case.

> ... 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).

The revealing of the "negotiating strategy with United Coop" means revealing it ***to*** United Coop. *City of Milton*, 300 Wis.2d at 660.

As noted in the direct excerpts above, the idea of keeping discussions between the City and the methanol plant developer (its ostensible partner) confidential was clearly rejected by the Court.

III. Other Issues raised by the City are not pertinent or applicable.

A. Specificity.

The City discusses that the City Attorney's reasoning for withholding the records was sufficiently specific. That may be but it is not an issue. Even if specific enough, the claim is that it is not adequate no matter how specific.

B. Damages Necessary for Mandamus.

The City argues that there are no damages and thus no action for mandamus is valid. The case cited, *Pasko v. City of Milwaukee,* is a general mandamus action, not an open records case. Friends have a specific cause of action under the open records law, which instructs that it pursue mandamus to obtain the withheld records. No economic damages need be shown. Moreover, even after the records are disclosed, the Court must still adjudicate whether the reason for withholding the records in the first place was sufficient and, secondly, whether attorneys fees are appropriate. Discussion of economic damages is a distraction. Friends discussed how it was prejudiced by the lack of disclosure to highlight the serious nature of the issue and thus that the Court's need to intervene to provide specific guidance for the future that make clear the limited circumstance when records may be withheld.

C. The records at issue are not "Drafts" that may be withheld from disclosure.

The records at issue here are not "drafts" that may be kept from disclosure. Wis. Stats. § 19.32(2) defines record and exempts working drafts, not proposed draft contracts sent to third parties: "Record" does not include drafts, notes, preliminary computations, and like materials *prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working See* Wis. Stats. § 19.32(2).

D. The Court may take judicial notice of the actual records at issue.

The records that were withheld were actually fairly voluminous, a portion are included in the appendix. And while they were not included in the circuit court record in the form of the actual documents, they were heavily referenced and discussed. It is puzzling why the City would spend multiple pages of briefing resisting inclusion of the records so that Court can review them. Appellant's case and argument are equally well-based with or without them because the basic issue is the same, which is that they were redlines of contracts already being exchanged with the private party, Big Top. However, given the nature of the records and the issue presented to the Court, the Court should be able to conduct its analysis based on its own assessment of the records. Thus, Friends does continue to request that the Court allow them into the record.

IV. Friend's filing of this action below was a cause of the release of the records.

This issue is a function of whether the circuit court's determination was reasonable regarding whether the filing of the complaint on December 18, 2017 was a cause of the release of the records two days later on December 20, 2017.

The circuit court's only basis is the City attorneys email to Counsel for Friends. However, that is really not evidence. It is even less valid in that the communication from the City Attorney lacks any foundation. Moreover, as described in the brief and the record, there was no factual basis for the decision to

release the records because nothing of consequence regarding the Frame Park/Big Top issue was discussed or decided at the Common Council meeting of December 19th.

The City's suggestion is that the meeting was an intervening event and thus implies that the actions at the meeting removed the basis for withholding the records. However, the fact that the City Attorney would not provide an explanation of the actual factual basis for his decision to release the records is evidence that there was no actual factual basis arising from the December 19th meeting. Rather, the only intervening cause was the filing of the court action and the obvious judgment call made by the City Attorney to try to preempt Friends' claims by quickly releasing the records. There is no other credible explanation for that decision.

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 12 day of August, 2019

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

I certify that this Reply 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 2478 words.

Joseph R. Cincotta

I certify that I have submitted an electronic copy of this reply 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