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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2019AP96

FRIENDS OF FRAME PARK, U.A.,

PLAINTIFF-APPELLANT,

v.

CITY OF WAUKESHA,

DEFENDANT-RESPONDENT-PETITIONER,

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, CASE NO. 17-CV-2197, THE HON. MICHAEL O. BOHREN, PRESIDING

NON-PARTY BRIEF OF NEWS MEDIA AMICI WIS. STAT. § (RULE) 809.19(7)

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INTRODUCTION

This is a simple dispute with significant ramifications. The City of Waukesha (the "City") urges this Court to hold that a governmental body can improperly withhold a public record solely for the benefit of a private party and then avoid paying the prevailing requestor's statutorily mandated attorney fees by voluntarily disclosing that record after the requestor files suit. Such conduct is contrary to Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.39, and it should not be sanctioned in Wisconsin. For generations, Wisconsin has prided itself on its commitment to open government and transparency. This case puts that commitment to the test. The News Media Amici urge the Court to affirm the decision of the Court of Appeals in favor of Plaintiff-Appellant Friends of Frame Park, U.A. ("Friends") and ensure that other individuals and organizations, including members of the news media, can continue to keep their communities informed about the workings of government.

ARGUMENT

I. The City of Waukesha's Decision to Withhold the Draft Contract Was Meritless.

Public/private partnerships have become increasingly common in recent years, especially in the context of professional sports teams. While the teams may be widely popular, using public funds or facilities on their behalf may not be. Unfortunately, if the terms of a contract between a governmental body and a private sports team are not disclosed until after rounds of discussions and negotiations, when the contract is ready for a potentially final review by elected officials, it may be too late for the public to provide meaningful input. It is critical that the Court interpret the Open Records Law to provide the transparency necessary for the public to understand and have a voice in public business decisions.

A. The Contract is not a "Draft" Under the Statutory Definition.

Despite being referred to throughout the record as a "draft contract," the document underlying this dispute is not a "draft" under the Open Records Law. Wis. Stat. § 19.32

defines "record" to exclude "drafts" from the statutory definition. That same statute and this Court's opinions, however, make clear that drafts are only excluded from the definition of "record" when they are "prepared for the originator's personal use." Wis. Stat. § 19.32(2); *see Fox v. Bock*, 149 Wis. 2d 403, 414, 438 N.W.2d 589 (1989). Here, "[t]he parties do not dispute that [the draft contract at issue] was created by and shared among Big Top [Baseball, LLC] and City representatives in a back-and-forth exchange." *Friends of Frame Park, U.A. v. City of Waukesha*, 2020 WI App 61, ¶ 12, 394 Wis. 2d 387, 950 N.W.2d 831. Thus, it was not "prepared for the originator's personal case," and it is not a "draft" for purposes of the Open Records Law.

B. The Court of Appeals Correctly Held that the City's Reasons for Initially Withholding the Draft Contract Had No Merit.

In ruling that the City's stated reasons for withholding the record at issue had no basis in the Open Records Law, the Court of Appeals affirmed Wisconsin's long tradition of open government. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010

WI 86, ¶ 1, 327 Wis. 2d 572, 786 N.W.2d 177 (Abrahamson, C.J. lead op.) ("If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State."). Indeed, baked into the state's Open Records Law is a "presumption of complete public access …." Wis. Stat. § 19.31. Moreover, the "denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id.*

While the presumption in favor of public access is strong, it is not absolute. This Court has held that the presumption "must be balanced against [the potential harm disclosure may do to the public interest] in determining whether to permit inspection." State ex rel. *Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965). This balancing does not, however, weigh private interests.

In denying public access to the record at issue, the City relied, almost exclusively, on Wis. Stat. § 19.85(1)(e), an exemption to Wisconsin's Open Meetings Law. Though the Open Records Law does permit a governmental body to rely

on the exemptions in Wis. Stat. § 19.85 "as grounds for denying public access to a record," it may do so "*only* if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made"—in other words, only when the balance of public interests favors secrecy. Wis. Stat. § 19.35(1)(a) (emphasis added). Section 19.85(1)(e), in turn, permits a governmental body to convene in closed session only when "competitive or bargaining reasons require."

The Court of Appeals properly held that Wis. Stat. § 19.85(1)(a) did not justify withholding the contract in this case. The City offered two alleged rationales, both based on Wis. Stat. § 19.85(1)(a), to support withholding the record: (1) the City was then in competition with another entity for a baseball team; and (2) disclosure before review by the Waukesha Common Council would "hamper the City's ability to negotiate favorable terms within the contract."

Friends of Frame Park, 2020 WI App 61, ¶¶ 8-9, 394 Wis. 2d 387, 950 N.W.2d 831. Neither rational has merit.

As to the first rationale, the record indicates that any competition between the City and another entity for a baseball team had ended months before Friends submitted its requests. *Id.* ¶ 44. Regarding the second rationale, the contract was marked up and exchanged among City and Big Top representatives in a succession of back-and-forth edits. Thus, disclosing the record could not possibly harm "the City's [bargaining position or] negotiating strategy with respect to Big Top." *Id.* ¶ 43.

Put plainly, the City's argument that withholding the records was necessary for competitive or bargaining reasons is nonsensical. The contract already had been shared with Big Top, so disclosure could have had no impact on the City's bargaining position—Big Top, the party on the other side of the negotiating table, already knew what was in the record. Moreover, if anyone's interests were served by withholding the record, they were Big Top's, not the public's.

Withholding the contract not only kept the record out of Friends' hands, but also kept the record secret from any of Big Top's potential competitors. The City's decision to withhold the record was, in fact, anti-competitive and could only have harmed the public interest by preventing competition from other potential teams.

Finally, there are no additional balancing test concerns that would have justified the City's decision to withhold the draft contract, and the City has identified none. *See Osborn v. Bd. of Regents of Univ. of Wisconsin Sys.*, 2002 WI 83, ¶ 16, 254 Wis. 2d 266, 647 N.W.2d 158 ("It is not this court's role to hypothesize or consider reasons to deny the request that were not asserted by the custodian ….").

The City claims that it was not the City, but rather City staff, that was negotiating the contract with Big Top. *See, e.g.,* Appellant's Brief at 46-47. This distinction is meaningless from a legal perspective. Nothing in the Open Records Law or case law interpreting it differentiates public records based on which public official drafted them. And,

indeed, if the Court were to consider that distinction as part of the balancing test, it would have the effect of shrouding in secrecy the vast majority of local government work, most of which is performed by non-elected public officials and employees. That is not consistent with the Open Records Law, and the Court should reject the City's invitation to artificially distinguish between the work of the City and the work of it staff.

Further, the City Attorney, in describing his initial decision to withhold the contract, noted that the City's Common Council had not yet had an opportunity to review and address the contract. Appellant's Brief at 32-33. In its brief, the City argues that the Court of Appeals misunderstood the power of the Common Council. Nonsense! The Court of Appeals simply recognized that there is no authority for the proposition that, because the Common Council ultimately must approve the City's contracts, the City may withhold those contracts until they have been formally addressed by the Common Council. The

City seems to argue that it is a good thing to hide a public record not only from the people, but also from the people's elected representatives. But the people should have the opportunity to weigh in on a public contract and contact their elected representatives about it, which they cannot do if the contract is withheld until, for example, the literal minute before the Common Council meeting. Moreover, the City does not address the most obvious solution to this alleged conundrum: if the City staff felt compelled to withhold the draft contract until the Common Council had seen it, it simply should have provided the record to the Common Council sooner. Ultimately, there is no legal justification for the City to have denied public access to the record at issue here. Hence, Friends should prevail on the merits of this dispute.

II. The Court of Appeals Correctly Held That Friends Should Have Been Awarded Its Reasonable Attorney Fees.

The Open Records Law mandates that governmental bodies who improperly withhold public records must pay the prevailing requestor's reasonable attorney fees. Wis. Stat. §

19.37. This private attorney general provision is critical to maintain transparency and public confidence in our state and local government. Without it, requestors may not be able to afford to enforce the law and help keep government accountable to the public. To avoid weakening the public's only means to enforce the Open Records Law, and to avoid turning the statutory presumption of openness on its head, the Court should affirm the decision of the Court of Appeals, ordering the City to pay Friends' reasonable attorney fees.

A. Friends Substantially Prevailed.

There is only one statutory test for attorney fee eligibility that has been codified by the Wisconsin Legislature: "the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester *prevails in whole or in substantial part* in any [mandamus action] relating to access to a record or part of a record under s. 19.35 (1) (a)." Wis. Stat. § 19.37(2)(a) (emphasis added).

Friends prevailed in whole or in substantial part. It is as simple as that. That fact is obvious from even a cursory review of the facts and the law. Friends submitted its records request on October 9, 2017. *Friends of Frame Park*, 394 Wis. 2d 387, ¶ 7. Two weeks later, the City denied that request. *Id.* According to the Court of Appeals well-reasoned decision and as discussed in Section I, *supra*, that denial was unlawful. More than two months after submitting its request, Friends used the only method approved by the Legislature to seek access to the record at issue—it filed a mandamus action. *Id.* ¶ 10. Two days later, the City released the contract to Friends. *Id.* ¶ 12. Based on these undisputed facts, Friends prevailed. It obtained the record it sought after the City had unlawfully withheld the record for months.

To hold that Friends did not prevail, in whole or in substantial part, would introduce unnecessary subjectivity and unreliability into the prospect of receiving a fee award and discourage individuals and organizations from filing even clearly meritorious mandamus actions. That could have

serious, adverse ramifications for local news organizations, in particular, who already are facing unprecedented financial and other challenges that some have been unable to survive. *See* Julie Boseman, *How the Collapse of Local News is Causing a National Crisis*, N.Y. Times (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/us/local-news-disappear-pen-america.html. One of the many downsides to this phenomenon is the reduction in reporting on—and, therefore, oversight of—local governmental affairs. If the Court adopts the City's proposed test for fee shifting, fewer individuals, newspapers, and citizen groups will be willing to challenge a governmental body's decision to withhold a document.

B. The City's Proposed Test is Not Workable in Some Cases.

The City proposes that the Court require record seekers to prove their mandamus action "caused" the governmental body to release the requested records. *See, e.g.,* Appellant's Brief at 21-22. But the City's proposed version of the "causal nexus" test to determine whether a requestor

has prevailed is simply not workable in some situations. Among other problems, it could be interpreted to require the requestor to prove the custodian's subjective reasons for withholding a record, which would be inconsistent with the straightforward statutory standard. Furthermore, it would give the custodian an opportunity, inconsistent with this Court's precedent, to create after-the-fact explanations for withholding records when the requestor files a mandamus action.

The City's proposed "causal nexus" test may work in some cases. For instance, the Court of Appeals referenced its prior decision in *Racine Education Ass'n v. Board of Educ. for Racine Unified School District* as one such situation. In that case, the court assumed that the custodian was initially justified in withholding the records. *Racine Educ. Ass'n*, 129 Wis. 2d 319, 327-28, 385 N.W.2d 510 (Ct. App. 1986). Given that assumption, the court found it needed to determine whether Racine Education Association's suit had caused the release of the records. *Id.* at 326-27. Thus, in cases in which

a governmental body was justified in initially withholding a record, but voluntarily releases it after a record seeker files a mandamus action, a court may have to consider whether the suit caused the release to determine if the record requestor substantially prevailed.

In a circumstance in which a custodian improperly withholds a document, however, the causation test is both unnecessary and runs afoul of the policy underlying the Open Records Law. The Open Records Law mandates custodians produce records "as soon as practicable and without delay." Wis. Stat. § 19.35(4). Thus, when governmental bodies voluntarily release records they had been unlawfully withholding, following the filing of a mandamus action, the record requestor has prevailed, in at least two ways: (1) the requestor has received the requested records; and (2) the requestor has put an end to the unnecessary and unlawful delay in producing the record. If that does not merit an award of fees under Wis. Stat. § 19.35(1)(a), the Court will be hard pressed to find a case that does.

Relying on the City's proposed version of the "causal nexus" test in all cases also would run contrary to the presumption of complete public access baked into Wisconsin's Open Records Law. Wis. Stat. § 19.31. Pursuant to this presumption, custodians, like the City, bear the burden of proving that records should not be disclosed. *See Friends of Frame Park,* 394 Wis. 2d 387, ¶ 21. It makes no sense to shift the burden to the requestor, by effectively permitting custodians to improperly deny access to requested records until the requestor files a mandamus action, and then forcing the requestor to justify its efforts to uncover government records, simply to recover the fees to which it is statutorily entitled. The burden should rest with the custodian, who has access to all of the relevant information, knows why the record was not released initially, and knows why the record was released after the requestor filed the lawsuit.

Here, the City's version of the "causal nexus" or "catalyst" test is a solution in search of a problem. The Court should not employ it in this case.

C. The Court of Appeals Decision Provides a Reasonable Test, Consistent with the Open Records Law, for Situations in Which a Custodian Illegally Withholds a Record.

While acknowledging its past use of the "causal nexus" test, the Court of Appeals ultimately held that such an analysis was unnecessary where, as here, the custodian had illegally withheld the requested record in the first place. The Court of Appeals concisely explained the reasoning behind this decision in one paragraph:

> [A]pplication of a causation analysis in all cases would likely thwart the goal of our public records law: to provide "*timely* access to the affairs of government," *WTMJ, Inc.,* 204 Wis. 2d at 457, 555 N.W.2d 140 (citation omitted), "as soon as practicable and without delay," *id*. (quoting Wis. Stat. § 19.35(4)). After all, "the purpose of [Wis. Stat. § 19.37(2)(a)] is to encourage voluntary compliance; if the government can force a party into litigation and then

> deprive that party of the right to recover expenses by later disclosure, it would render the purpose nugatory." *Racine Educ. Ass'n*, 129 Wis. 2d at 328, 385 N.W.2d 510. Where the delayed release is based on an event that terminates an exception that arguably never should have been invoked in the first place, the need to address the merits of that exception becomes compelling.

Friends of Frame Park, 394 Wis. 2d 387, ¶ 29. The News Media Amici urge the Court to adopt this reasoning, and not require a causation analysis when a court finds the custodian improperly withheld the records.

In the alternative, if the Court should choose to implement some version of the "causal nexus" test in this and other similar cases, it still should treat cases involving an improper decision to withhold records differently than others. In cases like this one, a custodian's failure to disclose records as mandated by the Open Records Law should create, at the very least, a rebuttable presumption that record requestors are owed the attorney fees they were forced to incur in successfully filing the mandamus action. Then the custodian

could not simply create justifications, after the fact, for improperly denying access to a record before the requestor files suit. Regardless of how the statutory "prevails in whole or in substantial part" test is interpreted and applied in this case, Friends should recover its attorney fees.

CONCLUSION

For all the foregoing reasons, the News Media Amici urge the Court to affirm the decision of the Court of Appeals.

Dated: May 17, 2021.

Respectfully submitted:

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,992 words.

Dated this 17th day of May, 2021.

Electronically signed by James A. Friedman
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 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 17th day of May, 2021.

Electronically signed by James A. Friedman
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