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Appeal No. 2020AP2081-AC & 2020AP2103-AC

2020AP2081-AC

WISCONSIN MANUFACTURERS
AND COMMERCE, MUSKEGO AREA
CHAMBER OF COMMERCE, AND NEW BERLIN
CHAMBER OF COMMERCE AND VISITORS BUREAU,
Plaintiffs-Respondents-Petitioners,

v.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF WISCONSIN, KAREN TIMBERLAKE,
IN HER OFFICIAL CAPACITY AS INTERIM SECRETARY
OF THE WISCONSIN DEPARTMENT OF HEALTH SERVICES
AND JOEL BRENNAN, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF THE WISCONSIN DEPARTMENT OF
ADMINISTRATION,
Defendants,

MILWAUKEE JOURNAL SENTINEL,
Intervenor-Appellant.

2020AP2103-AC

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Intervenor.

On Appeal from Waukesha County Circuit Court
The Honorable Lloyd V. Carter, Presiding
Waukesha County Case No. 20CV1389

NON-PARTY BRIEF OF WISCONSIN FREEDOM OF INFORMATION COUNCIL, WISCONSIN NEWSPAPER ASSOCIATION, WISCONSIN BROADCASTERS ASSOCIATION, WISCONSIN STATE JOURNAL AND THE CAPITAL TIMES

Under Section (Rule) 809.19(7), Wis. Stats.

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INTRODUCTION

This case presents a troubling attempt to inhibit the public's access to information the government collects, based on an untenable interpretation of the Wisconsin Open Records law, Wis. Stat. § 19.31 *et seq*. (the "Open Records law"). Plaintiffs-Respondents-Petitioners Wisconsin Manufacturers and Commerce et al. (collectively, "WMC") ask this Court to hold that Wisconsin's Uniform Declaratory Judgments Act, Wis. Stat. § 806.04 ("DJA"), permits private parties to sue to prevent the release of government records. Yet Wisconsin law allows such suits under only very limited circumstances based on the carefully-crafted provisions in 2003 Wisconsin Act 47, partially codified at Wis. Stat. § 19.356. This legislation, known informally as the "Woznicki Fix," was a response to this Court's ruling in *Woznicki v. Erickson* and its progeny, which created and then expanded a private right of action to prevent the release of records in response to an Open Records request. 202 Wis. 2d 178, 549 N.W.2d 699 (1996); *see also Milwaukee Teachers Educ. Assoc. v. Milwaukee Bd. of Sch. Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

Amici curiae Wisconsin Freedom of Information Council ("Council"), Wisconsin Newspaper Association ("WNA"), Wisconsin Broadcasters Association ("WNA"), Wisconsin State Journal, and the Capital Times (collectively, "Amici") are well familiar with *Woznicki* and the "Woznicki Fix." The Council is an organization of print and broadcast news media representatives, educators, and public members whose purpose is to safeguard the right of the public to the information it must have to act responsibly in a free and democratic society. The WNA and WBA are associations of over 250 print and 350 television and radio stations, respectively, whose purposes include asserting and protecting the First Amendment, freedom of information, and the open government interests of their members and the

public. The Wisconsin State Journal and the Capital Times are publishing companies that, *inter alia*, publish print and online media. They, along with the other Amici and their members, regularly use the Open Records law to obtain public records and to provide the public with the "greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31. Several of the Amici or their members submitted amicus briefs in the *Woznicki* line of cases and/or participated in the legislative process that eventually led to the Woznicki Fix, including by serving on the legislative study committee that recommended it.

Amici urge this Court to reject WMC's attempt to greatly expand the private right of action available for blocking the release of government records beyond the strictures of Wis. Stat. § 19.356, and to instead hold that the statute bars WMC's suit.[1] The court of appeals should be affirmed.

ARGUMENT

I. Access to Government Information Promotes Democracy; Impediments to Access Harm It.

The default rule is that records requested under the Open Records law must be released by the custodian, subject only to denial based on statute, common law, or the public interest balancing test. *Democratic Party of Wis. v. DOJ*, 2016 WI 100, ¶10, 372 Wis. 2d 460, 888 N.W.2d 584 (citing *Hempel v. City of Baraboo*, 2005 WI 120, ¶28, 284 Wis.2d 162, 699 N.W.2d 551). The statutory presumption is in favor of "complete public access." Wis. Stat. § 19.31.

[1] Amici agree with the briefs of Defendants-Appellants Tony Evers et al. (collectively, "Evers") and Intervenor-Appellant Milwaukee Journal Sentinel that WMC lacks standing to pursue this declaratory judgment action. Amici focus their brief on the other issue in this case, concerning the role and effect of Wis. Stat. § 19.356.

There is good reason for this arrangement. As the Legislature has stated, in relevant part:

> In recognition of the fact that **a representative government is dependent upon an informed electorate**, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.

Wis. Stat. § 19.31 (emphasis added).

In other words, the Open Records law is about democracy. Citizens cannot make informed choices about policies to support or people to elect unless they have the necessary information to do so. Hence, "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id*.

This concept extends not just to whether records access is granted, but also to related concepts such as delay and cost that indirectly affect access. For example, Wis. Stat. § 19.35(4)(a) requires custodians to provide records "as soon as practicable and without delay." As this Court has recognized, "delay defeats the purpose of the open records [law]." *State* ex rel. *Auchinleck v. Town of LaGrange*, 200 Wis. 2d. 585, 595, 547 N.W.2d. 587 (1996) (holding that the notice provisions of Wis. Stat. § 893.80(1) do not apply to an open records lawsuit, because "access to public records pertinent to governmental decision making may be delayed 120 days, in effect eliminating that information from the public debate"). Similarly, "[i]ncreasing the costs of public records requests for a requester may inhibit access to public records and, in some instances, render the records inaccessible." *Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶40, 341 Wis. 2d 607, 815 N.W.2d 367 (holding that the Open Records law does not authorize custodians to charge requesters for the cost of redacting records).

Thus, it is not just the substantive provisions of the Open Records law that must be construed in favor of access. So must the law's procedural

provisions, which can impact access—and democracy—just as much. As the Legislature has said, "ss. 19.32 ***to*** 19.37 shall be construed" in favor of access. Wis. Stat. § 19.31 (emphasis added). It is the procedural provisions of the Open Records law that are at issue here.

II. The Language and History of the Woznicki Fix Preclude WMC's Argument.

Despite the presumption in favor of access and clarity of Wis. Stat. § 19.356, WMC argues that the DJA allows what the Open Records law does not: a vast right to sue to block the release of government records. This argument is contrary to statute and would defeat the Legislature's careful balance between access and privacy.

The plain language of Wis. Stat. § 19.356 precludes WMC's argument. It provides, in part,

> Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.

Wis. Stat. § 19.356(1). While the language of the statute strictly limits pre-release lawsuits, *see Moustakis v. DOJ*, 2016 WI 42, ¶19, 368 Wis. 2d 677, 880 N.W.2d 142, WMC reads the "or as otherwise provided by statute" language to include the DJA (WMC Br. at 45). Nothing in the statutory language—such as an actual reference to the DJA—indicates that this is so, and this language clearly is confined to other statutes that specifically provide a right to block access to records.

The history of Wis. Stat. § 19.356 confirms this interpretation, particularly in light of the problem the Legislature was trying to solve. *See State* ex rel. *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶51, 271 Wis. 2d

633, 681 N.W.2d 110 ("legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation") (citation omitted).

As noted above and by other parties to this case, Wis. Stat. § 19.356 was drafted as a response to this Court's creation of a private right of action to block the release of records, generally by public employees seeking to protect their reputational interests. The Council's then-President described the resulting fallout:

> Across the state, public record keepers struggled with the hows, whos, whens and whys of this new process. The net effect was that records that were once readily accessible to the public were now only released after a long, often expensive legal jangle.
>
> It always was a little intimidating for the average citizen to ask a government office for what someone might consider "sensitive" information. After Woznicki, the task became even more daunting.

Jeff Hovind, *Your Right to Know: Records Fix Shows System Can Work* (Aug. 29, 2003).[2]

The Joint Legislative Council established the Special Committee on Review of the Open Records Law ("Special Committee") to decide what recommendations, if any, to make in response to *Woznicki*.[3] A Legislative Council attorney staffing the Special Committee raised, as one issue, whether "the right to judicial review extend[s] to any record subject, regardless of whether the record subject is a public employee?"[4] Despite being aware of this

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[2] *Available at* http://wisfoic.org/august-records-fix-shows-system-can-work/. The "Your Right to Know" column is a monthly publication of the Council that is distributed to news outlets statewide. Jeff Hovind was the Council's president in 2003, editor and publisher of the Waukesha Freeman, and a member of the Special Committee.

[3] *See* Wis. Leg. Council, General Report of the Joint Legislative Council to the 2003-04 Legislature at 21 (Aug. 2004), *available at* https://docs.legis.wisconsin.gov/misc/lc/general_report/2003_gen_report.pdf.

[4] Wis. Leg. Council, Review of the Open Records Law Minutes at 2 (Aug. 12, 2002), *available at* https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll4/id/729/rec/7.

issue, the Special Committee confined pre-release review to public employees in the legislation it ultimately recommended.[5]

WMC itself weighed in on the Special Committee's work, expressing concern that the Open Records law allowed access to the records of private employees working for government contractors. This concern was addressed by amending Wis. Stat. § 19.356(2)(a) to bar the release of private employee information unless the employee authorized the authority to provide access to it. *See* Wis. Stat. § 19.356(2)(a)3.[6] There is no indication that WMC raised any concerns about aggregate data that did not identify a particular employee or sought to preserve a right to challenge release through the DJA.

The Special Committee's proposed legislation was introduced as companion bills 2003 Assembly Bill 196 and 2003 Senate Bill 78, which later became 2003 Wisconsin Act 47.[7] The Act contained an extensive Joint Legislative Council prefatory note explaining the limited availability of pre-release lawsuits going forward:

> This bill partially codifies *Woznicki* and *Milwaukee Teachers'*. In general, the bill applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following 3 categories:
>
> 1. Employee–related records that may be released under the general balancing test without providing a right of notice or judicial review to the employee record subject.
> 2. Employee–related records that may be released under the balancing test only after a notice of impending release and the right of judicial review have been provided to the employee record subject.

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[5] *See* Wis. Leg. Council, Review of the Open Records Law Minutes (Dec. 10, 2002), *available at* https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll4/id/730/rec/2; Memorandum from Ronald Sklansky and Robert J. Conlin, Senior Staff Attorneys, Wisconsin Legislative Council, to Members of the Special Committee on Review of the Open Records Law (Jan. 15, 2003), *available at* https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll4/id/1263/rec/1.

[6] *See id*.

[7] *See* note 3, *supra*.

> 3. Employee–related records that are absolutely closed to public access under the open records law.

Id. (amending Wis. Stat. chs. 19, 59, 230, and 233). A record subject holding a local public office could only augment, not block, the release of records. *Id*. § 4; *Moustakis*, 368 Wis. 2d 677, ¶52.

Where an employee did elect to challenge the release of records, the Woznicki Fix included a highly expedited timeline for resolving the dispute to prevent undue delay in access to records. 2003 Wis. Act 47, §§ 4, 15. Or, as the first appellate court to interpret the legislation put it, "the language of WIS. STAT. § 19.356 evinces a legislative intent that public records be promptly disclosed to a requester, even if their release is challenged by an employee." *Loc. 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶14, 277 Wis. 2d 208, 689 N.W.2d 644.

Passage of the Woznicki Fix was not a foregone conclusion, and no one got everything they wanted. Media and transparency groups such as the Council would have preferred no provision for pre-release lawsuits at all.[8] Public employee unions wished to preserve and expand *Woznicki*, proposing changes that then-Senator David Zien condemned as "a delay technique to sabotage and ambush a piece of legislation, and we do not want that to happen."[9] In the end, as explained by Council President Hovind, "[i]t was the bipartisan efforts of Rep. Mark Gundrum (R-New Berlin) and State Sen. Jon Erpenbach (D-Middleton) that put together the fragile coalition to fix the law.

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[8] Rebecca Daugherty, *Fixing Bad Judicial Rulings with Good Laws*, The News Media & the Law, Fall 2003, at 36, *available at* https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2003/fixing-bad-judicial-rulings-g/

[9] Amy Rinard, Bill to clarify open records law advances despite gripes, Milw. J. Sentinel (Apr. 23, 2003), *available at* https://indexarticles.com/reference/milwaukee-journal-sentinel-the/bill-to-clarify-open-records-law-advances-despite-gripes/

These lawmakers shepherded the bill through a reluctant Legislature, and beat back the interests that sought to derail it."[10]

This history shows the absurdity of WMC's interpretation of the Open Records law. It would allow anyone to file suit to block—or, at a minimum, add significant delay and expense to—a requester's access to records. It would do so through the DJA, outside of the strict timelines in Wis. Stat. § 19.356(5)-(8). And it would subvert the Legislature's carefully-crafted balance between privacy interests and public information, along with the paramount right to access in Wis. Stat. § 19.31. The Court should recognize this absurd interpretation for what it is: an attempt to defeat the Open Records law and the democratic principles that underlie it. *See Kalal*, 271 Wis. 2d 633, ¶46.

An additional textual and historical fact belies WMC's argument that the "or as otherwise provided by statute" language in Wis. Stat. § 19.356(1) permits its suit. While 2003 Wisconsin Act 47 created a process for releasing certain employee records, it also allowed pre-release review and suit of one category of business records: those in the possession of the Wisconsin Public Service Commission ("PSC") "that would aid a competitor of a public utility in competition with the public utility that supplied the information held by the PSC." Wis. Legis. Council Act Memo, 2003 Wisconsin Act 47 (Sept. 22, 2003)[11]; 2003 Wis. Act 47 § 10M(4), codified at Wis. Stat. § 196.135; *see also* Wis. Stat. § 196.14. The inclusion of this provision in the Act shows that the Legislature knows how to draft a statute allowing pre-release lawsuits, and that these kinds of provisions are what "or as otherwise provided by statute" is intended to encompass. That phrase is not a broad free-for-all that permits pre-release suits under the DJA or any other non-specific statute.

The Court should find that WMC's suit is barred by Wis. Stat. § 19.356.

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[10] *See* note 2, *supra*.

[11] *Available at* https://docs.legis.wisconsin.gov/2003/related/lcactmemo/ab196.pdf

III. **Government Information Sometimes Implicates Individual Privacy and Reputational Interests, but Such Records Still May Strongly Implicate the Public Interest**.

Finally, WMC and its allies claim this suit must be permissible to protect the reputational interests of businesses who might be associated with COVID-19 cases and, purportedly, individual employees of those businesses (even though they are not actually identified in the records proposed for release). (WMC Br. at 45-46; Brief of Amici Curiae National Federation of Independent Business et al. (hereinafter, "NFIB")). They are incorrect.

Reputational and privacy interests are frequently asserted as reasons for authorities to block disclosure, but case law has appropriately limited their reach. This is because records that implicate such interests may still strongly implicate the public interest. For example, "[t]axpayers of a community have the right to know how and why their money is spent," including in situations where individuals may prefer confidentiality. *J./Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 459, 521 N.W.2d 165, 172 (Ct. App. 1994). Wisconsin courts have also recognized that allegations of wrongdoing by public servants—whether proven or not—are a matter of public importance that outweighs concerns for the servant's reputation or interest in avoiding embarrassment. *E.g., Linzmeyer v. Forcey*, 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811; *see also DPW*, 372 Wis. 2d 460, ¶22. And privacy interests must give way if they would bar citizens from understanding who is trying to influence public policy. *See John K. MacIver Inst. for Pub. Pol'y, Inc. v. Erpenbach*, 2014 WI App 49, ¶20, 354 Wis. 2d 61, 848 N.W.2d 862. The public interest is even more strongly implicated in matters of public health, like COVID-19 transmission and control in the community, and the government's handling of the same.

Moreover, privacy and reputational interests can be addressed through channels other than what WMC attempts here. Records containing information about individual employees of private businesses that happen to be in the possession of an authority are already subject to the process in Wis. Stat. § 19.356, under provisions of the law that WMC itself lobbied for. Section II, *supra*; Wis. Stat. § 19.356(2)(a)3. Records custodians cannot release information in violation of a statute or common law, and they may withhold records based on the balancing test. *See* Wis. Stat. § 19.35(1)(a). For businesses, authorities may withhold access to trade secret information, Wis. Stat. § 19.36(5), and state agencies have created specific processes to address such issues in a transparent way, *e.g.*, Wis. Admin. Code §§ NR 2.19, PSC 2.12.

The NFIB claims businesses will be marked with a "COVID-19 scarlet letter" (NFIB Br. at 11) but this claim is as hyperbolic as it is unsupported. Individual counties have already released similar COVID-19 outbreak information, including Wood County, Eau Claire County,[12] and Washington and Ozaukee counties.[13] There is no evidence that doing so has harmed any business, though at least the Washington Ozaukee Public Health Department ceased publishing the information after the circuit court's decision in this case.[14] As its director had told the Milwaukee Journal Sentinel, "[w]e are

[12] *See* Wood County Health Department, COVID-19 Exposures and Investigations, http://www.co.wood.wi.us/Departments/Health/CovidExposures.aspx (last checked Dec. 20, 2021); EC County Response Homepage, https://coronavirus-and-covid-19-information-hub-eccounty.hub.arcgis.com/pages/exposures (last checked Dec. 20, 2021).

[13] Daphne Chen and Maria Perez, Judge temporarily halts state health department from releasing names of businesses with COVID-10 cases, Milw. J. Sentinel (Oct. 1, 2020), *available at* https://www.jsonline.com/story/news/2020/10/01/business-lobby-tries-block-release-wisconsin-covid-19-case-data-coronavirus-wmc/5884455002/

[14] *See* Washington Ozaukee Public Health Department website, https://www.washozwi.gov/ (last checked December 16, 2021).

hopeful that giving the information to the community helps people make good decisions."[15]

This is exactly the purpose of the Open Records law: to provide access to information that enables citizens to make their own decisions, whether at the ballot box, at home, or in the community. The arguments of WMC and its allies boil down to their unsupported fear that the public will not understand or will misuse the information, or at the least that the public cannot be trusted with it. This is not how democracy, or the Open Records law, works. They also ignore their own ability to share their position about what the data reveal in press releases, social media, editorials submitted for publication, or public fora. *See Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

Whatever is ailing WMC, the cure is not to use the DJA's broad provisions to block the public's access to records and undermine the Open Records law.

CONCLUSION

Neither the Open Records law nor any other law permits WMC's suit, and this Court should affirm the court of appeals.

Respectfully submitted this 21st day of December, 2021.

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[15] *See* note 13, *supra*.

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CERTIFICATION

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. The length of this brief is 2,993 words.

Dated this 21st day of December, 2021.

Electronically signed by: Christa O. Westerberg

Christa O. Westerberg

CERTIFICATION REGARDING ELECTRONIC BRIEF

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 the text of the electronic copy of the brief is identical to the text of the paper copy 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 21st day of December, 2021.

Electronically signed by: Christa O. Westerberg

Christa O. Westerberg

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2021, I caused a copy of this brief to be served upon each of the following persons via email:

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