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SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2019AP000096

FRIENDS OF FRAME PARK U.A.

Plaintiff-Appellant-Respondent,

v.

CITY OF WAUKESHA

Defendant-Respondent-Petitioner.

Appeal from the Waukesha County Circuit Court, Case No. 17-CV-2197
Michael O. Bohren and Kathryn W. Foster, Presiding Judges
Reversed by the Court of Appeals

PETITION FOR REVIEW AND APPENDIX

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PETITION FOR REVIEW

Defendant-Respondent-Petitioner, City of Waukesha ("City"), petitions the Court to review the decision of the Court of Appeals, District II, in *Friends of Frame Park U.A. v. City of Waukesha,* Appeal No. 2019AP000096 (September 16, 2020) (recommended for publication).

STATEMENT OF ISSUES

1. Is the test to be applied to determine if a litigant is entitled to attorney's fees under Wis. Stat. § 19.37(2)(a) of the Public Records Law whether the legal custodian properly withheld records under an exception to that law initially, regardless of whether commencement of an action was a cause of the release of the records?

The Court of Appeals held that if a legal custodian improperly withholds records initially, the custodian is subject to an award of attorney's fees upon their voluntary disclosure regardless of whether commencement of an action was a cause of the release of the records.

2. May a draft contract which is the subject of negotiation between a municipality and a private entity be withheld from disclosure under the Public Records Law

pursuant to Wis. Stat. §§ 19.35(1)(a) and 19.85(1)(e) where the contract has not yet been presented to the municipality's governing body for review, and before it meets in closed session to do so?

The Court of Appeals held that such a draft contract must be disclosed prior to review and consideration by the governing body, regardless of whether the governing body properly convened in closed session to review and consider it pursuant to Wis. Stats. § 19.85(1)(e).

STATEMENT ON CRITERIA FOR REVIEW

The decision of the Court of Appeals conflicts with other Court of Appeals' decisions as it modifies the test established in prior case law to be applied in determining whether a litigant in an action brought under the Public Records Law is entitled to an award of attorney's fees pursuant to Wis. Stat. § 19.37(2)(a). While the governing case law has required that commencement of an action under that law be a substantial cause of the release of records as a prerequisite to an award of attorney's fees, the Court of Appeals in this case holds that an action need not be a cause of the release of records where the

custodian improperly relies on an exception to the Public Records Law in initially withholding the records, and the records are voluntarily released subsequently. For these reasons, review is appropriate pursuant to Wis. Stat. § 809.62(1r)(d).

In addition, the Court of Appeals' modification of the test for determining whether a litigant is entitled to attorney's fees under the Public Records Law will have a statewide impact, as questions whether attorney's fees are to be awarded will arise in most litigation. In determining whether the holding of the Court of Appeals is appropriate, the Supreme Court will help develop, clarify or harmonize the law. Review is therefore appropriate under Wis. Stat. § 809.62(1r)(c).

Finally, this case presents an opportunity for the Supreme Court to clarify the law regarding what must be established for the exceptions to the requirement of a governmental body to meet in open session pursuant to Wis. Stat. § 19.85 to be grounds for denying public access to a record under Wis. Stats. § 19.35(1)(a). If an

exception to the requirement to meet in open session applies, when may that exception be used as grounds for denying public access to a record? This is an issue which is likely to arise unless addressed by the Supreme Court, and therefore review is proper under Wis. Stats. § 809.62(1r)(c)3.

STATEMENT OF THE CASE

This is an appeal of an order granting a summary judgment motion to dismiss a mandamus action brought against the City under the Public Records Law by Friends of Frame Park, U.A. ("Friends"). (R. 49). 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. 2 Ex. A; P-App. 169-170). Some records were disclosed in response to that request; some were not. The City Attorney wrote a letter to the requester dated October 23, 2017, explaining why particular records, draft contracts between the City and a private entity, were being withheld. (R. 3 Ex. B; P-App. 171-172). Wis Stat. § 19.85(1)(e) was relied on in

withholding the documents, pursuant to Wis. Stat. § 19.35(1)(a).

This action was commenced on December 18, 2017. (R. 1). The records that had been withheld – the draft contracts – were disclosed two days after commencement of the action. (R. 14, 7-8 ¶¶ 21-22). They were disclosed one day after the City's Common Council had met in closed session to review and consider those documents. The Common Council met in closed session pursuant to the exception to the Open Meetings Law set forth in Wis. Stat. § 19.85(1)(e). The City Attorney wrote a letter to the requestor explaining that they were being disclosed because the reasons for withholding them no longer applied after review of the draft contracts by the Common Council in closed session. (R. 14, 8 ¶ 24).

Although the records regarding which Friends commenced the action had been disclosed, Friends amended its complaint, claiming that additional record requests were made subsequent to the commencement of the action, and it 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; P-App. 136-168). A written order was entered on November 26, 2018. (R. 49; P-App. 134-135). This appeal ensued.

Friends on appeal did not claim that the City had improperly failed to withhold any records outside of the draft contracts which were disclosed two days after commencement of its action. It effectively abandoned such claims, by virtue of which it continued the action in Circuit Court, on appeal. It maintained on appeal only that the draft contracts disclosed immediately after its action was commenced had not been disclosed as required by the Public Records Law.

The Circuit Court granted the motion for summary judgment determined that the City appropriately withheld the draft contracts and other documents, and that its disclosure of the draft contracts had not been caused by commencement of Friend's action, but was the result of

the fact that the City's Common Council was not interested in pursuing negotiations relevant to the draft contracts. (R. 69; P-App. 136-168).

The Court of Appeals reversed the Circuit Court. (Court of Appeals' Decision; P-App. 101-133). First, the Court of Appeals addressed the appropriate test to be used in determining when a party prevails in an action under Wis. Stat. § 19.37(2)(a). While acknowledging that, according to prior case law, the test for determining whether an award of fees is appropriate is whether the commencement of an action was a cause of the disclosure of records, it held that the test was not to be applied in this case. Claiming to clarify prior decisions, it held that the test to be imposed was one not previously employed by the courts. Instead, it held the question to be addressed is whether the exception from the Public Records Law relied on by the City applied. (Decision ¶ 4; P-App. 103). Therefore, according to the Court of Appeals, Friends was entitled to fees, regardless of whether its action was a cause of the release of the records, if the disclosure of the

records had been delayed by the City's improper reliance on an exception to the Public Records Law. (Decision ¶ 5; P-App. 103-104).

Having determined that Friends' action need not have been a cause of the disclosure of the records two days after commencement of the action, the Court of Appeals turned to the reasons on which the City relied in temporarily withholding those records. The Court of Appeals did not find that the Common Council violated the Open Meetings Law when it met in closed session to review and consider the draft contracts pursuant to Wis. Stat. § 19.85(1)(e). It made no determination regarding the propriety of the closed session but assumed it had been proper. (Decision ¶ 49; P-App. 128). It nonetheless held that the draft contracts which were the subject of the closed session were withheld in violation of the Public Records Law. It found, in other words, that the draft contracts should have been disclosed to Friends before they were reviewed by the Common Council in closed session. Therefore, according to the Court of Appeals,

Friends is entitled to an award of attorney's fees. (Decision ¶ 51; P-App. 129-130).

The Court of Appeals remanded the case to the Circuit Court for a determination of attorney's fees to be awarded, with directions. (Decision ¶ 55; P-App. 133).

ARGUMENT

I. THE COURT OF APPEALS HAS CHANGED THE TEST BY WHICH IT IS TO BE DETERMINED WHETHER ATTORNEY'S FEES ARE TO BE AWARDED UNDER THE PUBLIC RECORDS LAW

Case law prior to the Court of Appeals' decision in this case clearly set forth the test to be applied in determining whether attorney's fees are to be awarded under Wis. Stat. § 19.37. "The test to determine whether a party has prevailed under sec. 19.37(2) is whether there is a causal connection between the litigant's mandamus action and the agent's compliance with disclosure." ***State ex rel. Eau Claire Leader-Telegram v. Barrett***, 148 Wis.2d 769, 773, 436 N.W.2d 885, 887 (Ct. App. 1989). The mere fact that the disclosure occurred after initiation of the mandamus action, however, is insufficient to establish the required causal connection. ***Racine Educ. Ass'n v. Board of***

Educ., 145 Wis.2d 518, 522-23, 427 N.W.2d 414, 416 (Ct. App. 1988).

"[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 the 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). According to the Court of Appeals in ***WTMJ, Inc. v. Sullivan***, 204 Wis.2d 452, 454, 555 N.W.2d 140 (Ct. App. 1996):

> "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.

In the past, the Court of Appeals relied on Federal case law to support this test. In ***Racine Education Assoc. v. Board of Education***, 145 Wis.2d 518, 522, 427 N.W.2d 327-328, 385 N.W.2d 414 (Ct. App. 1988). for example, the Court of Appeals stated as follows:

> "To determine the meaning of 'prevails in whole or in substantial part,' we adopted the analysis of ***Cox v. United State Department of Justice***, 601 F.2d 1 (D.C. Cir. 1979), which held:
>
> > [T]he party seeking such fees in the absence of a court order [compelling disclosure] 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. Whether a party has made such a showing in a particular case is a factual determination that is within the province of the district court to resolve. In making this determination, it is appropriate for the district court to consider, *inter alia*, whether the agency, upon actual and reasonable notice of the request, made a good faith effort to search out material and to pass on whether it should be

> disclosed….If rather than the threat of an adverse court order either a lack of actual notice of a request or an unavoidable delay accompanied by due diligence in the administrative processes was the actual reason for the agency's failure to respond to a request, then it cannot be said that the complainant substantially prevailed in his suit.

See also ***Church of Scientology of California v. Harris***, 653 F.2d 584, 587-88 (D.C. Cir. 1981). Federal cases have therefore established that this is largely a question of causation -- did the institution and prosecution of the litigation cause the agency to release the documents obtained during the pendency of the litigation. ***Id.*** at 587."

The Court of Appeals in its decision in this case acknowledges that the test "most often invoked" to determine the prevailing party in public records cases is whether the lawsuit is the cause or at least a cause of the release of the records. (Decision ¶ 3; P-App. 102-103). Nonetheless, it found that test was not applicable in this case, or indeed in other cases with similar circumstances: "We hold that where litigation is pending and an authority releases a public record because a public records exception is no longer applicable, causation is not the appropriate inquiry for determining whether the requesting party 'substantially prevailed.'

Rather, the key consideration is whether the authority properly invoked the exception in its initial decision to withhold release." (Decision ¶ 4 P-App. 103).

The Court of Appeals holding is problematic on its face, as it seems self-contradictory. If an authority releases a public record "because a public records exception is *no longer* applicable" the exception necessarily must have applied at some point. If not, the exception could never be "no longer" applicable. It would make no sense then to ascertain whether an authority properly invoked the exception, as it perforce was properly invoked before it could become "no longer applicable." Presumably, therefore, the Court of Appeals intended to refer to a situation where an exception was invoked improperly, and the record was released when it was believed the exception improperly relied on no longer applied. Regardless, however, the Court of Appeals notes that the effect of its holding is that Friends is a prevailing party "even if the lawsuit was not an actual cause" of the release of the records in question. (Decision ¶ 5; P. App. 103).

Only the Supreme Court has the authority to overturn, modify or withdraw language from a previously published

decision of the Court of Appeals. ***Cook v. Cook,*** 208 Wis.2d 166, 189-90, 560 N.W.2d 246 (1997). Here, the Court of Appeals seeks to, at the least, modify language from prior published decisions, something it cannot do.

The Court of Appeals acknowledges that it must reconcile its holding with what "at least superficially" appears to be inconsistent language in prior decisions. (Decision ¶ 4; P-App. 103). Indeed, it admits that "throughout the years we have continuously focused on causation, or what the federal circuits term 'the catalyst theory." (Decision ¶ 25; P-App 114). The Court of Appeals contends, however, that this continual and lengthy focus on causation is irrelevant, because "several cases focus on whether an unreasonable delay was caused by the authority's improper reliance on an exception under the public records law, regardless of the subsequent voluntary disclosure." (Decision ¶ 26; P-App. 115). As an example it refers to the case of ***Portage Daily Register v. Columbia County Sheriff's Department*****,** 2008 WI App 30, ¶ 8, 308 Wis.2d 357, 746 N.W.2d 525, noting that in that case the Court of Appeals stated that the matter was not moot as it was necessary to determine whether the plaintiff was entitled

to damages and fees due to the failure to disclose the records in question. (Decision ¶ 26; P-App. 115).

It is unclear why the Court of Appeals believes this supports its decision to depart from the long-established test requiring that an action be at least a cause of the release of records. It is true that a matter is not moot in all cases where records have been voluntarily released, and that fees may be awarded in those circumstances. However, it does not follow from this that in that case attorney's fees may be awarded regardless of whether the action was a cause of the release of the records.

The Court of Appeals, in what may be an effort in minimize the significance of its departure from the case law, states that "[a]fter all, when an authority inexcusably delays in releasing records to the point that prompts litigation, *it can typically be inferred that the lawsuit was at least 'a' cause of the release.*" (Emphasis added) (Decision ¶ 27; P-App. 116). However, as was noted above, it is clear under the law that the fact that disclosure occurred after initiation of a mandamus action is insufficient to establish the required causal connection. ***Racine Educ. Assoc.***, 145 Wis.2d at 522-23, 427 N.W.2d at 416. To be entitled to fees, the

prevailing party in a Public Records Law action "must assert something more than *post hoc, ergo propter hoc.*" ***Racine Educ. Assoc.***, 129 Wis. 2d at 326.

Here, the Court of Appeals asserts that the disclosure of records after the commencement of an action is, in itself, *usually sufficient* to establish a causal connection between the action and the disclosure. In other words, the Court of Appeals is saying that *post hoc ergo propter hoc* applies in most instances, contrary to prior cases.

II. THE COURT OF APPEALS' RELIANCE ON FEDERAL CASE LAW IS UNFOUNDED

The Court of Appeals relies on the case of ***Church of Scientology v. United States Postal Service***, 400 F.2d 486 (9th Cir. 1983) as persuasive authority in support of its reinterpretation of the case law. It notes that the 9th Circuit instructed the district court on remand to consider the following factors in determining whether the Church had substantially prevailed under FOIA (as quoted in the Court of Appeals decision): "(1) when the documents were released; and (2) what actually triggered the release to the Church; and (3) *whether the Church was entitled to the documents at an earlier time in view of the fact the exemption*

[upon which the Postal Service initially relied] was eliminated." 700 F.2d at 492. (Emphasis in Court of Appeals Decision ¶ 31; P-App. 119).

It is from the third factor identified by the 9th Circuit for the district court's consideration, as referred to in a footnote to the 9th Circuit's decision, that the Court of Appeals infers that the ***Church of Scientology*** case "arguably refines" the ***Cox*** test "previously adopted by this court." According to the Court of Appeals, "[t]he three factor test set forth in ***Church of Scientology*** allows for a more flexible inquiry, one that permits consideration of factors other than causation." (Decision ¶ 32; P-App. 119).

Therefore, the Court of Appeals concludes that "[t]he third factor--whether a requester was entitled to the record at an earlier time--should control where the delay in a voluntary release can be attributed to the authority's reliance on a public records exception. Where that is the case, the trial court must scrutinize the claimed exception, rather than whether the lawsuit caused the release, to determine whether a requesting party has prevailed in whole or in substantial part." (Decision ¶ 33; P-App. 120). The Court of Appeals has misconstrued the ***Church of Scientology*** case.

First, the Court of Appeals does not establish that the 9th Circuit abandoned the causation test in that case and held that the third factor it instructed the district court to consider determined eligibility for fees in FOIA cases, regardless of whether an action was a cause of the release of records. It is very unlikely that the 9th Circuit would relegate such a holding to a footnote to its decision. More significantly, because the factor selected by the Court of Appeals as changing the test for an award of attorney's fees was one of three factors referred to by the 9th Circuit, and one of the other factors to be considered was "what actually triggered the documents release" it can hardly be said on this basis that the 9th Circuit intended to hold that cause is not a factor in the determining eligibility for attorney's fees.

Moreover, the ***Church of Scientology*** case expressly states and even reiterates the ***Cox*** test previously relied on by the Court of Appeals and confirms its applicability. Thus, the 9th Circuit states: "To be eligible for an award of attorney's fees in a FOIA suit, the plaintiff must present evidence that two threshold conditions have been satisfied. The plaintiff must show that: (1) the filing of the action could reasonably have been regarded as necessary to obtain

the information; and (2) the filing of the action had a substantial causative effect on the delivery of the information." ***Id.*** 700 F.2d at 489. Also: "On remand, in determining whether the Church is eligible for attorney's fees--that is, whether it has substantially prevailed--the district court should determine: (1) whether the Church's suit was reasonably necessary to obtain the information; and (2) whether the suit had a substantial causative effect on the release of the documents in question." ***Id.*** 700 F.2d at 490.

It is clear the 9th Circuit itself rejects any claim that it held in ***Church of Scientology*** that attorney's fees may be awarded in a FOIA action in certain cases regardless of whether release of records was caused by commencement of an action. According to the lead opinion in ***First Amendment Coalition v. United States Dept. of Justice*****,** 878 F.3d 1119 (9th Cir. 2017), ***Church of Scientology*** was representative of the "catalyst theory of recovery" as set forth in ***Cox***. ***First Amendment Coalition***, 878 F.3d at 1127. Two of the Judges joining in the lead opinion determined that "there still must be a causal nexus between the litigation and the voluntary disclosure or change in position by the government." ***Id.***, 878 F.3d at 1128. At most, ***Church of Scientology*** stands for the proposition that

"multiple factors may be at play" in determining whether a plaintiff has substantially prevailed. ***Id.***, 878 F.3d at 1130.

In summary, the Court of Appeals' revision of the test to be applied to determine whether a plaintiff in an action under the Public Records Law prevails and is entitled to attorney's fees has no basis in the case law, and is contrary to it. The Court of Appeals exceeded its authority.

The decision of the Court of Appeals revises the case law in another respect, however. By holding that attorney's fees are to be awarded where records are not disclosed initially due to improper reliance on an exception to the Public Records Law, it shifts the burden of proof as to eligibility for an award of attorney's fees from the plaintiff to the defendant in actions under that law. As was noted above, where the determination to be made is that the action commenced was a substantial cause of the release of records, the plaintiff pursuing the action is required to show that this is the case. "A party seeking attorney's fees under Section 19.37(2) 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. Vaughn v. Faust,*** 143 Wis.2d at 871.

According to the Court of Appeals in this case, however, there is no need for a party to do so in certain circumstances. Instead, the defendant is required to establish it properly relied on an exception to the law in cases where it temporarily withholds documents but voluntarily releases them subsequently. If it cannot do so, the plaintiff is entitled to an award of attorney's fees. In other words, according to the Court of Appeals, the defendant has the burden to prove that the plaintiff *is not entitled* to an award of attorney's fees in those cases.

III. WITHHOLDING THE DRAFT CONTRACTS UNTIL THEIR REVIEW BY THE COMMON COUNCIL WAS PROPER

Wis. Stat. § 19.35(1)(a) states that exemptions to the requirement that a public body 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." The Court of Appeals determined there was no such specific demonstration in this case.

Case law addressing what is needed to make the specific demonstration required has focused on the nature of the explanation to be made. 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 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 Department's 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 suggesting an interest to be served by disclosure; 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****.* 145 Wis.2d at 823. The Court of Appeals held that this statement satisfied the specificity requirement of Wis. Stat. § 19.35(1). ***Id.*** 145 Wis.2d at 824.

A review of the City Attorney's letter of October 23, 2017, establishes that the grounds for temporary nondisclosure of draft contracts pursuant to Wis. Stat. § 19.85(1)(e) met the specificity requirement according to prior case law as it relates to providing a description of the policy reasons supporting nondisclosure. (R. 3 Ex. B; P-App. 171-172). 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 support of withholding the records. 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. 3 Ex B; P-App. 171-172).

He also explained that nondisclosure was required to protect the City's ability to negotiate the best deal for taxpayers, and that there was 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 with interested parties. He 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. 3 Ex B; P-App. 171).

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.

The purpose of the specificity requirement of § 19.35 is twofold. First, it ensures that the custodian did not act arbitrarily, but rather balanced the general public interest in disclosure against a particular public interest in secrecy of certain matters as required. Second, the denial gives the requester notice sufficient to allow preparation of a challenge to the withholding. ***Journal/Sentinel, Inc. v. Aagerup****, supra,* 145 Wis. 2d at 774. The City Attorney's letter satisfied the purposes of the specificity requirement.

In its appeal, Friends asserted that the Open Meetings Law exemption appearing at Wis. Stat. § 19.85(1)(e) does not apply, relying on ***State ex rel. Citizens for Responsible Development v. City of Milton***, 2007 WI App. 114, 300 Wis. 2d 649, 731, 9 N.W. 2d 640. That case involves the application

of the Open Meetings Law, not the Public Records Law. It held that exception to the Open Meetings Law did not apply to certain closed sessions but would apply to others. Friends' argued the City's Common Council improperly entered into closed session to review the draft contracts. Therefore, it violated the Open Meetings Law when relying on that statutory exemption, and as a result that exemption could not be used in support of nondisclosure of the records in question. However, as noted by the City in its Response Brief in the Court of Appeals, relief from a violation of the Open Meetings Law cannot be sought in a mandamus action under the Public Records Law. ***Journal Times v. Racine Board of Police and Fire Commissioners*****,** 2015 WI 56 ¶ 51, 362 Wis. 2d 577, 866 N.W.2d 563.

The Court of Appeals, unlike Friends, does not claim that the City's Common Council violated the Open Meetings Law by entering into closed session to review and consider the draft contracts, as noted above. According to the Court of Appeals, it does not decide whether the Common Council did or did not violate the Open Meetings Law. Thus, the Court of

Appeals avoids overtly holding that Friends prevails in an action under the Public Records Law because of a violation of the Open Meetings Law, contrary to the Supreme Court's decision in ***Journal Times***.

However, the Court of Appeals also expressly states that Friends' entitlement to attorney's fees depends on whether the City complied with the Open Meetings Law, i.e. whether the exception to the Open Meetings Law was applicable: "Friends' claim for attorney's fees must hinge on whether the City appropriately invoked Wis. Stat. § 19.85(1)(e) to withhold disclosure until after the December 19 common council meeting. We therefore turn to a discussion of that exception." (Decision ¶ 34; P-App. 120-121). In addition, in note 11 to paragraph 36 of its decision, the Court of Appeals expressly states that "the issue here is not whether the City invoked Wis. Stat. § 19.85(1)(e) with sufficient specificity but whether the City met its burden of showing this exception applied." (Decision ¶ 36; P-App. 121-122). The Court of Appeals therefore expressly states that Friends is entitled to attorney's fees if the City fails to meet its burden of showing this exception to the Open Meetings Law applied.

As previously noted, the Court of Appeals does not hold that the City's Common Council improperly met in closed session. In fact, it assumes without deciding that it did so as necessary to prevent those with whom the City was negotiating to learning of what the City called in its Response Brief on the appeal "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." (Decision ¶ 49; P-App. 128). Thus, the Court of Appeals states "we assume without deciding that those portions of the December 19 meeting concerning the 'Common Council's reactions' were properly closed--the trial court's statement about not wanting to 'negotiate a contract in public' is well taken. It does not follow, however, that the City was justified in withholding all documents under discussion." (Decision ¶ 50; P-App. 128).

The fact that documents were compiled in conjunction with properly held closed sessions does not in itself render them exempt from disclosure under Wis. Stat. § 19.35(1). ***Wisconsin State Journal v. University of Wisconsin-Platteville*****,** 160 Wis. 2d 31, 38, 465 N.W.2d 266 (Ct. App. 1990); ***Zellner v. Cedarburg School District*****,** 2007 WI 53, ¶ 48, 300 Wis. 2d 290,

731 N.W.2d 240. In this case, however, the documents in question were the subjects of the closed session; they were the documents which were to be reviewed and considered in closed session, and possibly acted on by the Common Council. If the review and consideration of those documents was appropriate in closed session under the Open Meetings Law pursuant to § 19.85(1)(c), it is difficult to understand why the documents themselves should have been disclosed before the properly held closed session.

The Court of Appeals' conclusion that the City failed to meet its burden of showing Wis. Stat. § 19.85(1)(e) to be applicable, at least where disclosure of the draft contracts is concerned, is based on its interpretation of ***State ex rel. Citizens for Responsible Dev. v. City of Milton, supra.*** It notes that this case holds that this exception to the Open Meetings Law cannot be invoked because a private entity desires confidentiality. (Decision ¶ 41; P-App. 125). It notes that it also indicates that there are public policy reasons why that exception should not apply to prevent competition among

governmental entities. (Court of Appeals Decision ¶ 41; P-App. 125).

A review of the letter of the City Attorney explaining why disclosure was being temporarily withheld establishes that these were not significant reasons for non-disclosure, however. (R. 3 Ex. B; P-App. 171-172). No desire for confidentiality on the part of a private entity is even mentioned. That there is at least one other entity that may be competing with the City with respect to a baseball team is mentioned, but in connection with the fact that the contract between the City and Big Top Baseball is still in negotiation.

It is clear from the letter that the primary concern is that the Common Council had not had the opportunity to review and discuss the draft contracts between the City and Big Top: "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 of the City." (R. 3 Ex. B; P-App 171-172). Thus, it was explained that

the exception was invoked in connection with negotiations between the City and Big Top, not to protect confidentiality or strengthen the City's bargaining position over that of another public entity.

IV. THE COURT OF APPEALS FAILS TO RECOGNIZE THE ROLE AND AUTHORITY OF THE CITY'S COMMON COUNCIL

The Court of Appeals is seemingly dismissive of concerns with respect to bargaining between the City and Big Top, because the draft contract was "was marked up and exchanged among City and Big Top representatives in a succession of back-and-forth edits. To state the obvious, then, any harm from disclosing this document could not relate to the City's negotiating strategy with respect to Big Top." (Decision ¶ 43; P-App. 125). According to the Court of Appeals, "the City undoubtedly could have relied on Wis. Stat. § 19.85(1)(e) had it been able to show that disclosure prior to common council review would have impeded its negotiation strategy. The City, however, did not and probably could not meet this burden. Again, this is because this particular draft contract *was created by the City and Big Top together.*" (Decision ¶ 48; P-App. 127-128). (Emphasis in original).

The Court of Appeals' decision that Wis. Stat. § 19.85(1)(e) does not apply is therefore based on an unfounded

assumption--that the draft contract being reviewed by the Common Council was the product of the City in negotiation with Big Top, *before it was submitted to the Common Council.* Negotiations regarding the contract and its terms had therefore already taken place as far as the Court of Appeals is concerned. However, this simply was not the case. The Court of Appeals' decision is fundamentally misguided due to a misunderstanding of municipal law.

Where contracts are concerned, all decisions on their terms, and their approval by a City, is within the authority and discretion of the Common Council acting as a body, not that of any public officer or official. Only a City's governing body has the authority to approve, and authorize entry into, a contract on behalf of a City. Accordingly, negotiations in this case involving a contract between the City and Big Top, and bargaining, would continue until such time as the Common Council approved of the contract and authorized its execution by the appropriate city officers by vote duly noticed and taken. Alternatively, negotiations could be discontinued--as in this case--if the Common Council did not approve the contract and

authorize its execution. Those who negotiate a contract with a municipality are, practically and legally speaking, negotiating with the municipality's governing body, not its officers or employees.

This is clear from the case of ***Town of Brockway v. City of Black River Falls***, 2005 WI App 174, 285 Wis.2d 703, 702 N.W.2d 418. In that case, it was claimed that 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 1123.

The Court of Appeals in ***Town of Brockway*** 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 1124. The common council has a broad grant of authority under Wis. Stat. § 62.12 and § 62.11(5)

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

According to the court in ***Town of Brockway*****:**

"The general rule of municipal law is that only a duly authorized officer, governing body, or board can act on behalf of a city, and a valid contract with the municipality cannot be created otherwise. 10 McQUILLAN, MUNICIPAL CORPORATIONS § 29.15 at 307 (3d ed. 1999). The powers and duties of city mayors, clerks, and attorneys are prescribed by statute and do not include this authority. See Wis. Stat. § 62.09(8), (11), and (12). On the other hand, the common council has a broad grant of authority for the management and control of the city property, finances, highways, navigable waters, and the public service, and ... power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out is powers by license, regulation ... and other necessary or convenient means." ***Id.*** 2005 WI App 174 at ¶ 24.

The City's Common Council as a body was therefore not bound by the draft contract in any respect. It did not participate in the creation of the draft contract, its drafting, or attendant negotiations. It was not involved in prior discussions or negotiations with Big Top. It could only act as a body. Its review and consideration was essential to whether the contract

was entered into, rejected, altered, or subject to further negotiation. Accordingly, the Court of Appeals' reference to the deposition of the City Administrator as indicating a lack of evidence of continuing negotiations and supporting a conclusion that bargaining had already taken place before the Common Council met to review and consider the draft contract is not pertinent, as the City Administrator cannot be equated with the Common Council, the actual decision-maker in every respect.

Developing a negotiation 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 require a closed session." See Wis. Stat. § 19.85(1)(e). ***City of Milton,*** 2007 WI App 114, ¶ 19. The Court of Appeals appears to believe that the Common Council's review and discussion of the draft contract was of a contract already negotiated by the City, and therefore § 19.85(1)(e) does not apply. There is no basis for this belief. There is nothing in the record even suggesting that the City's officers and employees had been authorized to accept the contract or any of its terms by the

Common Council. The contract was not being presented to the Common Council as a *fait accompli* to be either accepted or rejected.

The Common Council's 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.

Disclosure before the Common Council had an opportunity to review and discuss the documents and receive information from City staff regarding them, and make such decisions as it deemed appropriate would have resulted in confusion of members of the Council and the public regarding

what was and was not the will and the opinions of the Council acting a body. Disclosure of the documents before Common Council review may have unduly prejudiced members of the Council for or against any agreement, or raised issues which could have been addressed, and their significance determined in closed session before disclosure. In addition, the public may have been needlessly disturbed or concerned by matters which the Common Council as a body would not countenance upon consideration in closed session.

The Court of Appeals distinguishes the propriety of disclosing the draft contracts from the propriety of the Common Council meeting in closed session to review those documents. Therefore, it discounts the fact that the meeting was appropriate for competitive or bargaining reasons. According to the Court of Appeals: "The problem with this argument is that Friends was not seeking access to a *meeting*--it was simply seeking disclosure of a *document* that might be discussed at that meeting. By itself, the document could itself reveal nothing about internal reactions or negotiating strategies." (Decision ¶ 49; P-App. 128).

The Court of Appeals' assertion that the draft contracts "might be discussed" at the meeting is less than accurate in this

case. Its rationale for distinguishing the draft contracts from the meeting is more significant: "The need to negotiate, and to form a strategy for negotiating, a contract in private is one thing; withholding all documents relating to those negotiations, so as to deprive the public of the ability to provide any input whatsoever, is quite another." (Decision ¶ 50; P-App. 128-129).

First, as noted above, the City clearly did not withhold "all documents." The only documents at issue are the draft contracts. Second, the draft contracts themselves are a part of the negotiations. They indicate what Big Top and City staff discussed, what Big Top was or was not willing to accept or consider, what City staff thought of importance, and what City staff felt should be included in a contract. All of that was subject to review, comment, questioning, modification, renegotiation and revision by the Common Council acting as a body. The documents in this case were what was being negotiated. There would be no point in the Common Council meeting without them.

CONCLUSION

The decision of the Court of Appeals in this case changes the test to be applied in determining whether a litigant

in an action under the Public Records Law is entitled to attorney's fees, so that a plaintiff is no longer required to show the action was a substantial cause of the release of a record in certain circumstances. It shifts the burden of proof as to entitlement to attorney's fees to the defendant. Such modification of the law is beyond the authority of the Court of Appeals.

The Court of Appeals has misinterpreted the law in determining that draft contracts which were the subject of negotiation should be disclosed prior to review and consideration by the governing body of a municipality. A review of this matter by the Supreme Court will clarify the application of Wis. Stat. § 19.35(1)(a) as it allows the use of exceptions from the requirement a public body meet in open session as grounds on which a record may be withheld from disclosure.

The City respectfully requests that the Supreme Court accept its Petition for Review in this action.

Dated at Two Rivers, Wisconsin this 13 day of October, 2020.

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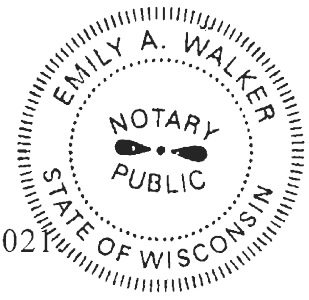
Certification as to Form and Length Requirements

I hereby certify that this petition and appendix meets the requirements set forth in Wis. Stat. § 809.62(4)(a) for a petition produced with a proportional serif font. This petition contains 7,833 words.

John M. Bruce

Subscribed and sworn to before me
this 13th day of October, 2020.

Notary Public, State of Wisconsin
My commission expires February 6, 2021



Certification as to E-Filing Requirements

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.62(4)(b). I further certify that:

The 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.

John M. Bruce

Subscribed and sworn to before me
this 13th day of October, 2020.

Notary Public, State of Wisconsin
My commission expires February 6, 2021