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STATE OF WISCONSIN
COURT OF APPEALS
District II

Appeal No. 2020AP338

SUSAN MEINECKE,

Petitioner-Appellant,

v.

JESSE THYES and WILLIAM Q. RICE,

Defendants-Respondents.

On Appeal from Ozaukee County Circuit Court
The Honorable Sandy A. Williams, Presiding
Ozaukee County Case No. 19-CV-62

NON-PARTY BRIEF OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL, WISCONSIN NEWSPAPER ASSOCIATION, AND WISCONSIN BROADCASTERS ASSOCIATION Under Section (Rule) 809.19(7), Wis. Stats.

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INTRODUCTION

Wisconsin has a strong tradition of open government, backed in large part by its Open Records law, Wis. Stat. §19.31-37 ("Open Records law"). *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶1, 327 Wis.2d 572, 786 N.W.2d 177 ("If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State.") Amicus curiae Wisconsin Freedom of Information Council, Inc., Wisconsin Newspaper Association, and Wisconsin Broadcasters Association ("Amici") have long worked to defend the Open Records law and prevent encroachment of interpretations that would undermine it. (*See* Mot. to File a Non-Party Brief, ¶¶1-4, 7.)

This case presents such an interpretation. The circuit court issued an order finding Defendants-Respondents Jesse Thyes and William Rice, officials with the Village of Grafton (collectively, "Thyes"), improperly withheld dozens of pages of records from requester Petitioner-Appellant Susan Meinecke ("Meinecke") under the Open Records law—ordinarily, a sufficient indicia of legal victory. Yet the court nonetheless concluded that Meinecke did not prevail in whole or

substantial part in her suit and was not entitled to her attorneys' fees and costs under Wis. Stat. §19.37(2)(a).

This categorical fee denial is not only inconsistent with the Open Records law—it threatens enforcement of the law more generally. As newsrooms continue to suffer financially and media enforcement of the Open Records law declines,[1] it is critical that attorneys are incentivized to accept meritorious Open Records cases, often on a contingent-fee basis, based on the law's strong fee-shifting provisions.

This Court should reverse the circuit court's decision that Meinecke did not prevail and remand for a determination of fee amount.

ARGUMENT

I. A Strong Open Records Law Relies on Strong Enforcement.

Wisconsin's Open Records law serves the important goal of fostering an "informed electorate," upon which "a representative government" depends. Wis. Stat. §19.31. Hence, "it is declared to be the public policy of this state that all persons are entitled to the greatest

[1] National Freedom of Information Coalition, *Survey: People want more government transparency, traditional media less likely to sue to get it*, National Freedom of Information Coalition and Media Law Resource Center, August 23, 2011, *available at* https://www.nfoic.org/survey-says-people-want-more-open-government (last accessed July 14, 2020).

possible information regarding the affairs of government and the official acts of those officers and employees who represent them." *Id*. "This statement of public policy in §19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis.2d 290, 15, 731 N.W.2d 240, 252 (citation omitted).

However, declarations of policy are meaningless if they cannot be enforced. "Enforcement is a crucial component of ensuring compliance with public access laws, which are at the heart of transparent democracy, in place to ensure that government meetings and records are open to the public." Daxton R. "Chip" Stewart, *Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 Comm. L. & Pol'y 265, 265 (2010).

Accordingly, Wisconsin's Open Records law, like many others, permits enforcement by private individuals who "shall" obtain their attorneys' fees and costs if they "prevail[] in whole or substantial part." Wis. Stat. §19.37(2)(a). Without attorney fee awards, many actionable lawsuits seeking to enforce public records laws could not be brought by individual litigants due to the expense. Katrina G. Hull, *Disappearing Fee*

Awards and Civil Enforcement of Public Records Laws, 52 U. Kan. L. Rev. 721, 749 (2004). By empowering all citizens to pursue their rights to government records, regardless of finances, mandatory fee-shifting provisions create an environment of more rigorous enforcement of and compliance with public records laws. *See Eau Claire Press v. Gordon*, 176 Wis.2d 154, 160, 499 N.W.2d 918 (Ct. App. 1993) ("the purpose of sec. 19.37, Stats., is to encourage voluntary compliance").

This common-sense notion is borne out by research. A recent comprehensive study of the fifty states found a positive, statistically significant correlation between states with mandatory fee-shifting provisions within their public record laws and greater compliance with public records requests. David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Record Statutes on Agency Transparency in the United States*, Global Conference on Transparency Research, 11, 12-13 (June 26, 2019).[2] Of the five most compliant states, four of them have mandatory fee shifting provisions. *Id*. at 19.[3]

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[2] *Available at* https://www.documentcloud.org/documents/6182080-Sticks-and-Compliance-Cuillier.html#document/p1 (last accessed July 14, 2020).

[3]These five states are:
1) Idaho (Mandatory Fee Award. Idaho Code § 74-116(2)),
2) Washington (Mandatory Fee Award. RCW 42.56.505(4)),

In contrast, other enforcement or regulatory tools such as provisions limiting copy fees, ombudsman offices, and penalty provisions for noncompliance with public records laws had no impact on a government's compliance. *Id*. at 12. Government enforcement of the Open Records law, through suits filed by the Attorney General or district attorneys, is sporadic at best. *See* Jonathan Anderson, "Resolving Public Records Disputes in Wisconsin: the Role of the Attorney General's Office," University of Wisconsin Milwaukee, UWM Digital Commons, *Theses and Dissertations* 656 (2013).[4]

Consequentially, mandatory fee provisions in suits by private individuals are the one legal provision that is "essential for compliance" with public records laws. Cuillier, *supra*, at 12.

II. The Wisconsin Open Records Law Sets a Low Bar for Entitlement to Attorneys' Fees and Costs.

Wisconsin sets a low bar for requesters' entitlement to attorneys' fees under the Open Records law, though courts retain discretion to

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3) Nebraska (Discretionary Fee Award. NRS 239.011(2).),
4) Rhode Island (Mandatory Fee Award. R.I. Gen. Laws § 38-2-9(d)),
5) Iowa (Mandatory Fee Award. Iowa Code Ann. § 21.6(3)(b))
Cuillier, *supra*, at 11, 19 (June 26, 2019).

[4] *Available at* https://dc.uwm.edu/cgi/viewcontent.cgi?article=1661&context=etd (last accessed July 14, 2020).

adjust the fee amount. Comparable interpretations of the U.S. Freedom of Information Act are not to the contrary.

A. The Wisconsin Open Records Law Awards Fees to Requesters Who Obtain Records Through a Court Order.

Three key features of the Open Records law strongly support awarding fees to those who prevail in full or in part by court order.

First, Wisconsin's fee-shifting provision is mandatory. Wis. Stat. §19.37(2) ("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 action filed under sub. (1)") (emphasis added); *WTMJ, Inc. v. Sullivan*, 204 Wis.2d 452, 462, 555 N.W.2d 140 ("the use of the word 'shall' in this statute is presumed to be mandatory"). To the extent Thyes attempts to convert this clear language to "may" or make it discretionary (Thyes Br. at 31), he is clearly wrong based on the law's text and prior interpretations.

Second, like the rest of the Open Records law, the law's enforcement provisions must be construed in favor of access to government information. Wis. Stat. §19.31 ("ss. 19.32 **to 19.37** shall be construed in every instance with a presumption of complete public access") (emphasis added). The law's drafters likely realized that

rigorous enforcement of its fee-shifting provision would be necessary to assure compliance; indeed, **"[s]tates that allow judges broad discretion, or impose high burdens of success for litigating requesters**, **demonstrate worst compliance than states that mandate judges to impose attorney fees**." Cuillier, *supra*, at 12-13 (emphasis added). Mandatory fees may impose a "severe" penalty, but "the legislature has decided that this is worth the benefit of openness." *WTMJ*, 204 Wis.2d at 462.

Third, the Open Records law awards fees not just to those who prevail in whole, but in "substantial part" in actions filed to "access a record" or even "part of a record." Wis. Stat. §19.37(2)(a). It is true that no published case has interpreted this provision where a requester received records through a court order—likely because, until now, such an order was easily considered to demonstrate a party prevailed in whole or substantial part. But courts have repeatedly found this criteria satisfied when a custodian voluntarily produces the disputed records after suit is filed, *e.g.*, *Eau Claire Press*, 176 Wis.2d at 161-62, or even just some of them, *State* ex rel. *Young v. Shaw*, 165 Wis.2d 276, 293, 477 N.W.2d 340. If "an order favorable in whole or in part" is not a

necessary "condition precedent" to an award of fees or costs, *Racine Educ. Assoc. v. Bd. of Educ.*, 129 Wis.2d 319, 328, 385 N.W.2d 510, then the presence of such an order must be.

This is not to say that considerations like degree of success or legitimacy of the defendant's position are irrelevant to a fee award; they are, when setting the ***amount*** of the award. Courts can use no less than fifteen factors in Wis. Stat. §814.045(1) to adjust an attorney's lodestar fee amount. *See State* ex rel. *Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶¶53-54 & n.13, 301 Wis.2d 178, 732 N.W.2d 804; *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶28, 275 Wis.2d 1, 683 N.W.2d 58. Courts can also consider some of these factors in deciding whether to assess punitive damages or monetary penalties. Wis. Stat. §§19.37(3), (4). However, these factors are not relevant to determining entitlement to fees in the first place.

An order to release records means a party has prevailed "in whole or substantial part" for purposes of determining entitlement to fees under Wis. Stat. §19.37(2)(a).

B. Case Law Interpreting FOIA Holds that Parties Substantially Prevail When they Obtain a Court Order Directing Release of Records.

Both parties in this case cite the federal Freedom of Information Act, 5 U.S.C. §552 ("FOIA") in support of their positions. Yet Thyes would import inapplicable interpretations of the FOIA that would substantially narrow the Open Records law, in contravention of the law's plain language.

The current text of FOIA provides that a complainant has "substantially prevailed" if it obtained relief through either "a judicial order, or an enforceable written agreement or consent decree," or "a voluntary or unilateral change in position by the agency, if the complainant's claim is not in substantial." 5 U.S.C. §552(a)(4)(E)(ii). To date, Wisconsin courts have only looked to FOIA for interpretations in the latter situation, regarding a custodian's voluntary change in position. *E.g.*, *Eau Claire Press*, 176 Wis.2d at 160; *Racine Educ. Assoc.*, 129 Wis.2d at 326-27.

However, Wisconsin courts can take notice of the fact that federal courts have generally found a party who receives relief via court order is "substantially prevailing"—even before the FOIA statute was

amended to specifically say so in 2007,[5] and even when courts were still relying on *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001). (Meinecke Br. at 15, 18 & n.5.) Under this vintage of cases, a complainant substantially prevails when "'the order changed the legal relationship between [the parties],' and . . . the plaintiff 'was awarded some relief on the merits of his claim.'" *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 367 (D.C.Cir. 2008) (quoting *Davy v. CIA*, 456 F.3d 162, 165 (D.C.Cir. 2006) (internal quotation marks and citation omitted)).

Cases decided after the 2007 FOIA amendments have continued this trend. *E.g.*, *EPIC v. U.S. Drug Enf't Agency*, 266 F.Supp.3d 162, 167 (D.D.C. 2017) ("The D.C. Circuit has at least thrice held that a judicial order requiring disclosure renders a plaintiff eligible for a fee award.") (citing cases). Total court success is not necessary. *Mattachine Society of Washington, DC v. U.S. Dep't of Justice*, 406 F. Supp. 3d 64, 68 (D.D.C.

[5] Prior to the OPEN Government Act of 2007, 5 U.S.C. § 552(a)(4)(E) stated that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred" in cases in which the "complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). Section 4 of the OPEN Government Act added subsections (i) and (ii), to specifically define the circumstances under which a complainant could be "substantially prevailing," including by obtaining relief through "a judicial order." *See* Public Law No. 110-175, Sec. 4 (Dec. 31, 2007).

2019) ("[t]he Court . . . did not need to find that every single redaction was improper in order for Mattachine to be entitled to fees").

Thyes acknowledges that one interpretation of the Open Records law may be that a mandamus order establishes a plaintiff's eligibility for fees—an interpretation with which Amici agree. (Thyes Br. at 24.) However, Thyes then invites this Court to adopt the four-part test for "entitlement" to fees under cases interpreting the FOIA. Federal courts apply this test after determining that is a party is "substantially prevailing," to guide their discretionary decision to award fees, *see Church of Scientology of California v. Harris*, 653 F.2d 584, 590 (D.C.Cir. 1981). The entitlement test makes sense under FOIA because it is not a mandatory fee-shifting statute, and courts have broader discretion on whether to award fees. *See* 5 U.S.C. §552(a)(4)(E)(i) (providing the court "may" assess fees and costs).

Because Wis. Stat. §19.37(2)(a)'s fee-shifting provision is mandatory, however, there is no statutory basis to import the FOIA "entitlement" test into case law here. No Wisconsin case has ever applied this test, and Thyes' dangerous invitation to do so would impermissibly narrow the Open Records law.

Thyes also requests the Court embark down the confusing and irrelevant path of case law employing the "catalyst theory" of fee recovery. (*E.g.*, Thyes Br. at 14.) However, as Thyes seems to acknowledge (*id*. at 15), this theory applies in cases where a custodian voluntarily produces records after suit is filed, as a means to determine whether the suit caused the release of records in whole or in part. *See Racine Educ. Assoc.*, 129 Wis.2d at 327; *WTMJ*, 204 Wis.2d at 458-59. It is unnecessary to perform this analysis where a plaintiff receives records via court order, since that order is obviously the catalyst for the record custodian's actions. *See Cox v. U.S. Dep't of Justice*, 601 F.2d 1, 6 (D.C.Cir. 1979) (applying catalyst theory to parties seeking fees "in the absence of a court order"), *abrogated on other grounds as stated in Benavides v. Bureau of Prisons*, 993 F.2d 257, 259-60 (D.C.Cir. 1993). And, as explained above, such an order also demonstrates the requester has prevailed in whole or substantial part for purposes of Wis. Stat. §19.37(2)(a).

III. The Court Should Reverse the Circuit Court's Decision that Meinecke Did Not Prevail in Whole or Substantial Part.

Respectfully, the circuit court erred when it determined Meinecke had not prevailed in whole or substantial part.

The circuit court did not correctly apply Wis. Stat. §19.37. Earlier, the court had issued an order determining that Thyes had improperly redacted or withheld nearly 150 pages of records from Meinecke. This order should have been enough to find that she prevailed at least in substantial part under Wis. Stat. §19.37(2)(a) and was entitled to costs, fees, and $100 in statutory damages. Section II, *supra*; *WTMJ*, 204 Wis.2d at 462. Meinecke also prevailed under the comparable federal standard: receiving nearly 150 pages of records by court order is a significant benefit that "changed the legal relationship between the parties" and reflects "some relief on the merits" of Meinecke's claim. *Judicial Watch*, 522 F.3d at 367. She should have been awarded her costs and fees.

Instead, the circuit court's decision reflects a number of improper discretionary factors that are irrelevant to determining whether a requester has prevailed in whole or substantial part. For example, the court considered whether she thought Meinecke had seen some of the released records before, in her role as a village trustee. (P.App.009.) Similarly, the court suggested that Meinecke had an "ulterior motive" and did not get the records she was seeking. These considerations forget

that a suit under the Open Records law vindicates the public's—not just the requester's—right to access records. Regardless of what the court believed Meinecke was "looking for," the release of the records provided her and the public with "information regarding the affairs of government." Wis. Stat. §19.31; *see also* Wis. Stat. §19.35(1)(i).

The court also considered whether Thyes acted with "wanton disregard" for the Open Records law, was simply confused about the law, or acted "appropriately." (P.App.010, 013-14.) As the Wisconsin Supreme Court has observed, most disagreements over the law probably reflect good faith attempts by a custodian to apply it. *State* ex rel. *Hodge v. Town of Turtle Lake*, 180 Wis.2d 62, 79, 508 N.W.2d 603 (1993). The custodian's motive or legal position thus cannot inform the threshold question of whether to award fees, *id.*, though it may influence the amount, *see* Wis. Stat. §814.045(1)(n). So is "the results obtained," Wis. Stat. §814.045(1)(g). The circuit court's struggle with how to assess Meinecke's degree of success—by number of pages released? claims initially brought? claims decided on summary judgment?—illustrates that this consideration is best left to be balanced with the other factors in Wis. Stat. §814.045(1).

Importantly, the circuit court did not consider one matter it should have: the Open Record law's presumption in favor of complete public access, and its direction that Wis. Stat. §19.37 be liberally construed to this end. Wis. Stat. §19.31; *WTMJ*, 204 Wis.2d at 462. With this presumption as a backdrop, Meinecke clearly prevailed in whole or in substantial part and was entitled to her fees and costs under Wis. Stat. §19.37(2)(a).

CONCLUSION

This Court should interpret Wis. Stat. §19.37(2)(a) as past courts have, to incentivize compliance with and enforcement of the law. The Court should thus rule that a circuit order finding non-compliance with the law or directing release of records means a party has prevailed in full or substantial part. Inserting discretionary factors into the threshold question of whether to award fees is contrary to the law's language, will water it down, and almost certainly will reduce compliance. Amici thus request that this Court reverse the circuit court and remand for a determination of the proper fee award.

Respectfully submitted this 20th day of July, 2020.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 2,973 words.

I further 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.

I further certify that three true and correct copies of this nonparty brief were sent via U.S. Mail to all parties of record.

Dated this 20th day of July, 2020.

/s/Christa O. Westerberg

Christa O. Westerberg